SUPREME COURT OF FLORIDA

CASE NO. SC10-823

SOLVEIG EDNA HILL,

Petitioner,

vs.

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

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, CASE NO. 1D09-4020

PETITIONER'S REPLY BRIEF ON THE MERITS

H. GUY GREEN
Fla. Bar No. 153300
4387 Clinton Street
Marianna, Florida 32446
(850) 526-3707
(850) 526-5810 (fax)

LOUIS K. ROSENBLOUM
Fla. Bar No. 194435
LOUIS K. ROSENBLOUM, P.A.
4300 Bayou Boulevard, Suite 36
Pensacola, Florida 32503
(850) 475-1211
(850) 475-1290
lrosenbloum@rosenbloumlaw.com

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

RULES

STATEMENT OF THE CASE AND FACTS

Respondent correctly notes in his answer brief that petitioner inadvertently referred to respondent as decedent's "nephew" rather than decedent's "stepson" in footnote six of petitioner's initial brief on the merits.

ARGUMENT

Respondent raises two issues in his answer brief, the conflict issue certified by the district court involving the time limit for challenging the qualifications of a nonresident personal representative and the issue of standing.

I. CERTIFIED CONFLICT ISSUE

Respondent attempts to reconcile the decision below, Hill v. Davis, 31 So. 3d 921 (Fla. 1st DCA), rev. granted, 41 So. 3d 218 (Fla. 2010),with Angelus v. Pass, 868 So. 2d 571 (Fla. 3d DCA), rev. denied, 873 So. 2d 1223 (Fla. 2004), by arguing that the personal representative in Angelus misrepresented the facts justifying his appointment while the personal representative in this case accurately stated the facts concerning his qualifications without fraud or misrepresentation. Although this comparison is accurate, neither Hill nor Angelus based its decision on this factual variation. Further, the controlling statutes[1] and rule of probate procedure[2] do not draw the distinction between petitions for appointment that

[1] Sections 733.212(2)(c) and 733.3101, Florida Statutes (2007).

[2] Florida Rule of Probate Procedure 5.310.

accurately state the facts qualifying or disqualifying the applicant as personal representative and those petitions in which the facts are misrepresented.

Respondent also attempts in his argument to shift the burden for determining the personal representative's qualifications from the personal representative to interested persons who receive notice of the personal representative's application for appointment. Contrary to respondent's assertion, however, Florida Probate Rule 5.310[3] and section 733.3101, Florida Statutes (2007),[4] unquestionably place

---

[3] Florida Probate Rule 5.310 provides:

> Any personal representative who was not qualified to act at the time of appointment or who would not be qualified for appointment if application for appointment were then made shall immediately file and serve on all interested persons a notice describing:
>
> (a) the reason the personal representative was not qualified at the time of appointment; or
>
> (b) the reason the personal representative would not be qualified for appointment if application for appointment were then made and the date on which the disqualifying event occurred.
>
> The personal representative's notice shall state that any interested person may petition to remove the personal representative.

[4] Section 733.3101, Florida Statutes (2007), provides:

> Any time a personal representative knows or should have known that he or she would not be

the burden on the person applying for appointment as personal representative to determine whether he or she is qualified and notify interested persons if he or she is not qualified.

Overlooking the controlling statutory language, respondent further argues "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." Answer Brief at 8. Section 733.3101, however, is not limited to situations where the applicant "knows" he or she is unqualified. The statute requires notice in cases where "a personal representative knows or should have known that he or she would not be qualified for appointment . . . ." § 733.3101, Fla. Stat. (2007).

Respondent also contends "where both the applicant and the challenger are aware of the operative facts, requiring additional notice is useless." Answer Brief at 8. This argument likewise is inconsistent with the plain language from section 733.3101 and improperly shifts the burden to determine whether the personal

---

> qualified for appointment if application for appointment were then made, the personal representative shall promptly file and serve a notice setting forth the reasons. A personal representative who fails to comply with this section shall be personally liable for costs, including attorney's fees, incurred in any removal proceeding, if the personal representative is removed. This liability shall be cumulative to any other provided by law.

representative is legally qualified to serve from the personal representative to interested parties.

Respondent next argues where the "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 . . . ." Answer Brief at 8-9 (italics in original). As petitioner noted in her initial brief, however, the district court below did not reach the question whether respondent is qualified to serve as a nonresident personal representative. See Hill, 31 So. 3d at 922 ("Appellant asserts that the trial court erred in concluding that appellee was qualified to serve as a nonresident personal representative pursuant to section 733.304(3), Florida Statutes (2007). We do not reach the merits of this claim . . . ."). [5]

[5] Respondent argued in the courts below he was qualified to serve as nonresident personal representative under section 733.304(3), Florida Statutes (2007), which permits a nonresident to serve as personal representative if he or she is "[a] spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person." Respondent is related to decedent's former spouse by lineal consanguinity but decedent's spouse predeceased decedent by three years. (R-II 226, 322). Thus, respondent is qualified to serve as nonresident personal representative only if the term "spouse used in section 733.304(3) includes a deceased or former spouse. The authorities suggest otherwise. See In re Estate of Angeleri, 575 So. 2d 794, 794 (Fla. 4th DCA 1991) (holding that nonresident named as personal representative in decedent's will was not qualified under section 733.304, Florida Statutes, to serve as personal representative in Florida because the nonresident was the nephew of the deceased's first and second wives, both of whom predeceased him); In re Estate of Chadwick, 309 So. 2d 587 (Fla. 2d DCA 1975) (holding that decedent's nonresident grand nephew was not qualified to serve as personal representative because the statutory term "nephew" does not include "grand" nephew).

II. STANDING

A. Respondent's standing argument is based on matters outside the record.

Respondent contends, alternatively, that petitioner lacks standing to challenge his qualifications to serve as nonresident personal representative because she is not an "interested person" as defined by the Florida Probate Code.[6] Respondent specifically argues petitioner lacks standing because her petition to revoke probate of decedent's will was denied by summary judgment order entered by the trial court on December 21, 2009. Respondent has appended a copy of the summary judgment order to his brief.

Respondent's reliance on the December 21, 2009 summary judgment order is improper. The December 21, 2009 order was not entered until after petitioner filed her notice of appeal on August 3, 2009. (R-II 325-26). Consequently, the December 21, 2009 summary judgment order was not included in the record on appeal reviewed by the district court and is not part of the record on appeal forwarded by the district court to this Court. See Vinnik v. Vinnik, 831 So. 2d 1271, 1274 n.2 (Fla. 4th DCA 2002) (stating that orders entered by the lower

[6] Although respondent now argues petitioner is not an "interested person" under the Florida Probate Code, he took a contrary position earlier in the litigation when he served a copy of the notice of administration on petitioner because he considered her an "interested person" entitled to notice. (R-I 27; R-II 266). In fact, in answer to petitioner's first petition for revocation of probate, respondent admitted "the mother of the decedent has standing." (R-I 27 at ¶ 1).

tribunal during an appeal are not part of the appellate record and generally have no bearing on the propriety of the ruling under review).

Fundamentally, appellate review is confined to the record before the Court. Atlas Land Corp. v. Norman, 116 Fla. 800, 801, 156 So. 885, 886 (Fla. 1934); Sheldon v. Tiernan, 147 So. 2d 593, 593 (Fla. 2d DCA 1962). Thus, a party is not permitted to refer in the briefs to material which is not included in the record on appeal. See Ullah v. State, 679 So. 2d 1242, 1244 (Fla. 1st DCA 1996); Altchiler v. State, Dep't of Prof'l Reg., 442 So. 2d 349, 350 (Fla. 1st DCA 1983). Likewise, it is improper to include documents in an appendix which are not part of the record on appeal. See Hughes v. Enterprise Leasing Co., 831 So. 2d 1240, 1240 (Fla. 1st DCA 2002); Mann v. State Road Dep't, 223 So. 2d 383, 385 (Fla. 1st DCA 1969). Accordingly, petitioner respectfully urges the Court to disregard respondent's argument based on the December 21, 2009 summary judgment order.

B. The record before this Court shows petitioner has standing to challenge the nonresident personal representative's qualifications.

Under the Florida Probate Code, any "interested person" may file a petition to remove the personal representative. See §§ 733.212(3), 733.506, Fla. Stat. (2007). The Florida Probate Code defines "interested person" as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved." § 731.201(23), Fla. Stat. (2007). See generally Hayes v.

Guardianship of Thompson, 952 So. 2d 498, 507 (Fla. 2006); Wheeler v. Powers, 972 So. 2d 285, 288 (Fla. 5th DCA 2008).

On the record before this Court, petitioner is an "interested person" under the statutory definition because she stands to inherit her daughter's estate in the event decedent's will is declared invalid. See § 732.103(2), Fla. Stat. (2007). Further, if the probate court ultimately invalidates decedent's will, petitioner will have preference for appointment as successor personal representative and, therefore, has standing on that basis to petition for respondent's removal. See § 733.301(1)(b), Fla. Stat. (2007). Respondent's argument that petitioner is not an interested person because the trial court has now granted his motion for summary judgment on her petition to revoke probate is premature and based on matters outside the record.

Alternatively, even if the will is valid, petitioner could be entitled to preference as personal representative pursuant to section 733.301(1)(a)2., Florida Statutes (2007) as "[t]he person selected by a majority in interest of the persons entitled to the estate," four of the seven putative beneficiaries under the will (petitioner's nephews) having consented to her appointment.[7] (R-II 228-31, 241).

[7] If the person nominated by decedent's will is disqualified or unable to serve as personal representative, the next preference for appointment is the "person selected by a majority in interest of the persons entitled to the estate." § 733.301(1)(a)2., Fla. Stat. (2007).

On this point, respondent argues his children hold "[t]he vast majority of the beneficial interest in the Family Trust" while the four nephews favoring petitioner's appointment will receive nothing more than "reasonable educational expenses." Answer Brief at 14. This issue, however, was not addressed by the district court below. See Schreiber v. Rowe, 814 So. 2d 396, 398 n.1 (Fla. 2002) (declining to consider issue not addressed by district court). Further, section 733.301(1)(a)2., Florida Statutes (2007), does not indicate whether the "majority in interest of the persons entitled to the estate" refers to monetary value, a numerical majority of beneficiaries or some other formula. The trial court never reached this issue because it found respondent qualified to serve as nonresident personal representative.

Finally, even if petitioner is not an "interested person," the Florida Probate Code and Florida Probate Rules give the trial court express authority on its own motion to remove a personal representative who is not qualified to serve. See § 733.506, Fla. Stat. (2007) ("Proceedings for removal of a personal representative may be commenced by the court or upon petition of an interested person."); Fla. Prob. R. 5.440 ("The court on its own motion may remove, or any interested person by petition may commence a proceeding to remove, a personal representative."). Thus, the trial court may remove respondent as personal representative even if petitioner lacks standing to challenge his qualifications.

CONCLUSION

This Court should quash the decision below and remand to the district court with directions to address the merits of petitioner's appeal on the question whether respondent is qualified to serve as nonresident personal representative.

Respectfully submitted:

H. GUY GREEN
Fla. Bar No. 153300
4387 Clinton Street
Marianna, Florida 32446
(850) 526-3707
(850) 526-5810 (fax)

LOUIS K. ROSENBLOUM
Fla. Bar No. 194435
LOUIS K. ROSENBLOUM, P.A.
4300 Bayou Boulevard, Suite 36
Pensacola, Florida 32503
(850) 475-1211
(850) 475-1290 (fax)
lrosenbloum@rosenbloumlaw.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following attorneys for respondent by U.S. Mail this 5th day of October, 2010.

Frank A. Baker, Esquire
4431 Lafayette Street
Marianna, Florida, 32446

Michele M. Lenoff, Esquire
Steven Lenoff, Esquire
Lenoff & Lenoff, P.A.
1761 West Hillsboro Boulevard, Suite 405
Deerfield Beach, Florida 33442

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman font in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

LOUIS K. ROSENBLOUM
Fla. Bar No. 194435
LOUIS K. ROSENBLOUM, P.A.
4300 Bayou Boulevard, Suite 36
Pensacola, Florida 32503
(850) 475-1211
(850) 475-1290 (fax)
lrosenbloum@rosenbloumlaw.com

Attorney for Petitioner