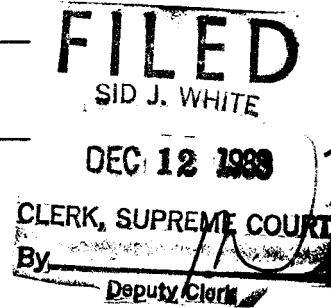


IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,207



EDITH J. WILCOX, as Executrix
of the Estate of CARRIE MAUD
JORDAN,

Appellant,

vs.

WILLIAM RENE LEVEROCK and
COMMERCIAL CARRIER CORP.,

Appellees.
_____ /

ON QUESTION CERTIFIED FROM
UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT
DOCKET NO.: 88-3248

APPELLEES' ANSWER BRIEF

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STATEMENT OF THE ISSUES

The single **issue** here is:

WHETHER NET ACCUMULATIONS **AS** DEFINED IN
5768.18 (5), FLA. STAT. (1983), INCLUDES
INCOME FROM TRUSTS NOT GENERATED BY
DECEDENT THROUGH BUSINESS OR SALARY
INCOME.

STATEMENT OF THE CASE AND FACTS

To the statement of the case of the Appellant, Appellees would add the following:

The suit below was brought under the 1983 Florida wrongful death law, §768.21, Fla. Stat. The present wrongful death law changed the test for recovery of net accumulations. Under the present law, a decedent's personal representative may recover net accumulations on behalf of the estate only if the decedent's survivors include a surviving spouse or lineal descendent; or if the decedent is not a minor child, there is no loss support and services recoverable, and there is a surviving parent.

Further, in addition to the fact that upon the death of the decedent the right to receive the income from one of the trusts passed to Edith Wilcox and the right to receive the income from the other trust passed to Edith Wilcox's daughter, Appellees would point out that Edith Wilcox and her daughter are also the people who will receive the proceeds of the estate of the decedent, Carrie Maud Jordan (R2-74); deposition of Edith Wilcox, page 9.

SUMMARY OF THE ARGUMENT

This is a case of first impression in the courts of Florida on the issue raised in this appeal.

Legislative intent is helpful, if not dispositive, because while the Florida Legislature was considering its Wrongful Death Act, a comprehensive report was submitted to it by the Florida Law Revision Commission. The report was followed by the legislature. It is referred to in this brief as the FLRC Report.

Using these criteria, the clear language defining net accumulations in the Florida Wrongful Death Act excludes income from the two trusts sought to be included by Appellant.

Additionally, there is no **loss** to any survivor since the present income beneficiaries are the same people to whom the proceeds of the estate would be distributed.

Thus, the district court correctly ruled in this case.

ARGUMENT

The single issue here is:

WHETHER NET ACCUMULATIONS AS DEFINED IN
§768.18(5), FLA. STAT. (1983), INCLUDES
INCOME FROM TRUSTS NOT GENERATED BY
DECEDENT THROUGH BUSINESS OR SALARY
INCOME.

Appellant's interpretation of the wrongful death statute would have the effect of allowing, as net accumulations, recovery for every item of value under the category of net accumulations. While this case of first impression is one of statutory construction, appropriate and acceptable criteria are available to guide the court to a correct decision.

RULES OF STATUTORY CONSTRUCTION

At common law there was no general right of action for wrongful death, Chamberlain v. Florida Power Corp., 198 So. 486 (Fla. 1940). Rights and remedies for death by wrongful act are purely statutory. Florida Eastcoast Railway v. McRoberts, 149 So. 631 (Fla. 1933). Thus, the right of action for wrongful death should not be extended beyond the meaning of the statute creating the right of action. U.S.F. & G. v. Reed Construction Corp., 149 So. 2d 578 (Fla. Dist. Ct. App., 1963). The statute must not be construed as to extend the right of action beyond that intended by the legislature and reflected in the language they used. Stokes v. Liberty Mutual Insurance Company, 213 So. 2d 695 (Fla. 1968). It must be construed to be consistent with the objectives sought to be accomplished. Klepper v. Breslin, 83 So. 2d 587 (Fla. 1955).

Further, the court should give effect to the legislature's intent. City of Tampa v. Thatcher Glass Corp., 445 So. 2d 578 (Fla. 1984).

Florida's Wrongful Death Act in its present version was first enacted in 1972 and remains substantially intact. Before its enactment, the FLRC'S Report was submitted to the legislature.

Section 768.18 (5), Fla. Stat. (1983), says:

"Net accumulations" means the part of the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of his estate if he had lived his normal life expectancy. "Net business or salary income" is the part of the decedent's probable gross income after taxes, excluding income from investments continuing beyond death, that remains after deducting the decedent's personal expenses and support of survivors, excluding contributions in kind.

This statute was adopted almost verbatim from the FLRC Report (R2-80). The emphasis in the statute is not on "probable gross income" but rather "net business or salary income".

The ruling of the District Court here is correct. Some items of value potentially available to a decedent may not be properly includable as "net accumulations" to that decedent's estate. Such is obviously the case under the wrongful death law in Florida. Further, the Appellant's statement that Mrs.

Jordan's survivors had suffered a loss is incorrect since the present trust income beneficiaries are the same people who fell heir to it anyway (Will of Carrie Maud Jordan (R2-74); depositions of Tom Gause, Peter Sherman and Edith Wilcox (R2-74). Appellant is clearly not entitled to a double recovery.

The interpretation urged on the court by Appellant finds no comfort in the law because it runs afoul of the rule requiring courts to give effect to legislative intent. Vildibil v. Johnson, 492 So. 2d 1047 (Fla. 1986). As the Florida Supreme Court said in Stern v. Miller, 348 So. 2d 303 (Fla. 1977) :

We recognize that the new Wrongful Death Act is remedial in nature and is to be construed liberally. However, we cannot construe the statutory provisions so "liberally" as to reach a result contrary to the clear intent of the legislature. The act must be construed to be consistent with the objectives sought to be accomplished. Klepper v. Breslin, 83 So. 2d 587 (Fla. 1955). This Court is without authority to do by statutory construction that which the legislature has not intended.

We agree with Appellant that Smith v. Lassing, 189 So. 2d 244 (Fla. Dist. Ct. App., 1966), is helpful. While no Florida court has ever defined "business or salary income" under §768.18(5), Fla. Stat. (1983), the Smith case, a pre-1972 death act decision, supports the district judge in our case. The decedent in Smith was a business woman who by her skill and efforts made sound income yielding investments. Indeed, those are precisely the sorts of income intended to be included as net accumulations in the present law because they are generated by a decedent's skill and efforts. No such skill and effort of the

decedent Jordan generated any of the trust income or corpus at issue in this case.

All of the forms of income in Smith would thus come within the present statutory definition of "business or salary income". Nowhere in Smith does the court even imply that earnings need not be earned. It clearly indicates, on the other hand, that some sort of skill or effort must be applied by the decedent for the income to be earnings for net accumulations purposes.

THE COMMISSION'S REPORT - LEGISLATIVE INTENT

The FLRC Report examined the history of Florida's wrongful death laws, as well as others, before proposing a revised act to the legislature. One of its recommendations was as follows:

Although the act should contain an expanded "loss to survivors" theory of damages, a limited recovery should be allowed the estate for losses heretofore allowed under the survival statute, and lost accumulations should be recoverable to the estate under certain defined circumstances.
FLRC Report, p.44 (R2-80).

Thus, the estate's potential recovery of net accumulations was to be limited and well defined. The commission then recommended a definition of net accumulations which is virtually identical to the definition later adopted into law by the Legislature. Section 4(5), FLRC Report (R2-80).

Appellant argues that skill and effort on the decedent's part are irrelevant and that if income is "gross income" it is "net business or salary income." Then Appellant's

circular argument is completed by the suggestion that the Florida Legislature must have intended that the Internal Revenue Code, Section 61, definition of gross income controls, even though Appellant candidly admits that the reference in the Florida wrongful death law to "gross income after taxes" does not command adherence to the Internal Revenue Code definition of "gross income." As a matter of fact, neither the FLRC Report nor the death act mention the Internal Revenue Code. Surely, if the code was important it would have at least been mentioned.

Revenue codes are different in their scope and purpose and bear no reasonable interpretive relationship in wrongful death legislation.

It does seem abundantly clear that when the legislature adopted the language of the Commission, with respect to the phrase "net business or salary income", it clearly intended to limit the meaning of net accumulations. Under the Appellant's argument, anything would be recoverable since under the argument, all income falls within "gross income." Hence, there is an apparent conflict between the Appellant's argument and the clear intent of the Legislature to limit the definition of net accumulations. To focus on the phrase "gross income" would make the need for a definition nonexistent since everything is gross income. It therefore seems logical that if the Legislature intended that all gross income be recoverable as net accumulations, there would have been no need to even define net accumulations or perhaps more importantly, the Legislature would just simply have said that everything is recoverable as net accumulations.

In its analysis, the Florida Law Revision Commission said that:

(T)he jury must not only evaluate the decedent's propensity to earn but also his propensity to save. In Florida, the jury is allowed to consider the habits, skill, age and health of the decedent in determining his probable accumulations. This approach is probably more difficult to apply, however, since the jury must objectively evaluate the subjective personality traits of the decedent. FLRC Report, p. 31 (R2-80).

Thus, as the District Court said in this case:

"The Legislature adopted the definition of "net accumulations" as proposed by the Florida Law Revision Commission with only minor alterations. The focus of the discussion is on the decedent's net earnings, his propensity to earn, and his subjective personality traits in calculating any award of "net accumulations". The Court finds that "net accumulations" include salary or business income earned by the personal efforts of a decedent, and that in this case, since only passive income was received, the estate cannot recover for its loss of "net accumulations." Plaintiff has argued that because the words "probable gross income" appear in the definition of "net accumulations," the Legislature must have intended to include both earned and passive income, based on the definition of "gross income" found in the Internal Revenue Code. The definition of "gross income" found in the Internal Revenue Code is not mentioned in the Florida Law Revision Committee report".

We suggest, therefore, that this approach explains why items which are to be includable as net accumulations must bear some reasonable relationship to the skill and effort of the decedent in order to qualify as business or salary income.

CONCLUSION

The district court was correct in its ruling and its reasoning, both of which find total support in the language of the statutory law and the legislative intent. Further, it results in no loss to the estate or its distributees, The district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 9th day of December 1988, to: JAMES A. HIGHTOWER, ESQ., P. O. Box 12308, Pensacola, FL 32581.

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