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STATEMENT OF THE CASE AND FACTS

Respondent agrees with the Petitioners' Statement of the Case and Facts and would add the following facts:

SHRINERS HOSPITAL, a Petitioner in a companion case in this Court also requesting discretionary review, Case No. 73,639, did file a Motion for Rehearing of the Fifth District's opinion on November 3, 1988, which was denied on January 4, 1989.

However, and more importantly, Co-Personal Representatives LLOYD, ERDMAN and MERRICK herein failed to file a Motion for Rehearing on their cross-appeal, directed solely to the issue of ZRILLIC's standing to bring the Petition for Order to Avoid a Charitable Devise.

Respondent, ZRILLIC, has filed a Motion to Dismiss contemporaneously with this response, requesting the Petition for Discretionary Review be dismissed for lack of jurisdiction.

Additionally, the trial court's exact finding in its Order Denying Petition for Order Avoiding Charitable Devise dated December 14, 1987, regarding the Respondent's standing is:

5. That the Petitioner, LORRAINE E. ZRILLIC, does have standing to maintain a Petition for Order Avoiding Charitable Devise. As the sole lineal heir of the Testatrix, she is the only person eligible to take should this residual charitable devise fail. The intent of the Testatrix to severely limit Petitioner's interest in the estate does not deprive Petitioner of standing, since the effect of Section 732.803, Florida Statutes, is to render intent irrelevant.

Petitioners appealed this finding to the Fifth District Court of Appeal, which, by opinion dated October 20, 1988, stated:

We find no merit to the cross-appeal, which attaches the trial court's determination that appellant [ZRILLIC] had standing to file the subject petition. Notwithstanding appellant's [ZRILLIC's] limited bequest under the will, she would be entitled to her intestate share upon the avoidance or absence of the residuary clause [cites omitted].

ARGUMENT

The Co-Personal Representatives have requested this Court to grant them discretionary review to revisit their complaint on the standing of Appellee, ZRILLIC to bring a Petition for Order to Avoid a Charitable Devise.

Both the trial court and the Fifth District Court of Appeal ruled that decedent's only daughter and lineal descendant, LORRAINE E. ZRILLIC, has standing to bring the Petition for Order to Avoid a Charitable Devise, pursuant to Section 732.803, Florida Statutes (1985).

In the request herein, Co-Personal Representatives JAMES C. LLOYD, JAMES C. ERDMAN and BETTY C. MERRICK urge that the Fifth District's opinion, finding no merit to their cross-appeal, "is in direct conflict with decisions of the Supreme Court or other District Courts of Appeal involving the right of a decedent to direct the transfer of her property in her estate after her death, etc." (Pet. Amended Brief on Jurisdiction at 4.) However, pursuant to Article V, Section 3(b)(3) of the Florida Constitution, the Supreme Court may review any decision of a district court of appeal

that expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law.

Petitioners fail to show how the Fifth District's opinion "expressly and directly" conflict with other district opinions or the opinions of this Supreme Court.

In fact, the Fifth District opinion cites three (3) cases

which expressly support its ruling that "notwithstanding appellant's limited bequest under the will, she (ZRILLIC) would be entitled to her intestate share upon the avoidance or absence of the residuary clause." (Op. at 2.) In Re: Barker's Estate, 448 So.2d. 28 (Fla. 1st DCA 1984); In Re: Reid's Estate, 399 So.2d 1032 (Fla. 1st DCA 1981); and Ruppert v. Hasting's Estate, 311 So.2d. 810 (Fla. 1st DCA 1975).

Co-Personal Representatives, Petitioners herein, totally misconstrue the application of Section 732.803, Florida Statutes. This section of our Florida Statutes does not intend to supercede nor deter from the application of sections of our probate code regarding disinheritance of spouse or issue. Sections 732.301(3) and 731.302(1), Florida Statutes.

The Co-Personal Representatives, Petitioners herein, insist that because the language in Item Eighth of the Will provides for a limited gift to Respondent ZRILLIC, this limitation should carry over to the application of Section 732.803, Florida Statutes. The legislative intent of 732.803, Florida Statutes, as this Court specified in Taylor v. Payne, 154 Fla. 359, 17 So2d. 615 (Fla. 1944); app. dis. 323 U.S. 666 (1944), reh. den. 323 U.S. 812 (1944), is:

to protect the widow and children from improvident gifts made to their neglect by the testator; the design of the statute being obviously to prevent testators who may be laboring under the apprehension of impending death from disposing of their estates to the exclusion of those who are, or should be, the natural objects of the testator's bounty. 154 Fla. 359, 17 So.2d. 615, 618 (Fla. 1944).

Intent is irrelevant to the application of Section 732.803, Florida Statutes. Both the trial court and Fifth District concluded likewise.

Petitioners have failed to cite one case which expressly conflicts with the Fifth District's opinion, nor have they addressed any legal principles applied as a basis for this decision, which conflict with another decision of the district courts of appeal or this Florida Supreme Court.

Lastly, the Petitioners, Co-Personal Representatives, failed to file a Motion for Rehearing in the Fifth District, which effectively caused the loss of jurisdiction to even request discretionary review pursuant to Rule 9.030(a)(2), Fla.R.App.P.

Respondent, LORRAINE E. ZRILLIC, respectfully prays this Honorable Court to deny and/or dismiss Petitioners' request for discretionary jurisdiction.

SUMMARY OF ARGUMENT

Pursuant to Section 732.803, Florida Statutes, the test for standing in order to file a Petition to avoid a charitable devise is that Petitioner must be:

- (1) a lineal descendant or a spouse; and
- (2) a lineal descendant or a spouse who would receive any interest in the charitable devise, if avoided.

The Respondent, LORRAINE E. ZRILLIC, as the only daughter of the deceased, meets the criteria above. Thus the lineal descendant, Respondent ZRILLIC, would take her intestate share upon the avoidance or absence of the residuary clause. Since there was no named taker in default of the residuary, the residuary must pass by intestacy.

The limiting language of Item Eighth of the Will has no bearing on the application of Section 732.803, Fla. Stat. The application of this statute is in the nature of strict liability. Intent is irrelevant. Ruppert v. Hasting's Estate, 311 So.2d. 810 (Fla. 1st DCA 1975).

In order to cut off an heir's right to succession, a testator must do more than merely evince an intention that the heir should not share in the estate -- he must make a valid disposition of his property. In Re: Estate of Levy, 196 So.2d. 225, 229 (Fla. 3rd DCA 1967).

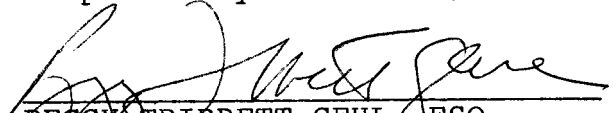
Therefore, without a complete and valid disposition of all of her property, the residuary would necessarily pass by intestate succession to Respondent, LORRAINE E. ZRILLIC, as the deceased's lineal descendant.

CONCLUSION

There are no conflicts, express or direct, between the Fifth District's opinion, Zrillic v. Estate of Romans, and any other district court of appeal decision or any Supreme Court decision which would invoke the discretionary jurisdiction of this Supreme Court.

Respondent respectfully requests this Honorable Court to deny jurisdiction.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by mail this 23 day of March, 1989, to: Linda Chambliss, Esq., 707 S.E. Third Avenue, Suite 401, Ft. Lauderdale, Fl 33316; Lawrence B. Dolan, Esq., 500 E. Jackson Street, Orlando, FL 32801; William S. Belcher, Esq., 600 First Avenue North, St. Petersburg, FL 33731; and Joseph W. Fleece 111, Esq., 540 Fourth Street North, St. Petersburg, Florida 33701.

  
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