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

RESPONDENTS' ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondents, Laurie Basile and Leanne Krajewski, do not dispute the summary of the facts as stated in petitioner James Michael Aldrich's brief. The facts as stated by the First District Court of Appeal, however, are more developed and may be of more use to the Court. Accordingly, respondents also rely upon the statement of facts set forth in that court's decision, which is attached to petitioner's brief and reported as *Basile v. Aldrich*, 70 So.3d 682 (Fla. 1st DCA 2011).

SUMMARY OF THE ARGUMENT

The Court appears to have the discretion to accept jurisdiction pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure, since the majority below, "[i]n an abundance of caution", certified a question "as a question of great public importance". *Basile v. Aldrich*, 70 So.3d at 688. The Court does not, however, have discretionary jurisdiction under Rule 9.030(a)(2)(A)(iv), since the decision below did not expressly and directly conflict with a decision of this Court.

The Court should not exercise its discretion to accept jurisdiction under Rule 9.030(a)(2)(A)(v) because petitioner's argument regarding the certified question, if it became law, would turn a long-standing, well-settled principle of the law and practice of estate planning and probate administration on its head and would moot

Section 732.101(1), Florida Statutes. The Court should deny review and, thus, finally put an end to this protracted, estate wasting litigation.

ARGUMENT

I. THE COURT'S JURISDICTION

A. The Decision Passes on a Question Certified to be of Great Public Importance.

The majority below, "[i]n an abundance of caution", certified the following question "as a question of great public importance":

> WHETHER SECTION 732.6005, [FLA. STAT. (2004)], 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?

The question certified is the same question that was presented on appeal. As such, both lower courts "passed" on the question certified. Thus, despite the half-hearted, out of an abundance of caution, nature of the certification, it appears the Court does have the discretion to accept jurisdiction pursuant to Rule 9.030(a)(2)(A)(v).[1]

B. The Decision Does Not Expressly and Directly Conflict with Decisions of this Court on the Same Question of Law.

[1]Nevertheless, as argued below, the Court should decline review and allow the district court's decision to stand without the expense and delay of further review.

Contrary to as argued by petitioner, the Court does not have discretionary jurisdiction under Rule 9.030(a)(2)(A)(iv), since the decision below did not expressly and directly conflict with a decision of this Court on the same question of law. The test of conflict jurisdiction is not whether the Court would have reached a different conclusion from that reached by the lower court, but whether the decision of the lower court "on its face collides with a prior decision of this Court or another District Court on the same point of law so as to create an inconsistency or conflict among the precedents." *Kincaid v. World Ins. Co.*, 157 So.2d 517, 517 (Fla. 1963). In *Mancini v. State*, 312 So.2d 732, 733 (Fla. 1975), the Court explained the standard as follows:

> Our jurisdiction cannot be invoked merely because we might disagree with the decision of the district court nor because we might have made a factual determination if we had been the trier of fact (citations omitted) . . . [;] our jurisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. In this second situation, the facts of the case are of the utmost importance.

There is no express and direct conflict present in this case. The lower court's decision follows Section 732.101(1), Florida Statutes, to wit: "Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed in the following sections of this code." The cases cited by

petitioner are not in conflict with this codification of a long-standing, well-settled principle of the law and practice of estate planning and probate administration. Moreover, the question of law decided by the lower court was the meaning of Section 732.6005. That is not a question that was addressed in any of the cases upon which petitioner relies to assert conflict jurisdiction.

1. Will Construction

Petitioner posits the following straw man: "The district court construed the will as not passing after-acquired property." Petitioner then argues there is direct and express conflict between the lower court's decision and this Court's decisions in *In re: Smith*, 49 So.2d 337 (Fla. 1950) and *Koerner v. Borck*, 100 So.2d 398 (Fla. 1958), which apply the principle of will construction "which abjures constructions that result in partial intestacy". Petitioner misses the point of the lower court's decision. The lower court's decision actually held that property the will did not dispose of passed by intestacy pursuant to Section 732.101(1) since Section 732.6005 does not create an exception to the rule that a will must dispose of property in order for it to pass under the will, whether or not that property was after-acquired.[2]

[2]The court wrote: "In order for property, after-acquired or not, to pass under a will, the will must dispose of it in some manner." *Basile* at 686-687. The court added: "[w]hether acquired before, after, or at the time a will is executed, assets covered by no provision in the will—specific, general, or residuary—are not disposed of under the will." *Id*. at 687. The court concluded this point as follows:

Nowhere in its opinion does the lower court take issue with the rule of construction that creates a presumption against partial intestacy. On the contrary, it expressly acknowledged that rule when it wrote: "The presumption against partial intestacy is designed to resolve ambiguities where they exist[;] [t]he presumption should not be applied to create ambiguities in a will where none would otherwise exist." *Basile* at 688. The court then noted that the presumption has no application in the present case because the will at issue here only contains specific bequests and, therefore, does not dispose of property not specifically identified. *Id*. That is, the will was not susceptible of more than one meaning.

This does not conflict with the presumption against intestacy to be applied in cases where there is an ambiguity. Indeed, it does not even turn on that rule of construction.[3] Thus, the decision does not "on its face collide[] with a prior decision of this Court or another District Court on the same point of law so as to

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"The will cannot, therefore, dispose of these items, *not because they are after-acquired, but because no provision of the will covers them.*" (e.s.) *Id*. That is, contrary to petitioner's novel argument, Section 732.6005 does not mean that after-acquired property passes under a will no matter what. Petitioner's reading of the statute leads to absurd results. Consider the scenario where a will, like Aldrich's, only makes specific bequests but, unlike Aldrich's, makes those bequests to multiple persons. How would a court dispose of the undisposed of property, whether after-acquired or not? Who would get it and why?

[3]The "Court's discretionary review jurisdiction can be invoked only from a district court decision `that expressly addresses a question of law within the four corners of the opinion itself' by `contain[ing] a statement or citation effectively establishing a point of law upon which the decision rests.'" *Persaud v. State*, 838 So.2d 529, 532 (Fla. 2003), *quoting Florida Star v. B.J.F.*, 530 So.2d 286, 288 (Fla.1988). This is not present here.

create an inconsistency or conflict among the precedents." *Kincaid v. World Ins. Co*. On the contrary, the lower court decision is consistent with Section 732.101(1), *In re: Estate of Barker*, 448 So.2d 28 (Fla. 1st DCA 1984)[4] and with the way things are done. Accordingly, there is no conflict jurisdiction on this point.

2. Statutory Construction

Petitioner also contends that the decision below directly conflicts with various decisions of this Court[5] "concerning the proper role of the courts in statutory construction, by ignoring the plain language of § 732.6005(2) and instead rewriting it to add words that the legislature did not place there". It does not. The lower court acknowledged that rule of construction, but explained why it did not apply. The court did not announce any new rule of law and its decision is entirely consistent with other rules of construction.

First, the lower court explained that its decision turned on Section 732.6005(1), not (2). Subsection (1) provides that "[t]he intention of the testator as expressed in the will controls the legal effect of the testator's dispositions."

[4]Petitioner attempts to distinguish *Barker* on the grounds that it did not involve after acquired property, but that is a distinction without a difference since Section 732.6005(2) (and the lower court's construction of the same) expressly includes not only after acquired property, but "all property", owned by testator at the time of death. If the lower court's view of the statute applied in *Barker*, *Barker* and every other case that resulted in partial intestacy would have been decided differently.

[5]*State v. Dugan*, 685 So.2d 1210 (Fla.1996); *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1 (Fla.2004); *Hayes v. State*, 750 So.2d 1 (Fla.1999); *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So.2d 1071 (Fla.1982); *Seagrave v. State*, 802 So.2d 281 (Fla.2001); *Overstreet v. State*, 629 So.2d 125 (Fla.1993).

Subsection (2) begins “Subject to the foregoing”. Thus, it is expressly *subject to* the subsection (1) language, not the other way around.[6] In order to get past the language of this unambiguous will, petitioner’s argument ignores subsection (1) and begs the question of the intention of the testator as expressed in the will.

Second, the rule of construction petitioner advances is not absolute. If the change in the language of the statute is not material and substantial, then the presumption does not apply. *Mangold v. Rainforest Golf Sports Center*, 675 So.2d 639 (Fla. 1st DCA 1996). Also, if "a contrary indication is clear", then the presumption does not apply. *Id.*[7]

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[6]That is, the subsection (2) "all property passes" language is expressly subject to the subsection (1) language that "[t]he intention of the testator *as expressed in the will* controls the legal effect of the testator's dispositions."

[7]As this Court explained in 1973, an exception to the presumption petitioner advances is when the legislature changes the language of a statute to correspond to what had previously been assumed to be the law:

> The mere change of language does not necessarily indicate an intent to change the law for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law. (Citation omitted). The language of the amendment in 1971 was intended to make the statute correspond to what had previously been supposed or assumed to be the law. The circumstances here are such that the Legislature merely intended to clarify its original intention rather than change the law.

State ex rel. Szabo Food Services, Inc. of N. Carolina v. Dickinson, 286 So.2d 529, 531 (Fla. 1973); *see also Southeastern Staffing Services, Inc. v. Fla. Dept. of Ins.*, 728 So.2d 248, 251 (Fla. 1st DCA 1998) (Amendment can clarify, rather than change, legislative intent.); *Prison Rehab. Indus. v. Betterson*, 648 So.2d 778, 779 (Fla. 1st DCA 1994) (The amendment of a statute does not necessarily indicate that the legislature intended to change the law); *Asphalt*

In the context of the state of the law in 1974, the legislature's change to the statute was neither substantial nor material. Moreover, given the then longstanding state of the law and the nature of the re-write, a contrary indication to the presumption that the legislature intended to change the law was clear: the removal of the words "residuary clause" from subsection (2) in the 1974 re-write as part of Florida's adoption of the model code merely conformed the language of the statute to comport with then long-standing Florida law, which the legislature was deemed to have been aware of, and which allowed after-acquired property to pass under applicable general devises *in addition to* residuary clauses.

If the legislature intended to make such a fundamental change to will drafting and construction so as to allow property, for the first time, to pass under a will even where the will contains no dispositive provisions through which the property could pass, the legislature would have expressly said so rather than merely, in the context of adoption of an entire model code, drop two words that resulted in the statute conforming with longstanding practice and precedent. Moreover, there would have been legislative history on the subject.

Pavers, Inc. v. Dep't of Revenue, 584 So.2d 55, 58 (Fla. 1st DCA 1991) ("[A] mere change in the language of a statute does not necessarily indicate an intent to change the law, because the intent may be to clarify what was doubtful and to safeguard misapprehension as to existing law."); *See also City of New Smyrna Beach v. Bd. of Trustees of Internal Imp. Trust Fund*, 543 So.2d 824, 829 (Fla. 5th DCA 1989) ("Another rule ... is that the mere change of statutory language does not necessarily indicate an intent to change the law for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law.").

The statute never has, and still does not, expressly refer to the black-letter, axiomatic requirement that a will must dispose of property in order for property to pass under the will. That has never been the purview of the statute. The Court should not accept jurisdiction on the basis of conflict jurisdiction because the decision below is not in express and direct conflict with any decision of this Court. The decision does not apply a rule of law to produce a different result in a case involving controlling facts substantially similar to those in any of the cases relied upon by petitioner. Nor does the decision announce a rule of law that conflict with a rule previously announced by this Court. In short, there is no conflict basis for jurisdiction.

II. THE COURT SHOULD DECLINE DISCRETIONARY REVIEW

Jurisdiction in this case is a matter of discretion in light of the certification. Respondents respectfully submit that the Court, in its discretion, should decline jurisdiction in this case. This case does not merit this Court's review because it merely applies well-settled, black-letter law. Indeed, the Court should not exercise its discretion to accept jurisdiction (as a question certified to be of great public importance) because petitioner's argument regarding the certified question, if it became law, would turn a long-standing, well-settled principle of the law and practice of estate planning and probate administration on its head and would moot Section 732.101(1), to wit: "Any part of the estate of a decedent not effectively

disposed of by will passes to the decedent's heirs as prescribed in the following sections of this code." Accordingly, the Court should not exercise its discretion to accept jurisdiction and should, instead, finally put an end to this protracted, estate wasting litigation by denying review.

CONCLUSION

Judicial economy and justice would be better served if the Court refused jurisdiction and allowed the decision below to stand without further review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: James J. Taylor, Jr., Esquire, P.O. Box 2000, Keystone Heights, FL 32656, on this 12th day of December, 2011.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.2210(a)(2), Florida Rules of Appellate Procedure, the undersigned hereby certifies that this brief was typed in Times New Roman 14-point font (and is double-spaced).

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