IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 10-823

SOLVEIG EDNA HILL,

Petitioner,

vs.

DCA Case No. 1D09-4020
L.T. No. 07-185 PR

DOUGLAS DAVIS, as Personal Representative of the Estate of Kristine E. Davis, deceased,

Respondent.

ON REVIEW FROM THE COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This review is taken from the decision of the First District Court of Appeal in *Hill v. Davis,* 31 So.2d 921 (Fla. 1st DCA 2010). In this brief, Petitioner SOLVEIG EDNA HILL is referred to as Petitioner. Respondent DOUGLAS DAVIS, as Personal Representative of the Estate of Kristine E. Davis, deceased, is referred to as Respondent or "the Personal Representative". The decedent is referred to as "the decedent" or KRISTINE. References to the pleadings in the record on appeal will be to "R-[volume number]-[page number]". Unless otherwise stated, the authors of this brief have not supplied any emphasis to quotes.

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts is incomplete and inaccurate in the following regards:

a) Respondent DOUGLAS DAVIS, the Personal Representative designated by the decedent in her will and appointed by the trial court, is the stepson of the decedent. The Personal Representative is the son (and therefore the lineal descendant)] of decedent's husband, John. At page 12 of her brief on the merits, in note 6, Petitioner mistakenly refers to Respondent as the "nephew" of the decedent, either inadvertently or in an attempt to parallel the facts of *Angelus v. Pass*.

Not only is Respondent the son and lineal descendent of decedent's husband and the stepson of the decedent, Respondent did not misstate his status or his relationship to the decedent in any pleading or court proceeding. Petitioner (the mother of the decedent) at all times after service of the notice of administration had actual knowledge of: (1) Respondent's legal relationship to the decedent; and (2) the fact that decedent's husband (John) had predeceased decedent. There is no support in this record for a suggestion that Respondent misled the trial court or Petitioner, either affirmatively or by failing to disclose material facts about his status.

b) Petitioner's first motion challenging Respondent's qualifications actually requested that Petitioner be substituted as

personal representative, under Section 733.301(1)(b)(3) (relating to priority of appointment in intestate estates). See Petitioner's Motion To Substitute Personal Representative, at R-I-132. The first motion was not filed until August 2008, 13 months after service of the notice of administration on Petitioner.[1] The first motion was heard by the trial court (on August 28, 2008)[2] and orally denied, although no written order was rendered (see the preface of the subsequent Order at R-II-322, which refers to the first motion as a "motion to disqualify").

In response to the oral denial, Petitioner filed a second motion seeking the same remedy, a "renewed motion to disqualify personal representative and to appoint Petitioner as personal representative", on March 10, 2009, approximately 20 months after service of the notice of administration on Petitioner. R-II-226. The sole ground asserted by Petitioner in the second motion was that, because Respondent's father (John) had predeceased the decedent, Respondent was no longer "a lineal descendant of a spouse of the decedent" within the meaning of the statute.

In her second motion, however, Petitioner sought to justify her

[1] Petitioner acknowledges service of a copy of the notice of administration in July 2007. R-I-27, R-II-266.

[2] This date is shown in the notice of hearing of "all motions" served by Petitioner for August 28, 2008, along with the order denying Respondent's motion for summary judgment (R-I-173), also reflecting a hearing date of August 28, 2008.

own appointment on a different basis, by her "nomination by a majority of the beneficiaries in the will". See paragraph 4 of Petitioner's second motion, at R-II-226. In a subsequent response (at R-II-261, 262), Petitioner's contention took on still a different form:

> Even if the will is upheld Petitioner is entitled to preference as appointment as personal representative pursuant to Section 733.301(1)(b)(2), as she is selected by *a majority in interest* of [*sic* the] heirs.

R-II-262 (emphasis supplied). There is no support in the record below for either of Petitioner's contentions.

The consents attached to the second motion were signed by Joe Lissy, Seth Fraser, Keith Fraser, and Gabe Lissy (blood nephews of the decedent). Those four nephews were named as contingent beneficiaries of a minor portion of the Family Trust created in KRISTINE's will, to receive ". . . so much of the income as the co-trustees shall, in their sole discretion, from time to time determine . . . necessary or desirable for the purposes of their education . . . ." See Section Fifth, subsection (a), of the will, at R10-19. The vast majority of the beneficial interest in the Family Trust devolved to Respondent's children and not to the four nephews. The trustee of the Family Trust is the Respondent. Even assuming that Respondent were to exercise his discretion as trustee to pay some amount of the four nephews' reasonable educational expenses, the remainder of the beneficial interest in this $2,000,000+ estate goes to Respondent's own children.

Conversely, this record lacks any showing by Petitioner that the four nephews consenting to her appointment as personal representative are a "majority in interest" of the persons entitled to this estate, within the meaning of Fla. St. section 733.301(1)(a)(2).

c) No other party (including the four nephews) has challenged Respondent's qualifications as personal representative.

d) In her Statement, Petitioner fails to include a material portion of the district court decision in *Hill*. The panel below "disagreed with the sweeping holding in *Angelus,*" noting that

> . . . [t]his is not a situation where the factual basis for the claim of disqualification was concealed from appellant or arose after the three-month period [in Fla. St. section 733.212(3)] had expired . . . ,"

distinguishing the case at bar from *Angelus*.

e) The record below is devoid of any showing of fraud, misrepresentation, or deception on the part of the Respondent or of the Petitioner's lack of actual knowledge of the pertinent facts.

f) At no time did Petitioner ask the trial court for an extension of the 3-month statutory period for any reason (extenuating circumstances, mistake, inadvertence, or excusable neglect, or because of any prejudice arising from any failure of Respondent to comply with the rules).

g) Petitioner's Statement of the Case and Facts (pages 4-5) sets forth a short statement of Petitioner's original contentions

regarding the invalidity of the decedent's will. See page 4 and following, in the initial brief on the merits. Those allegations have been rejected as a matter of law by the trial court in its order of December 21, 2009, granting the personal representative's motion for summary judgment directed to HILL's petition to revoke probate. In that order, the lower court noted that there was no evidence that the decedent had not, in fact, signed her own will. The probate court held that the clerical errors in the will did not invalidate the will, but only required that the will be construed to determine the testamentary intention of the decedent. While the order authorized Petitioner to pursue construction of the will, no petition seeking construction of the will was filed, and final judgment on the petition to revoke the will was entered. The order and judgment are not final, as the Petitioner has timely filed her notice of appeal from the judgment. A copy of that order rendered December 21, 2009, after the preparation of the record on appeal herein, is included as Appendix Exhibit A to this brief.

SUMMARY OF ARGUMENT

THE DISTRICT COURT HEREIN PROPERLY APPLIED SECTION 733.212(3) TO BAR PETITIONER'S UNTIMELY MOTIONS CHALLENGING RESPONDENT'S QUALIFICATIONS AS PERSONAL REPRESENTATIVE. The decision under review properly construed section 733.212(3), Fla. Stat. (2007), holding that, where the factual basis for a challenge to Respondent's

qualifications was known at all times to Petitioner, Petitioner's failure to timely challenge those qualifications barred Petitioner's motions. To hold otherwise would render meaningless a portion of section 733.212(3). Respondent had no obligation to furnish notice under Rule 5.310 or section 733.3101, Fla. Stat. (2007), where the facts were disclosed on the face of the petition for administration or otherwise known to Petitioner. Because there was no such obligation imposed upon Respondent, the reasoning and holding of *Angelus v. Pass* are distinguishable from those in the case at bar. To the extent that the decision in *Angelus* can be read to apply to cases even where no notice under Rule 5.310 or section 733.3101 is required, such a holding should be viewed as *dicta*. The district court decision applying the 3-month limit to bar Petitioner's motions should be sustained and, to the extent of any conflict, *Angelus v. Pass* should be overruled.

FURTHERMORE, PETITIONER LACKS STANDING TO CHALLENGE THE QUALIFICATIONS OF RESPONDENT AS PERSONAL REPRESENTATIVE. Section 733.506 requires that a petition to remove a personal representative be brought by "an interested person". The burden of demonstrating movant's "interest" lies on the movant, in this case, Petitioner. Because Petitioner failed to sustain that burden - either as an intestate heir (because she was unsuccessful in challenging the will) or as designee of four contingent trust beneficiaries (because they are not a "majority in interest") - Petitioner's challenges to

Respondent's qualifications should be rejected for lack of standing.

ARGUMENT

Petitioner notes in her "Preliminary Statement" (p. 9 of her initial brief on the merits) that she includes no argument on the substantive issue resolved by the trial court in Petitioner's challenges to the Personal Representative's qualifications, an issue not addressed by the district court. Respondent has likewise made no argument on that substantive issue in this answer.

I. THE DISTRICT COURT HEREIN PROPERLY APPLIED SECTION 733.212(3) TO BAR PETITIONER'S UNTIMELY MOTIONS CHALLENGING RESPONDENT'S QUALIFICATIONS AS PERSONAL REPRESENTATIVE.

Standard of review: Respondent agrees that the standard of review applicable to the construction of the statute (section 733.212(3) regarding the timeliness of Petitioner's motions to disqualify) is *de novo*. *Fernandez-Fox v. Estate of Lindsay,* 972 So.2d 281, at 283 (Fla. 4th DCA 2008).

Petitioner's first motion to substitute personal representative (filed 13 months after service of the notice of administration) and Petitioner's second motion to disqualify Respondent (filed 20 months after service of the notice) were each untimely. *Rogers v. Rogers*, 688 So.2d 421 (Fla. 3d DCA 1997) (the passage of four months and 21

days was, by itself, sufficient under section 733.212 to require the denial of the objection). *See also Pastor v. Pastor*, 929 So.2d 576, at 577 (Fla. 4th DCA 2006).

Petitioner contended in the trial court that there was effectively no time limit for her challenge of the non-resident Respondent's qualifications. Petitioner's argument is essentially that all applicants whose qualifications are later challenged on any ground are required to have furnished a notice under Rule 5.310 and section 733.3101 stating that ground, even though: (1) the applicant did not agree that s/he was thereby disqualified; and (2) the challenger knew of all such grounds at the time of service of the notice of administration. For example, in the case at bar, the probate court determined that Respondent was entitled to serve, even though a non-resident (because Respondent was the son of decedent's spouse). Petitioner's position regarding the time limit must of necessity be that, even though Respondent was qualified, some notice was still required.

Stated another way, three of the four applications of Petitioner's argument either impose an impossible burden on applicants or are nonsensical. On the first hand, where an applicant knows of no grounds for disqualification, requiring the applicant to give notice of that of which s/he is unaware is meaningless. Second, as in the case at bar, where both the applicant and the challenger are aware of the operative facts, requiring additional

notice is useless. Third, as in the case at bar, where those facts do *not* give rise to disqualification, requiring the applicant to give notice of facts which *don't* preclude his/her appointment is not mandated by the language of Rule 5.310 (which governs a "personal representative who was *not* qualified to act at the time of appointment"). Moreover, to require notice from an applicant who contends that s/he is qualified, stating that s/he may *not* be qualified, makes no sense.[3] The fourth possible scenario is that of *Angelus*. Where the applicant has knowledge of facts which the applicant reasonably knows would render the appointment improper, then - and only then - do Rule 5.310 and section 733.3101 operate to require an additional notice to interested parties.[4]

Jurisdiction was granted in this case, because of apparent conflict between the decision of the First District herein and that

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[3] One might ask what notice would have been required of Respondent herein - that he was a non-resident? But that fact was made clear in Respondent's original petition for administration. Was Respondent required to give notice that the decedent's husband had predeceased decedent? That would mean Respondent would be required to give notice of a fact known to Petitioner. Was Respondent required to give notice that he *was* qualified, as ultimately determined by the probate court?

[4] Interestingly, that rule and section merely impose the obligation to give notice; neither contains a time limit for petitioning for removal after notice. For example, neither states that an interested party has "3 months", or "30 days", or any other time limit from service of the notice within which to act. As a result, that rule and section *must* be read in conjunction with the remainder of the probate code, including section 733.212(3).

of the Third District in *Angelus v. Pass*, 868 So.2d 571 (Fla. 3d DCA 2004). The facts underlying the holding in *Angelus* are striking: a) Pass knew that he was the nephew of the decedent's former husband, not of the decedent; b) Pass misrepresented under oath (in his petition) that he was the *decedent's* nephew; and c) under the clear language of section 733.304, a non-resident nephew of a decedent would be qualified, while a non-resident nephew of a decedent's spouse would not, and no reasonable person could read the statute otherwise. The Third District expressly reacted to that misconduct:

> We find no reason to engraft the three-month limitation of the commencing administration statute onto the explicit provisions of the qualifications statute nor upon Rule 5.310 . . . . To do so would render Rule 5.310 meaningless and would improperly shift the burden of discovery of an applicant's misrepresentations to the court and interested parties.

Angelus, 868 So.2d at 573.

With the decision in *Angelus* viewed in that light, the district court below properly rejected the application of *Angelus* to this case. In so doing, the First District panel noted the "sweeping" nature of the holding. *Hill*, 31 So.3d at 923. Reading *Angelus* so broadly as to hold that "there is [never] a time limit to seeking disqualification when the applicant is, in fact, not qualified" does what the First District indicated: It renders meaningless the words in section 733.212(3) imposing a 3 month deadline on challenges to ". . . the qualifications of the personal representative . . . ."

To apply *Angelus* to the case at bar - in the absence of any misrepresentation on the part of Respondent and given Petitioner's knowledge of the factual basis for her challenge at all times during the 3 month challenge period - would be tantamount to holding that a challenger may object to qualifications at any time, provided that s/he is ultimately successful in the objection.

Can the results in *Angelus* and *Hill* be reconciled, even if the broad strokes of *Angelus'* reasoning are overruled? Where a probate court or challenger is truly misled by false statements made by a personal representative, might an interested party move for an extension of time within which to object, after discovery of the facts? This Court might well reject that notion, in favor of a "bright line" time limit for challenges to qualifications, given the policy supporting the cost-effective and timely closing of decedents' estates. There are, after all, other sanctions available to prevent abuse of the process, such as the denial of statutory personal representative fees, as in *Angelus*. 868 So.2d at 573.

The resolution of the question in this case does not, however, require *Angelus* to be overruled in its entirety. Simply put, where the grounds for challenge to an applicant's qualifications are of record or otherwise known to the contesting party, that party must comply with the express time limits in section 733.212(3), or suffer

the denial of his/her challenge as untimely. In this case, the First District properly held that Petitioner's motions attacking Respondent's qualifications, filed 13 and 21 months after Petitioner received notice of the administration, were untimely. The district court decision applying the 3-month limit to bar Petitioner's motions should be sustained and, to the extent of any conflict, *Angelus v. Pass* should be overruled.

II. PETITIONER LACKS STANDING TO CHALLENGE THE QUALIFICATIONS OF Respondent AS PERSONAL REPRESENTATIVE.

Standard of review: The standard of review of a probate court's determination of standing ("interested party" status) is *de novo*. *Fernandez-Fox v. Estate of Lindsay,* 972 So.2d 281, at 283 (Fla. 4th DCA 2008) (construction of a provision of the probate code involves "statutory interpretation", which the appellate courts review *de novo*).

In moving to strike Petitioner's second motion (R-II-234), Respondent asserted Petitioner lacks the requisite "interest" to question the qualifications of the personal representative. While in most types of civil proceedings, standing is considered an affirmative defense, this is not so in probate proceedings to remove the personal representative. Whether Petitioner is an "interested person" must first be established by Petitioner herself. *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So.2d 1002 (Fla. 5th DCA

2005). Under section 731.201(23), Petitioner is not an "interested person" who could challenge the appointment of Respondent as personal representative.

Section 733.506 requires that a petition to remove a personal representative must be brought by "an interested person". Section 731.201(23) provides that

> "[i]nterested person" means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. . . . The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.

The petition itself is required to state the interest of the movant. Fla. Prob. R. 5.270(a). A determination of standing, or "interest", often turns on the resolution of the underlying claim. *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So.2d 1002, at 1006-1007 (Fla. 5th DCA 2005).

Here, Petitioner is neither a beneficiary under the will nor a creditor of this estate. Petitioner's petition to revoke probate of the will has been rejected by the trial court (by its order of December 21, 2009, appendix exhibit A to this brief)[5], and, as a result, Petitioner has no claim in her own right. Petitioner personally remains unaffected by the removal (or not) of Respondent. Under the plain meaning of the definition, Petitioner is not an

[5] The order and the judgment thereon are not final, as the Petitioner has timely filed her notice of appeal therefrom.

"interested person" in her own regard.

Petitioner's alternative reasoning in the trial court was that her "interest" was supplied by the consents of the four nephews (Joe, Seth, Keith and Gabe). R-II-226. This contention also fails. The four nephews do not constitute a "majority in interest" under KRISTINE's will. They were named only as contingent beneficiaries of the Family Trust, to receive ". . . so much of the income as the co-trustees shall, in their sole discretion, from time to time determine . . . necessary or desirable for the purposes of their education . . . ." Section Fifth, subsection (a), of the will, at R10-19. The vast majority of the beneficial interest in the Family Trust belongs to Respondent's children and not to the four nephews. Even assuming that Respondent were to exercise his discretion (as trustee) to pay some amount of the four nephews' reasonable educational expenses, the remainder of this $2,000,000+ estate devolves to the beneficial interest of Respondent's children.

Petitioner has made no showing that the four nephews preferring her as personal representative are a "majority in interest" of the persons having the beneficial interest in the Family Trust, within the meaning of section 733.301(1)(a)(2), Fla. Stat. Moreover, Petitioner's alternative theory - that probate of the will should be revoked - has failed. The burden was on Petitioner to make a showing of her status as "interested person". *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So.2d 1002 (Fla. 5th DCA 2005). Petitioner's failure to carry the burden to establish her "interest"

provides an alternate basis for affirmance of the probate court's denial of her motions and for not reversing the district court's decision herein.

CONCLUSION

The district court herein properly applied section 733.212(3) to bar Petitioner's untimely motions challenging Respondent's qualifications as personal representative. Moreover, Petitioner lacks standing to challenge Respondent's qualifications as personal representative. This Court should decline to reverse the holding of the First District herein and, to the extent of any conflict, the rationale in *Angelus v. Pass* should be rejected.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was furnished by regular U.S. mail to H. Guy Green, Esq., 4387 Clinton Street, Marianna, FL 32446, and to Louis K. Rosenbloum, Esq., 4300 Bayou Blvd., Suite 36, Pensacola, FL 32503-2671, co-counsel for Petitioner, this September 10, 2010.

s/ Frank A. Baker

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CERTIFICATE OF COMPLIANCE REGARDING FONTS

I HEREBY CERTIFY that the foregoing brief complies with the font and form requirements of Fla. R. App. P. 9.210(a)(2).

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