IN THE SUPREME COURT OF FLORIDA

JAMES MICHAEL ALDRICH,

Petitioner,

v.

LAURIE BASILE, et al.,

Respondents.

_____/

Case No. SC11-2147
L.T. Nos. 1D10-3110
2009-CP-000373

On Review From The District Court Of Appeal
First District, State Of Florida

_____

PETITIONER'S INITIAL BRIEF ON THE MERITS

_____

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STATEMENT OF THE CASE AND FACTS

The Court has accepted jurisdiction to review the decision of the First District Court of Appeal in *Basile v. Aldrich,* 70 So. 3d 682 (Fla. 1st DCA 2011) [A 1]. The case concerns the construction of the will of Ann Aldrich ("Ann" or "Ms. Aldrich").

Facts

In 2004 Ms. Aldrich made a "do-it-yourself" will using an "E-Z Legal Form." [A 2]. It is dated April 5, 2004. [A 2 at 2]. The two-page, pre-printed will form contains three substantive articles.

Article I concerns the appointment of a personal representative. Ms. Aldrich filled in the blanks in that article to name her sister, Mary Jean Eaton, as personal representative, with her brother, James Michael Aldrich, as alternate personal representative. [*Id.* at 1] Mr. Aldrich is the petitioner in this case.

Article II provided for appointment of a guardian of minor children, with blanks to fill in the names of the guardians. Ann, who had no children (R. 143), did not fill in these blanks. [A 2 at 1]

Article III, entitled "BEQUESTS," consisted of a single pre-printed statement – "I direct that after payment of all my just debts, my property be bequeathed in the manner following:" – followed by a three-inch blank space. In that space Ann wrote in her own hand:

> - My body cremated and ashes scattered, no services
>
> - My pet companion animals be humanely destroyed by a licensed veterinarian as soon as possible
>
> - House, contents, lot at 150 SW Garden Street, Keystone Heights FL 32656
>
> - Fidelity Rollover IRA 162-583405 (800-544-6565)
>
> - United Defense Life Insurance (800-247-2196)
>
> - Automobile Chevy Tracker, 2CNBE13C 916952909
>
> - All bank accounts M&S Bank 2228448, 269679, 0900020314 (352-473-7275)
>
> All possessions listed are bequeathed to Mary Jean Eaton PO Box 38 Melrose Florida. If Mary Jean Eaton dies before I do, I leave all listed to James Michael Aldrich, 2250 S Palmetto 114 S Daytona FL 32119.

[*Id.*]

The pre-printed will form contains no residuary clause or other distributive provisions. In the will Ann named no beneficiaries other than Ms. Eaton and Mr. Aldrich.

Ms. Eaton was Ann's only sister. (R. 143). Mr. Aldrich was Ann's only living brother. (*Id.*). Ann was unmarried and had no children. (*Id.*). Ms. Eaton and Mr. Aldrich were Ann's closest living relatives. (*Id.*). Respondents are Ann's nieces, the children of a fourth sibling, a brother who had died before Ann made her will. (R. 142). The nieces are not mentioned in the will.

It is undisputed that in her will Ann listed all of the property that she owned at the time she made the will. (*See* R. 136-144; *see also* R. 91). Thus, despite the absence of a residuary clause, the will in fact disposed of Ann's entire then-existing estate. There is no suggestion in the record that when she made her will, Ann had any reason to expect that she would afterward acquire additional property.

However, in 2007, three years later, Ms. Eaton died and left her estate to Ann. (R. 125-134, 142-143). As a result, Ann inherited from her sister a parcel of land in Putnam County, Florida, and cash which she deposited in an account she opened with Fidelity Investments. (*Id.*). It is this unexpected inheritance, acquired after Ann made her will, that is in issue in this case.

Ann did not update her will after receiving this inheritance. However, she did write in her own hand an "addendum to my will dated April 5, 2004." (R. 150). She paper-clipped the original addendum to her original 2004 will. (R. 146). In this addendum, which is dated November 18, 2008, Ann wrote:

> This is an addendum to my will dated April 5, 2004. Since my sister Mary Jean Eaton has passed away, I reiterate that all my worldly possessions pass to my brother James Michael Aldrich, 2250 S Palmetto 114, S. Daytona FL 32119.
>
> With her agreement I name Sheila Aldrich Schuh, my niece [Mr. Aldrich's daughter], as my personal representative, and have assigned certain bank accounts to her to be transferred on my death for her use as she seems [sic] fit.
>
> (R. 150).

Ann signed the addendum, but it is not witnessed. (*Id.*).[1]

A year later, in October 2009, Ann died. (R. 146).

The foregoing facts were undisputed in the probate court.

Proceedings in the Probate Court

After Ann's death her 2004 will was admitted to probate and Mr. Aldrich was appointed personal representative of the estate. (R. 12).

In his capacity as personal representative, Mr. Aldrich brought an adversary proceeding to construe Ann's will as it concerned the disposition

[1] Because it is unwitnessed, this addendum could not be given effect as a testamentary instrument. *See* §732.502(1)(b), (1)(c), and (5), Florida Statutes.

of her after-acquired inheritance from Ms. Eaton. (R. 16). Mr. Aldrich argued that as a matter of law, pursuant to Florida's after-acquired property rule set forth in §732.6005(2), the will should be construed to pass the after-acquired property to himself, as the sole beneficiary named in it. (R. 16, 98, 101-103). Alternatively, he argued that if the will were not so construed as a matter of law, it is ambiguous as to whether Ann intended it to pass after-acquired property, and the extrinsic evidence of Ann's intent confirms that she did intend her will to pass her after-acquired inheritance to Mr. Aldrich. (*Id.*).

Respondents argued, on the other hand, that the will should not be construed to pass after-acquired property; that extrinsic evidence of Ann's intent should not be considered; and that the after-acquired property should pass by intestacy, in which case that property would pass one-half to respondents, despite the fact that they are not mentioned in the will, and one-half to Mr. Aldrich. (R. 24). In addition, respondents disputed that the will had been duly executed and attested. (*Id.*).

Respondents moved for summary final judgment in their favor on the will construction issue. (R. 41). Mr. Aldrich filed an opposing memorandum of law together with affidavits and other summary judgment evidence in opposition to respondents' motion. (R. 56-67, 123-150). He

also moved for summary judgment on the limited issue of the due execution and attestation of the will. (R. 48).

At the hearing on these motions, respondents' counsel stipulated that the will was duly executed and attested (R. 86), and the probate court (Honorable John H. Skinner) entered summary judgment in Mr. Aldrich's favor on that issue. (R. 68).

On the will construction issue, the probate court held that §732.6005(2) of the Florida Probate Code (the "Probate Code" or the "Code") "requires that the will be construed to pass decedent's after-acquired inheritance to [Mr. Aldrich]." (R. 69). Accordingly, the probate court denied respondents' motion for summary judgment, and entered summary final judgment for Mr. Aldrich. (R. 69-70).[2]

The probate court made clear that its ruling was based solely on §732.6005(2), and that it was not "getting into extrinsic evidence at this point." (R. 105). The probate judge stated his view that the issue of §732.6005(2)'s applicability to Ann's will should be addressed on appeal "before we have any further hearings on the matter." (R. 106).

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[2] There is no dispute that the probate court had authority to enter summary final judgment for Mr. Aldrich, even though he had not moved for summary judgment on the will construction issue. *See Carpineta v. Shields*, 70 So. 2d 573, 574 (Fla. 1954)(trial court has authority to enter summary judgment for non-moving party, even in absence of cross-motion).

Proceedings in the District Court

Respondents appealed to the First District Court of Appeal the probate court's summary final judgment on the will construction issue. On April 21, 2011, a divided panel of the First District rendered its opinion affirming the summary judgment in Mr. Aldrich's favor.[3] Respondents moved for rehearing.

On August 23, 2011, a differently composed,[4] still-divided panel (Judge Van Nortwick dissenting) granted rehearing and substituted the opinion now under review, *Basile v. Aldrich,* 70 So. 3d 682 (Fla. 1st DCA 2011) [A 1], in place of the previous opinion. The new panel majority reversed the summary judgment, holding that Ann's will did not pass her after-acquired inheritance, and that the inheritance passed by intestacy, resulting in Ann's having died partially intestate despite her will. *Id.* at 683. To reach this result, the majority held in effect that §732.6005(2) does not apply because there is "no provision of the will – specific, general, or residuary" that "dispose[s] of" or "covers" Ann's after-acquired property. *Id.* at 687. No such language or limitation appears in the text of the statute.

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[3] That opinion was formerly reported at 36 FLW D861 and 2011 WL 1496721.

[4] During the pendency of respondents' motion for rehearing, Judge Webster, who authored the April 21, 2011 opinion, retired from the court. He was replaced on the panel by Judge Thomas.

The panel majority certified the following question to be one of great public importance:

> WHETHER SECTION 732.6005, FLORIDA STATUTES, REQUIRES CONSTRUING A WILL AS DISPOSING OF PROPERTY NOT NAMED OR IN ANY WAY DESCRIBED IN THE WILL, DESPITE THE ABSENCE OF ANY RESIDUARY CLAUSE, OR ANY OTHER CLAUSE DISPOSING OF THE PROPERTY, WHERE THE DECEDENT ACQUIRED THE PROPERTY IN QUESTION AFTER THE WILL WAS EXECUTED?

Judge Van Nortwick concurred in the certification of the question, but otherwise dissented with an opinion. 70 So. 3d at 688, *et seq.*

Proceedings in this Court

Mr. Aldrich petitioned this Court to take jurisdiction to review the panel majority's decision, based on the certified question and also because of conflict with decisions of this Court concerning statutory construction and construction of wills. By its order entered June 28, 2012, this Court accepted jurisdiction and directed briefing on the merits.

SUMMARY OF THE ARGUMENT

The district court's decision contravenes important principles of statutory construction and will construction.

First, in attempting to ascertain Ann's intent, the district court failed to take into account Ann's circumstances at the time she made her will. As a result, the court failed to consider the important fact that by her will Ann disposed of everything she owned at the time.

Second, the district court ascribed to Ann an intention to die partially intestate, although her will – especially considering that it disposed of her entire then-existing estate – indicates no such intention. This violates the presumption against partial intestacy enunciated by this Court.

Third, the district court ignored the plain and unambiguous language of §732.6005(1). That subsection of §732.6005 expressly states that application of the statutory rules of construction found in Part VI of Chapter 732 of the Probate Code is mandatory, the sole stated exception being where the will indicates a contrary intention. The district court impermissibly engrafted on the statute an additional exception not found there, which would also preclude application of Part VI unless a will were found to be ambiguous. Under our system of separation of powers, if indeed the

Legislature intended to limit the application of Part VI to ambiguous wills, it is for the Legislature, not the courts, to amend §732.6005(1) to so provide.

Fourth, the district court also ignored the plain and unambiguous language of §732.6005(2), Florida's after-acquired property statute, by adding a limitation to its scope that is nowhere stated in that subsection – that the rule applies only to wills that contain residuary clauses or language affirmatively encompassing the particular after-acquired property in issue. In doing so, the district court resurrected a limitation that was found in Florida's pre-Code after-acquired property statutes, but which the Legislature omitted when it enacted the Probate Code in 1974. Here again, if the Legislature intended the limitation in prior law to continue into the Probate Code, it is for the Legislature to correct the omission through amendment of the statute.

The result of these errors was to frustrate Ann Aldrich's intent to pass all of her property to a single named beneficiary who was her closest living relative, and instead to pass a substantial part of her estate by intestate succession to remote relatives who are not mentioned in the will.

This Court should answer the certified question in the affirmative. Section 732.6005 by its plain terms requires that Ann's will be construed to

pass after-acquired property to the sole beneficiary named in the will. There is simply nothing in the text of the statute that could support any other result.

Further, to maintain uniformity in the jurisprudence of this state, the Court should uphold and reaffirm the fundamental principles of statutory construction and will construction which the district court failed to follow. Otherwise, the district court's decision portends uncertainty regarding the continuing vitality of those principles.

Finally, the Court should reverse the First District and affirm the probate court's entry of summary final judgment for petitioner.

ARGUMENT

Standard of Review. The overriding issue in this case is whether the First District properly interpreted §732.6005. Therefore the standard of review is de novo. *Bennett v. St. Vincent's Medical Center, Inc.*, 71 So. 3d 828, 837 (Fla. 2011).

I. The District Court's Decision Departs From Established Principles Of Statutory And Will Construction.

A. Part VI of the Probate Code.

Section 732.6005 appears in Part VI of Chapter 732 of the Probate Code. Part VI is entitled "Rules of Construction." In addition to §732.6005(2)'s after-acquired property rule, Part VI contains the following additional rules for the construction of wills:

§732.601 – Simultaneous Death Law

§732.603 – Antilapse; Deceased Devisee; Class Gifts

§732.604 – Failure of Testamentary Provision

§732.605 – Change in Securities; Accessions; Nonademption

§732.606 – Nonademption of Specific Devises in Certain Cases; Sale by Guardian of the Property; Unpaid Proceeds of Sale, Condemnation or Insurance

§732.607 – Exercise of Power of Appointment

§732.608 – Construction of Terms

§732.609 – Ademption by Satisfaction

§732.611 – Devises to Multigeneration Classes to be Per Stirpes

§732.615 – Reformation to Correct Mistakes[5]

§732.616 – Modification to Achieve Testator's Tax Objectives.

Application of these statutory rules of construction is precluded only where, as stated in §732.6005(1), "a contrary intention is indicated by the will." Other than the "contrary intention" exception, Part VI contains no other exception or limitation to the mandatory application of its constructional rules. In particular, nothing in Part VI suggests that application of its rules is also precluded unless the will were found to be ambiguous.

According to one of the leading commentaries on the Legislature's enactment of the Probate Code in 1974, Part VI represents "codified solutions to several common problems" in the construction of wills, "[d]ue primarily to either the draftsman's lack of recognition of likely problems, or a lack of foresight in dealing with them." Henry A. Fenn and Edward F. Koren, *The 1974 Florida Probate Code – A Marriage of Convenience*, 27 U.Fla.L.Rev. 1, 26 (1974). The authors make clear that these "codified solutions" should yield to a contrary intention in the testator's will – as

[5] Section 732.615 and the following section, §732.616, were not part of the Probate Code at the time of the proceedings in the probate court. Those sections were enacted in 2011.

§732.6005(1) now makes clear – but they do not suggest that application of the Part VI rules is also conditioned on a finding that the will is ambiguous. *Id.* at 27.

B. Section 732.6005.

Section 732.6005 states in full as follows:

> (1) The intention of the testator as expressed in the will controls the legal effect of the testator's dispositions. The rules of construction expressed in this part [i.e., Part VI] shall apply unless a contrary intention is indicated by the will.
>
> (2) Subject to the foregoing, a will is construed to pass all property which the testator owns at death, including property acquired after the execution of the will.

Section 732.6005(2) is the 1975 re-enactment of former §732.602, which was enacted as part of the 1974 Code. Section 732.602 provided that "[a] will is construed to pass all property that the testator owns at his death including property acquired after the execution of the will."

As is discussed more fully below, the First District's decision ignores the plain language of subsections (1) and (2) of §732.6005, instead rewriting the statute to add words and insert limitations that the Legislature did not place there. In doing so the decision departs from important principles enunciated by this Court to delineate the proper role of the courts in construing and applying legislative enactments. These principles are

discussed in the following section of this brief, and also in section I.D.3., *infra* at 31.

C. Relevant Principles of Statutory Construction.

The decisions of this Court provide an established framework of principles for the judicial construction and application of legislative enactments. The Court has long made clear that the beginning point of statutory construction is "the plain meaning of the statute." *Petty v. Florida Insurance Guaranty Association,* 80 So. 3d 313, 316 n. 2 (Fla. 2012). "Where a statute's language is plain and unambiguous, its plain meaning will control and further statutory construction is not necessary." *Id.* The courts may not "speculat[e] as to what the legislature intended." *State v. Dugan,* 685 So. 2d 1210, 1212 (Fla. 1996). The Court explained these overarching principles nearly 100 years ago in *Van Pelt v. Hilliard,* 75 Fla. 792, 78 So. 693 (1918):

> 'The Legislature must be understood to mean what it has plainly expressed, and this excludes construction. The legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. Cases cannot be included or excluded merely because there is intrinsically no reason against it. *Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plan meaning of the language which is free from ambiguity.* If a legislative

> enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety, and policy of its passage. Courts have then no power to set it aside or evade its operation by forced and unreasonable construction. If it has been passed improvidently the responsibility is with the Legislature and not the courts. * * *'
>
> 75 Fla. at 798, 78 So. at 694-695 (emphasis added; citations omitted).

This Court has invoked the guiding principles enunciated in *Van Pelt* on many occasions. *See, e.g., Florida Birth-Related Neurological Injury Compensation Association v. Department of Administrative Hearings,* 29 So. 3d 992, 997-998 (Fla. 2010); *State v. Ruiz,* 863 So. 2d 1205, 1209 (Fla. 2003).

In accordance with those principles, this Court has consistently made clear that courts are "without power to construe an unambiguous statute in a way which would extend, modify, *or limit*, its express terms or its reasonable and obvious implications." *Davila v. State,* 75 So. 3d 192, 196 (Fla. 2011)(emphasis added), and cases cited therein. "To do so," the Court has cautioned, echoing *Van Pelt,* "would be an abrogation of legislative power." *Bennett v. St. Vincent's Medical Center, Inc., supra* at 838 (quoting *McLaughlin v. State,* 721 So. 2d 1170, 1172 (Fla. 1998), which in turn quoted *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984)).

It is therefore "a well-established tenet of statutory construction that *courts 'are not at liberty to add words to the statute that were not placed there by the Legislature.'*" *Lawnwood Medical Center v. Seeger,* 990 So. 2d 503, 512 (Fla. 2008)(emphasis added; quoting *State v. J. M.*, 824 So. 2d 1005, 111 (Fla. 2002), which in turn quoted *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999). The courts thus have no power to alter the plain language of a statute that is clear and unambiguous, "however wise it may seem" to do so. *Overstreet v. State,* 629 So. 2d 125, 126 (Fla. 1993); *see also Seagrave v. State,* 802 So. 2d 281, 291 (Fla. 2001)("impermissibl[e] [to] read words into the statute other than those that were written"); *Knowles v. Beverly Enterprises-Florida, Inc.,* 898 So. 2d 1, 7 (Fla. 2004)(even a liberal construction of a statute "does not mean that this Court may rewrite the statute" to "add words"); *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982)(courts may not engage in a "judicial rewrite" that deviates from statute's plain meaning). This principle is rooted in our constitutional separation of powers: "Under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the Legislature clearly has not done so." *Florida Department of Revenue v. Florida Municipal Power Agency*, 789 So. 2d 320, 324 (Fla. 2001).

Consistent with the constitutional separation of powers, "[i]f the legislature did not intend the results mandated by the statute's plain language, then the appropriate remedy is for it to amend the statute." *Overstreet v. State, supra*. The courts must presume that if the Legislature intended to limit a statute's scope, "it would have expressly stated so." *Davila v. State, supra* at 196. The courts must further presume that "if the Legislature did not intend the result mandated by the plain and unambiguous language of [the statute], the Legislature itself will amend the statute." *Id.* at 196-197.

The foregoing authorities demonstrate that statutory construction in Florida is still guided by the principle articulated by this Court many years ago in *Fine v. Moran*, 74 Fla. 417, 77 So. 533 (1917):

> In construing or interpreting the words of a statute it should be borne in mind that the courts have no function of legislation, and seek only to ascertain the will of the Legislature. The courts may not imagine an intent and bend the letter of the act to that intent, much less. . . 'can we indulge in the license of striking out and inserting and remodeling with the view of making the letter express an intent which the statute in its native form does not evidence.' * * * Courts cannot correct supposed errors, omissions or defects in legislation. 'The object of interpretation is to bring sense out of the words, and not to bring a sense into them.'
>
> 74 Fla. at 428-429, 77 So. at 536 (citations omitted).

D. The District Court's Decision Departs From These Principles.

Petitioner respectfully submits that the First District's decision departs from these principles – and also departs from important principles governing the construction of wills – with the result that the decision construes Ann's will in a way that, instead of effectuating her intent, frustrates it. The best way to assess the district court's construction and application of the statute in this case is to consider in turn the three sentences that comprise §732.6005.

1. The First Sentence of Subsection (1).

Section 732.6005(1) begins with the statement that "[t]he intention of the testator as expressed in the will controls the legal effect of the testator's dispositions." This statement codifies the long-standing common law rule in Florida that the "intention of the testator, as expressed in his will, shall prevail over all other considerations, if consistent with the principles of law." *Lines v. Darden,* 5 Fla. 51, 68 (1853).

The First District correctly noted that "[a] testator may choose to dispose of only a portion of his or her estate by will, allowing the balance to descend under the laws of intestate succession." 70 So. 3d at 687. The court went further, however, to conclude that Ann's will discloses just such an intent, that is, an intent to "delimit[] the parts of her estate on which [her

will] operates," by not "allud[ing]" to the after-acquired inheritance she did not then own, and could have had no reason to expect. 70 So. 3d at 686.

This conclusion, which underpins the decision, fails to take into account that Ann did ***not*** "choose" to dispose of only a portion of her estate by her will. Rather, it is unrebutted that she chose by her will to dispose of everything she owned. The record demonstrates, without dispute, that the property that Ann listed in Article III of her will constituted all of the property that she owned at the time she made the will. (*See* R. 136-144; *see also* R. 91).

The district court erred when, in seeking to ascertain Ann's intent, it failed to take this important fact into account. Reference to such evidence is proper, because "whether or not the will is ambiguous on its face, the court is required to receive and consider evidence of the circumstances surrounding its execution in determining testamentary intent." *In re Estate of McGahee,* 550 So. 2d 83, 86 (Fla. 1st DCA 1989); *see also In re Estate of Lenahan,* 511 So. 2d 365, 371 (Fla. 1st DCA 1987)("intention of the testator must be gathered from the will itself, read in the light of the extrinsic evidence" of surrounding circumstances at the time of execution of the will); *In re Estate of Parker,* 110 So. 2d 498, 501 (Fla. 1st DCA 1959)(to determine testator's intent, "situation of the testator at the time he made his

will" must be considered); *In re Howard's Estate*, 393 So. 2d 81, 83 (Fla. 4th DCA 1981)("[i]n determining the testator's intent, numerous factors should be considered, including his situation at the time he made his will"; error for probate judge to attempt to discern intent from "the face of the [will] alone"). This point is also made clear by *In re Estate of Barker*, 448 So. 2d 28 (Fla. 1st DCA 1984), since the court in that case ascertained that after-acquired property was not in issue, and obviously could have done so only by taking into consideration extrinsic evidence of what property the testatrix did in fact own at the time she made her will.

The fact that Ann by her will disposed of all of her then-existing estate removes the underpinning of the First District's decision. Ann did not choose, or intend, to dispose of only a portion of her estate, or to die partially intestate. She chose and intended by her will to pass everything she then owned. Nothing in the record suggests that she had any reason at that time to expect that she would own anything more when she died.

That Ann did not choose or intend that her will would dispose of only a portion of her estate distinguishes this case from the two cases that the district court cites on this point, *In re Barker*, *supra*, and *In re Stephen's Estate*, 142 Fla. 88, 194 So. 343 (1940). Both of those cases involved property that the testator owned at the time the will was made, but which the

will did not dispose. Indeed, the court in *Barker* refused to consider §732.6005(2) for the very reason that after-acquired property was not involved in the case. 448 So. 2d at 32.

Barker stands for a wholly unrelated proposition: That where a testator executes a will that devises only *part* of the property that he or she owns *at the time of the will*, the will necessarily indicates an intention that the testator's other, undevised property should not pass under it. That is because the law presumes that when the testator executed the will he or she understood and approved its terms, including that it left property that the testator then owned, but did not devise, to pass outside the will. 448 So. 2d at 30-31.

That presumption – on which the result in *Barker* is based – has no application here, since Ann did not own the property in issue when she executed her will. Indeed, that presumption supports the opposite result under the facts in this case. Here, since Ann's will ***did*** dispose of her entire then-existing estate, the presumption that she understood and approved her will when she signed it supports the conclusion that Ann intended to pass her entire estate under the will; it does not support a conclusion that she meant to leave something out.

Barker's holding is consistent with §732.6005. A will does not pass undevised, *then-existing property*, because the testator's omission of that property is presumed to have been intentional. Therefore, the will cannot be construed to pass "all property," as the §732.6005(2) would otherwise require, since by its omission of then-existing property the will indicates a "contrary intention" within the scope of §732.6005(1)'s limiting clause. *See* discussion in section I.D.2., *infra* at 26.

That Ann's will disposed of her entire estate also distinguishes this case from *Matter of Estate of Allen*, 388 N.W.2d 705 (Mich. Ct. App. 1986), another case cited in the First District's decision. Here the will did not dispose "of only one small specific item out of a large and valuable estate," as was the case in *Allen. Id.* at 707. Ann's will disposed of her entire estate.

Respectfully, the First District simply got it wrong in asserting, 70 So. 3d at 688, that it does not matter whether Ann did or did not own the inherited property in issue when she made her will. It ***does*** matter. Because Ann's will disposed of her entire then-existing estate, and because she did not own the property in issue at the time of the will, and had no reason to expect that she ever would, she cannot be legally presumed – as was the case in *Barker* – to have intended that it pass outside the will.

Ann's will says nothing about property she did not own at the time she made the will. It does, however, dispose of everything she then owned to a single beneficiary (her sister, or if her sister died before her, her brother) who was her closest living relative. Petitioner submits that it is much more reasonable to see in such a will an intention that property acquired later would also pass to that same beneficiary, than to see in it, as the First District did, an intent that after-acquired property would pass by intestacy to more remote relatives who are nowhere mentioned in the will.

The latter construction conflicts with a principle of will construction established long ago by this Court, which abjures constructions that result in partial intestacy. In *In re Smith*, 49 So. 2d 337 (Fla. 1950), this Court rejected a will construction that "would be to ascribe to [the testatrix] an intention to die intestate as to [part of her] property," holding that

> [s]uch a construction will not be given where a will is susceptible of two constructions, by one of which the testator may be held to have disposed of the whole of his estate and by the other of which he will be held to have disposed of only a part and to have died intestate as to the remainder.
>
> *Id.* at 339.

The Court, quoting Page on Wills, adopted the rule that

> '[a] construction which results in partial intestacy will not be used *unless such intention appears clearly*. It is said that the courts will prefer any reasonable construction, *or any*

> *construction which does not do violence to the testator's language*, to a construction which results in partial intestacy.'
>
> *Id.* (emphasis added; citation omitted).

See also In re Gregory's Estate, 70 So. 2d 903, 907 (Fla. 1954)(citing presumption against partial intestacy); *Koerner v. Borck*, 100 So. 2d 398, 403 (Fla. 1958)(same).

Construction against partial intestacy is also consistent with the purpose of the after-acquired property rule. As this Court has stated, the "primary purpose" of that rule is to "permit transmissal [sic] of after-acquired property by will rather than by intestacy." *In re Vail's Estate*, 67 So. 2d 665, 670 (Fla. 1953)(addressing predecessor after-acquired property statute). Indeed, leading commentators on the 1974 Florida Probate Code considered that §732.602, §732.6005(2)'s Code predecessor, represented a codification of *In re Smith*'s presumption against partial intestacy. Fenn and Koren, *The 1974 Florida Probate Code – A Marriage of Convenience*, *supra* at 32 (§732.602, now §732.6005(2), "adopts a presumption against partial intestacy").

The decision in this case conflicts with *In re Smith* in holding that Ann Aldrich died partially intestate. Ann's will plainly discloses no such intention. Her will is at least equally susceptible to a construction that it was meant to pass all property that Ann may have owned at her death to the sole

beneficiary named in it, as to one which ascribes to her an intention to pass after-acquired property not to that sole beneficiary but rather to more remote, unnamed intestate heirs. Certainly, construing the will to pass after-acquired property to the only named beneficiary would, in the words of *In re Smith*, "not do violence" to the will's language. *In re Smith* therefore requires that Ann's will be construed to effect that result.

2. <u>The Second Sentence of Subsection (1)</u>.

Section 732.6005(1) concludes by stating that "[t[he rules of construction expressed in this part [Part VI of the Probate Code] shall apply unless a contrary intention is indicated by the will." This sentence thus plainly mandates that Part VI's constructional rules "shall apply," excepting only where "a contrary intention is indicated by the will." As the discussion in the preceding section of this brief demonstrates, Ann's will evinces no intention *contrary* to the application of §732.6005(2)'s after-acquired property rule.

Nevertheless, the First District declined to apply §732.6005(2) on the basis that "[r]ules of construction are to be resorted to only if the testator's intent cannot be ascertained from the will itself," i.e., the will is ambiguous. 70 So. 3d at 688 (citing cases that did not involve any of the Part VI

statutory rules of construction). In this respect the decision contravenes statutory construction principles in two ways.

First, it ignores that, by the statute's plain language, application of the Part VI rules of construction is mandatory (absent a contrary intention indicated in the will). "The word 'shall' is mandatory in nature." *Sanders v. City of Orlando,* 997 So. 2d 1089, 1095 (Fla. 2008); *see also Neal v. Bryant*, 149 So. 2d 529, 532 (Fla. 1962)(word 'shall' "according to its normal usage, has a mandatory connotation").

Neal does recognize that, notwithstanding its plain-sense meaning, "shall" can be considered directory rather than mandatory in limited situations where the statute "relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of a statute are given with a view to the proper, orderly and prompt conduct of business merely . . . ." *Id.* Those exceptions do not apply here, however.

The Part VI rules of construction, including §732.6005(2)'s after-acquired property rule, are concerned with the determination of beneficiaries and beneficiaries' rights in decedent's estates, and thus affect substantive property rights. As such, those rules cannot be considered "immaterial" or "matter[s] of convenience." *See DeGregorio v. Balkwill*, 853 So. 2d 371,

374 (Fla. 2003)(word "shall" must be "given its literal meaning" where statute affects substantive rights); *Neal, supra* (word "shall" must be considered mandatory where statute affects property rights); *City of St. Petersburg v. Remia,* 41 So. 3d 322, 326 (Fla. 2d DCA 2010)(same effect; "use of the mandatory term 'shall' normally creates an obligation impervious to judicial discretion"). Accordingly, the Legislature's use of the word "shall" in the second sentence of §732.6005(1) must be construed in its literal, mandatory sense, except as otherwise provided in that sentence itself (i.e., where the will indicates an intention contrary to a particular Part VI constructional rule).

The cases cited in the First District's decision on this point – *Barley v. Barcus*, 877 So. 2d 42 (Fla. 5th DCA 2004), *First Nat'l Bank of Fla. v. Moffett*, 479 So. 2d 312 (Fla. 5th DCA 1985), and *In re Estate of Lesher*, 365 So. 2d 815 (Fla. 1st DCA 1979) – are not to the contrary, because none of those cases concerned application of one of the mandatory statutory rules of construction found in Part VI of the Code.

Petitioner is aware of no case that has conditioned the application of a Part VI constructional rule on a finding that the will is ambiguous. Rather, the cases that have addressed Part VI rules have treated their application as mandatory (unless, of course, the will indicates a "contrary intention"). *See*,

e.g., In re Estate of Jones, 472 So. 2d 1299 (Fla. 2d DCA 1985)(application of Section 732.606's nonademption rules is mandatory); *In re Estate of Wagner*, 423 So. 2d 400 (Fla. 2d DCA 1982)(application of Section 732.603's antilapse rule is mandatory, unless will indicates a contrary intention; and, where will is ambiguous as to whether it indicates such a contrary intention, courts may properly invoke "common law canons of testamentary construction" to determine whether testator's intent was that otherwise mandatory antilapse statute would not apply).

In re Estate of Scott, 659 So. 2d 361 (Fla. 1st DCA 1995), also illustrates the point that, other than the "contrary intention" exception, there is no other exception or limitation to the mandatory application of Part VI's construction rules. In *Scott* the will devised the testatrix's entire estate to her sister, with no contingent devise in the event of the sister's death before the testatrix (which is what subsequently occurred). The will was not ambiguous; it simply did not provide for the disposition of the testatrix's estate to anyone other than her predeceased sister. Notwithstanding the will's lack of ambiguity, the First District nevertheless held that the case was "controlled by Florida's antilapse statute," one of Part VI's rules of construction, so that the estate passed to the predeceased sister's lineal descendants. 659 So. 2d at 362.

As it concerns §732.6005(1)'s second sentence, the First District's decision also contravenes statutory construction principles in a second way: The court's construction requires the impermissible addition of words that the Legislature did not place there. As enacted, that sentence plainly mandates application of Part VI's construction rules in all cases except where the will indicates a "contrary intention." The decision under review effectively adds another limitation, such that the Part VI rules would apply "unless a contrary intention is indicated by the will *or the testator's intent cannot be ascertained from the will*." As discussed above in section I.C., *supra* at 15, this Court's statutory construction jurisprudence eschews such a judicial revision of a clear and unambiguous statute so as to limit the statute's application in a way not provided in the statute itself.

The Legislature did not make the application of Part VI's rules of construction dependent on a finding that the will is ambiguous, as may be the case where non-statutory, common-law constructional aids are involved. Grafting such a limitation onto §732.6005(1) violates fundamental statutory construction principles. Petitioner respectfully submits that, to uphold and reaffirm those principles, the Court should confirm that the statute means what it plainly says: That the rules of construction set forth in Part VI of the Code apply to all wills, excepting only those that indicate a "contrary

intention." If the Legislature intended there to be other limitations to the application of the Part VI rules of construction, that is for the Legislature to address through statutory amendment.

3. Subsection (2)

Section 732.6005(2) provides that "[s]ubject to the foregoing, a will is construed to pass all property which the testator owns at death, including property acquired after the execution of the will." The "[s]ubject to the foregoing" qualifier refers to the two sentences in subsection (1) of the statute. As discussed above, Ann's will says nothing about after-acquired property, nor can it reasonably be read to express an intention that after-acquired property would not pass to the sole beneficiary named in the will. Therefore, since the will indicates no intention *contrary* to subsection (2)'s after-acquired property rule, it follows from the plain, unambiguous language of subsection (2) that Ann's will must be construed to pass her after-acquired inheritance to the sole beneficiary named in it, the petitioner here.

Just as the First District's construction of subsection (1) of the statute runs afoul of this Court's statutory construction jurisprudence, so its conclusion that subsection (2) does not apply to Ann's will also contravenes that jurisprudence. In construing subsection (2), the district court noted that

the predecessor versions of Florida's after-acquired property statute – those in effect prior to the enactment of the Probate Code in 1974 – permitted after-acquired property to pass under a will *only* where the will "contain[s] a residuary clause" or there are "general expressions in the will showing such to be the intention of the testator." 70 So. 3d at 684-5. Section 732.6005(2), however, contains no such language and no such limitation to its application.

To support inserting such a limitation, the First District considered that §732.602 of the 1974 Probate Code, and its successor, current §732.6005(2), were "largely housecleaning not intended to effect substantive changes to [the prior after-acquired property statutes]." *Id.* at 685. The court cited no authority to support this proposition that §732.6005(2) was intended to insert, *sub silentio*, the prior statutes' limitation.[6]

Having thus dismissed the change in the after-acquired property statute's language as non-substantive "housecleaning," the district court proceeded to read into §732.6005(2) the very limitation to the application of the after-acquired property statute found in prior law, but not expressed in §732.6005(2). Thus, the decision asserts that "[i]n order for property, after-

[6] The court does cite *Trawick's Redfearn Wills and Administration in Florida,* but the cited passage concerns the Probate Code as a whole, does not really support the notion that the Probate Code was merely "housecleaning," and nowhere addresses §732.6005(2) or the predecessor versions of the after-acquired property rule.

acquired or not, to pass under a will, the will must dispose of it in some manner" and that "assets covered by no provision of the will – specific, general, or residuary – are not disposed of under the will." 70 So. 3d at 686-7. There is, of course, no such language in §732.6005(2). On its face, the only exception to §732.6005(2)'s application is where the will indicates a "contrary intention," as stated in §732.6005(1). Otherwise, the statute on its face applies to *all* wills.

The First District's construction violates rules of statutory construction discussed in section I.C. of this brief, *supra* at 15. The gist of those rules is succinctly stated in this Court's decision in *Nicoll v. Baker*, 668 So. 2d 989 (Fla. 1996):

> A basic rule of law controls: When the words of a statute are plain and unambiguous and convey a definite meaning, courts have no occasion to resort to rules of construction – they must read the statutes as written, for to do otherwise would constitute an abrogation of legislative power. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984).

Id. at 990-991.

The Court has cautioned that in applying this "basic rule of law" it must be kept in mind that "there is a difference between ambiguity and unexpressed intent." *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So. 2d 452, 455 (Fla. 1992). Further, "the fact that the legislature may not have anticipated a particular situation does not make the

statute ambiguous." *Id.* The courts simply are without the power to engage in a "judicial rewrite" that "deviates from the plain meaning of the statute" in order to achieve what the court believes was or should have been the Legislature's (unexpressed) intent. *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982).

As this Court stated in *Hamm*, the district court's

> inability to 'believe that the legislature could have intended for its statute to be read in such a way as would permit the outcome portrayed in the hypothetical' is insufficient to overcome the plain meaning of the statutory language. * * *
>
> Moreover, '[e]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.' *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693 (1918).

Id.

See also Tropical Coach Line, Inc. v. Carter, 121 So. 2d 779, 782 (Fla. 1960)(where statutory language is clear and unambiguous, courts may not "engag[e] in speculation as to what the judges might think that the legislators intended or should have intended").

As this Court has stated more recently, when faced with the argument that it should judicially engraft a limitation to the plain scope of an unambiguous statute, courts must presume that "if the Legislature did not

intend the result mandated by the plain and unambiguous language of [the statute], the Legislature itself will amend the statute." *Davila v. State*, 75 So. 3d 192, 196-197 (Fla. 2011). "If [it] is correct that the Legislature erred in the . . . amendments, the Legislature is the only branch with the constitutional authority to correct this alleged error." *Florida Department of Revenue v. Florida Municipal Power Agency*, 789 So. 2d 320, 324 (Fla. 2001).

As noted above, *supra* at 16-18, this Court has employed this separation-of-powers principle on numerous occasions to refuse to add words to, or impose limitations to the scope of, an unambiguous statute. *See, e.g., Lawnwood Medical Center, Inc. v. Seeger*, 990 So. 2d 503, 512 (Fla. 2008), and cases cited therein (applying statutory construction principles to constitutional provision); *Exposito v. State*, 891 So. 2d 525, 528 (Fla. 2004); *Seagrave v. State*, 802 So. 2d 281, 291 (Fla. 2001)(restricting scope of statute "would require us to impermissibly read words into the statute other than those that were written"). Thus,

> [w]hen there is doubt as to the legislative intent or where speculation is necessary, then the doubts should be resolved against the power of the courts to supply missing words. * * *
>
> * * * In *Atlantic Coast Line Co. v. Boyd*, Fla., 102 So. 2d 709, we refused to supply a word where the legislative intent was unclear and the addition of our own words would merely have

> amounted to our view of what the statute should have contained.
>
> *Armstrong v. City of Edgewater,* 157 So. 2d 422, 425 (Fla. 1963).[7]

This disinclination to engage in judicial rewriting of legislative enactments carries special force where, as here, the words sought to be added to the statute are the very words that the Legislature omitted from the statute's predecessor. "When the legislature amends a statute by omitting words, we presume it intends the statute to have a different meaning than that accorded it before the amendment." *Capella v. City of Gainesville,* 377 So. 2d 658, 660 (Fla. 1979)(citations omitted). In *Capella* the Court reiterated that

> it is not our function to review the wisdom of [a] legislative enactment. We may not substitute our views of what the law should be for the legislature's pronouncement of the law. [Appellant's] challenge to the wisdom of the statute should be addressed to the legislature.
>
> *Id.*

As the Court stated in *Carlile v. Game & Fresh Water Fish Commission,* 354 So. 2d 362 (Fla. 1977):

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[7] In *Armstrong* this Court found that it could supply unintentionally omitted words because there was clear evidence that the words "or mayor" had been left out of the statute due to a "clerical omission" resulting from the "inadvertence of the draftsman." *Id.* at 425-426. There is no such evidence in this case.

> The omission of a word in the amendment of a statute will be assumed to have been intentional. And, where it is apparent that substantive portions of a statute have been omitted by process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive, and not merely clerical and inconsequential.
>
> *Id.* at 364-365.

In construing §732.6005(2) to require that a will include particular language in order to pass after-acquired property, where the statute plainly contains no such limitation to its application, the district court violated these statutory construction principles.

The history of §732.6005(2) underscores the fallacy in the district court's analysis. As one of the leading commentaries on the 1974 Probate Code recognized, §732.6005(2) (and its Code predecessor, former §732.602) *changed* Florida law, since, although "similar" to the Code provision, former §731.05(2) "applie[d] only to wills containing a residuary clause," whereas §732.6005(2) contains no such limitation. Fenn and Koren, *The 1974 Florida Probate Code – A Marriage of Convenience, supra* at 32 n. 212. A more recent commentator agrees that §732.6005(2) *changed* prior Florida law, so that, under the statute,

> [i]f a will contains no residuary clause, or if a doubt exists about whether a will is intended to dispose of all the assets the testator owned at the time of death, the will will be construed to make such disposition.
>
> 12 Abraham M. Mora, Shelly Wald and Lorna J. Scharlacken, *Florida Estate Planning* (West's Florida Practice Series) § 18:41 (2010-2011 ed.).

The district court dismissed the change in the statute's language by asserting, without support, that the 1974 Code was "largely housecleaning not intended to effect substantive changes." 70 So. 3d at 685. That assertion cannot withstand scrutiny. As Professors Fenn and Koren noted, of the 185 sections in the 1974 Code (Chapters 731 through 735 of the Florida Statutes), *only 73 sections*, or *less than 40%*, represented "continuations of present law with only editorial changes." Fenn and Koren, *The 1974 Florida Probate Code – A Marriage of Convenience*, *supra* at 3. They also noted that

> [t]he law pertaining to the effect of changes in the testator's property between the time of the execution of the will and the testator's death *has undergone considerable modification and clarification.*
>
> *Id.* at 28 (emphasis added).

That includes, as the discussion above makes clear, §732.6005(2) and its Code predecessor. Clearly, neither the changes in the 1974 Code in general,

nor the change in §732.6005(2) in particular, can be ignored as mere "housecleaning."

Here again, fundamental statutory construction principles support the above commentators' views that §732.6005(2) changed prior Florida law, by eliminating the former restriction in the statute's reach. As discussed above, when the Legislature amends a statute – as it did when it replaced §731.05(2), which applied only to wills containing residuary clauses, with §732.6005(2), which has no such limitation – "[i]t is presumed that . . . the legislature intends to *change* the meaning of [the] statute unless a contrary intention is clearly expressed." *Equity Corp. Holdings, Inc. v. Department of Banking and Finance*, 772 So. 2d 588, 590 (Fla. 1st DCA 2000)(emphasis in original); *Mangold v. Rainforest Golf Sports Center*, 675 So. 2d 639, 642 (Fla. 1st DCA 1996)("[w]hen the Legislature makes a substantial and material change in the language of a statute, it is presumed to have intended some specific objective or alteration of law, unless a contrary indication is clear").

Moreover, when the amendment involves the *omission of words*, the courts must "presume [the Legislature] intends the statute to have a *different meaning* than that accorded it before the amendment." *Capella v. City of Gainesville*, 377 So. 2d 658, 660 (Fla. 1979)(emphasis added); *Carlile v.*

Game & Fresh Water Fish Commission, 354 So. 2d 362, 364 (Fla. 1977)(when Legislature, in reenacting statute, excluded prior special venue provision, it must be presumed that Legislature intended to eliminate it).

In accordance with this Court's statutory construction jurisprudence, §732.6005(2) should be applied as it is written, according to its plain terms. In failing to do so, the district court usurped the function of the Legislature not only by re-writing the statute, but by doing so in the most jurisprudentially unsound way: By adding to §732.6005(2) the very words that the Legislature excluded when it enacted the statute in place of former §731.05(2). As the foregoing discussion demonstrates, that position contravenes Florida law on the proper role of the judiciary in construing and applying the enactments of the Legislature.

II. In Departing From Established Statutory And Will Construction Principles, The District Court Reached The Wrong Result In This Case.

The district court's departures from statutory construction and will construction principles are not harmless error. Respectfully, due to those errors, the district court reached the wrong result here.

Nothing suggests that when she made her will, Ann Aldrich intended to leave any part of her estate to pass outside the will. In the will she carefully listed everything she owned at that time, and left it to a single

beneficiary who was her closest living kin. Nothing suggests she had any reason to expect that she would later acquire more property. Nothing suggests that she intended anyone other than her sister, or brother, to share in her estate.

Petitioner submits that under the simple facts of this case, the presumption against partial intestacy compels that Ann's will be construed to pass the property she did in fact later (unexpectedly) acquire. That is a reasonable construction, and does no violence to the will's language. Further, §732.6005(2) by its plain language compels the same result. No other conclusion can be reached without adding words and limitations to §732.6005(1) and (2) that are not there.

Reversal of the district court's decision is necessary not only to uphold this Court's statutory construction and will construction jurisprudence; it is necessary to reach the correct and just result under the particular facts of this case.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the Court should answer the certified question in the affirmative, reverse the district court, and affirm the probate court's summary final judgment for petitioner.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Initial Brief and accompanying Appendix have been sent by U.S. Mail to Jonathan D. Kaney, III, Esq., 55 Seton Trail, Ormond Beach, Florida 32176, this _____ day of July, 2012.

_____
James J. Taylor Jr.

CERTIFICATE OF COMPLIANCE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), I hereby certify that this Brief was typed in Times New Roman 14-point font.

_____
James J. Taylor Jr.