DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

CASE NO.: 17-4066
TRIAL COURT CASE NO.: 17-006796 CA

BERNICE WATKINS WALLACE, HEIR AND BENEFICIARY OF THE ESTATE OF HELEN HICKS WATKINS, AND RODNEY J. STRAWTER,

Appellants,

vs.

TERRY JOSEPH WATKINS, SR., DELPHINE WATKINS AND JOYCE ELIZABETH WATKINS, HEIRS AND BENEFICIARIES OF THE ESTATE OF HELEN HICKS WATKINS,

Appellees.

Initial Brief

Appeal of Order on Petition to Reopen Summary Administration

FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

This appeal is about protecting an unknowing heir and a bona fide purchaser from the prejudice of excessive delays by estate claimants and the probate court. This appeal challenges an improper probate order on a time-barred and unverified petition to reopen probate administration, entered 16 years after the estate's final administration order and 15½ months after a non-evidentiary hearing. The probate order did not reopen the case, but instead made *sua sponte* findings on knowledge, notice, and heredity without evidence tested by cross-examination. R. 149–50.

The probate decedent is Helen Hicks Watkins, who died in 1971. R. 7. She had two biological children, Helen Mansell and Bernice Watkins Wallace. R. 7–9. Mansell is 81 years old, Bernice is 80, and both reside in separate assisted-living senior care centers. R. 194 (Tr. 37, ln. 16–Tr. 38, ln. 1); R. 209 (Tr. 52, ln. 14–16). Bernice has five children. R. 62 at ¶ 2. Mansell has an uncertain number of children, thought to be between five and eight. R. 62 at ¶ 3.

Appellees Delphine, Terry, and Joyce Muhammad (a/k/a Watkins a/k/a Coleman) allege to be children of Mansell and adoptees of decedent. R. 11. Appellants are ages 64–67. R. 52 at ¶ 2. Appellees lived in and out of Jacksonville with Mansell from the 1960s to 1999. R. 63 at ¶ 5. Although the decedent died in 1971, no one in the family had the means or know-how to file estate administration papers with the County at that time. R. 52.

Appellant Rodney Strawter is purchaser of the real estate at issue (the "Property"), and purchased without knowledge of any claims thereto. R. 93 (deed) and 65 at ¶¶ 22–36 (affidavit of Mr. Strawter, swearing "I had no knowledge . . .").

In 2000 appellant Bernice Watkins Wallace engaged attorney Haywood M. Ball, the law firm of Donahoo, Ball, McMenamy & Johnson, P.A., Clean Title & Abstract Co, Inc., Collins Title Company, and Leo C. Chase Funeral Home to administer the estate of her mother (decedent Helen Watkins) and to determine all proper heirs under Florida law. R. 5, 71, 76, and 79–87. Among other things, these professionals performed a title and record search for any colorable claims to the Property. R. 72. These professionals determined that Bernice and Mansell were the only heirs at law, next of kin, and beneficiaries of the estate. R. 5 at ¶ 3.

Attorney Ball filed for probate administration of the estate in or about December 2000. R. 89. Attorney Ball verified that Mansell and Bernice were the only two known heirs on the Property in 2000. R. 88–89. Mansell swore in a separate affidavit that there were no other interests in the Property. R. 85–86.

The probate trial court held that all interested persons were served proper notice of the probate administration, and that Bernice and Mansell were the sole proper heirs under Florida law, entering its final administration judgment. R. 9.

Mansell sold her interest in the Property to Bernice, and Bernice sold half of the Property to Rodney Strawter, who purchased it for value and without

knowledge of any claims thereto. R. 65 at ¶¶ 22–36.[1] At least one of the Appellees, Joyce Watkins a/k/a Muhammad, had notice of the administration and executed the deed from Mansell to Bernice. R. 66 at ¶ 28 (affidavit); R. 92 (deed). Over the next 15 years, Rodney and Bernice maintained the Property. R. 67 at ¶¶ 35–36.

In May 2016 Appellees filed an *unverified* Petition to Reopen the probate estate. R. 11. The sole relief requested was reopening for the later presentation of evidence. R. 15. Appellees attached one uncertified, unverified, and unauthenticated document purporting to be an adoption decree, circa 1963. R. 17. It bore no case number, but purported to have the decedent adopt Appellees. *Id*.

Bernice immediately served discovery upon Appellees for any evidence supporting the allegations in their Petition to Reopen. R. 34–50. Appellees confirmed in sworn interrogatories that they had no such evidence, for which Bernice and Rodney requested the probate court's judicial notice. R. 100.

On August 9, 201**6**, Bernice and Rodney filed their verified response to the Petition to Reopen, requesting its denial as time-barred, factually unsubstantiated, and legally untenable. R. 51. Bernice and Rodney attached affidavits and exhibits. R. 51–96. The probate trial court ordered a *non*-evidentiary hearing. R. 32.

At the August 12, 2016 *non*-evidentiary hearing, the trial court repeatedly confirmed that the hearing was of a limited and *non*-evidentiary scope, to decide

[1] The Property was appraised at $5,700 in 1984, but Rodney Strawter bought a ½ interest for over triple that, in good faith. R. 53 at ¶ 14; R. 54 at ¶ 24.

whether the court could even reopen the probate after 15 years. R. 207 (Tr. 50, ln. 1–5).[2] Appellees too acknowledged that the *non*-evidentiary hearing was only to consider reopening at all. R. 188 (Tr. 31, ln. 24–Tr. 32, ln. 1). Bernice and Rodney countered and objected to any relief outside of initially reopening probate, which they also opposed. R. 190 (Tr. 33, ln. 12) ("[we] just object to that.").[3] The trial court stated that Appellees needed to address their claims through a separate civil action, rather than in probate. R. 170 (Tr. 13, ln. 22–Tr. 14, ln. 2).

The trial court never took testimony or evidence, and confirmed that: "the factual part of this is for another day and another dispute." R. 213 (Tr. 56, ln. 13–14).[4] The trial court confirmed it had no evidence on knowledge or notice: "THE COURT: I don't know who was doing what and with whose consent or with knowledge and all that other stuff." R. 214 (Tr. 57, ln. 7–12).[5] The trial court was unable to locate or access the purported adoption decree in the County's Official

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[2] *See also* R. 209 (Tr. 52, ln. 9–10) ("whether or not I'm going to reopen."); R. 213 (Tr. 56, ln. 16–18) ("whether or not . . . to reopen an estate."); R. 191 (Tr. 34, ln. 1–2) ("whether or not I reopen it").

[3] *See also* R. 184 (Tr. 27, ln. 24–Tr. 28, ln. 1) ("You just can't . . . avoid this by just reopening."); R. 209 (Tr. 52, ln. 19–20) ("This really should be just in another court."); R. 208 (Tr. 51, ln. 11) ("I cited the burdens [] to the petition to reopen, where those burdens lie, and where the assumptions lie."); R. 206 (Tr. 49, ln. 14–25) ("[W]e're ***not*** in a complaint stage where we assume on behalf of the petitioner. We're actually in the opposite where the burden is on the petitioner to prove that . . . The assumption is in my favor."); R. 27 (objections).

[4] *See also* R. 212 (Tr. 55, ln. 12–18) ("for another day and another court.").

[5] *See also* R. 202 (Tr. 45, ln. 9–18) ("I don't know."); R. 171 (Tr. 14, ln. 10–1) ("I don't know."); R. 205 (Tr. 48, ln. 6–Tr. 49, ln. 6) ("I don't know.").

Records. R. 195 (Tr. 38, ln. 12–16). No court hearings occurred after August 12, 2016. R. 3–4.

On November 30, 2017—some 15½ months after the *non*-evidentiary hearing—the trial court issued an order on the Petition to Reopen, failing to reopen, but making factual findings as to Bernice's knowledge of a 1963 adoption at its 1963 occurrence; Bernice's knowledge of a 1963 adoption at the 2000 probate administration; lack of probate notices to creditors, public, and the Appellees in 2000; and Mansell's knowledge of all throughout. R. 149–50 (order). The trial court then made legal findings that the heirs were Appellees, without mention of the decedent's biological children, Bernice and Mansell, or any of their collective 10 other children. *Id*.

In its written order, the trial court failed to articulate any factual basis for its new findings on knowledge, notice, and heredity. *Id*. The trial court merely pronounced that its findings on knowledge and heredity were "obvious" because Appellees alleged they were biologically related to Mansell in the ***unverified*** Petition to Reopen. R. 150. The trial court did not attempt to justify its findings on notice at all. R. 149. The trial court did not address any time-bar or other such legal effect. *Id*. The trial court gave no explanation for its 15½-month delay. *Id*.

This appeal ensued.

SUMMARY OF ARGUMENT

Constitutional due process requires the trial court to provide every person with certain fairness and procedural safeguards throughout a court proceeding. Due process requires that a trial court shall ***not:*** (1) wander outside the pleadings, granting unrequested relief as the court sees fit;[6] (2) wait months to enter an order after a hearing, after memory of it has faded away;[7] (3) make findings of fact on the court's personal assumptions, without receiving actual and substantial proof;[8] (4) turn evidence on its head through the misapplication of law, misinterpreting its legal effect;[9] and (5) make unfounded pronouncements about parties, without giving them an opportunity to be heard, call witnesses in their favor, and question witnesses speaking against them.[10] These are fundamental requirements in our judicial system, and failure to provide each requires reversal. *Id.*

For appellants Bernice Watkins Wallace and Rodney Strawter, the trial court violated all of these due process requirements in the probate matter below. They

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[6] *Deutsche Bank Nat'l Trust Co. v. Patino*, 192 So. 3d 637, 638 (Fla. 5th DCA 2016) (reversing as judgment granting relief outside the pleadings as void).
[7] *Carnicella v. Carnicella*, 140 So. 3d 697, 699 (Fla. 5th DCA 2014) (six-month delay required reversal, inconsistencies showed judge forgot or confused issues).
[8] *Brennan v. Honsberger*, 101 So. 3d 415, 416–17 (Fla. 5th DCA 2012) (reversing on proponent's failure to present substantial competent evidence for probate).
[9] *Zinger v. Gattis*, 382 So. 2d 379, 380 (Fla. 5th DCA 1980) (reversing where ruling was contrary to the legal effect of the evidence).
[10] *Walker v. Edel*, 727 So. 2d 359, 360–61 (Fla. 5th DCA 1999) (reversing on error that trial court did not provide full evidentiary hearing on all issues).

expected the trial court to enforce their rights and hold that the Petition to Reopen was time-barred by the two-year statute of repose—it was 15 years too late.

At the very least, Bernice and Rodney were entitled to an evidentiary hearing within the confines of the relief requested in the Petition (i.e. to reopen for the later presentation of claims and evidence). Instead, they received a non-evidentiary hearing, a 15½-month delay, and an order that granted unrequested relief, factual findings without grounds or substantial competent evidence, and legal findings without basis in law. Each of these due process violations requires reversal of the order on appeal. The Petition to Reopen is time-barred. Thus, Bernice Watkins Wallace and Rodney Strawter request that this Court reverse the order below with instructions to deny the Petition to Reopen as time-barred.

STANDARD OF REVIEW

The *de novo* standard of review applies to this trial court's non-evidentiary post-judgment decision on the Petition to Reopen; the trial court's excessive delay, due process violations, and factual findings thereunder; and as to the need for an evidentiary hearing. *Dobson v. U.S. Bank Nat'l Ass'n*, 217 So. 3d 1173, 1174 (Fla. 5th DCA 2017) (whether a trial court violated due process rights is subject to *de novo* review); *McKinnon v. State*, 221 So. 3d 1239, 1240 (Fla. 5th DCA 2017) (decision to grant or deny an evidentiary hearing on post-judgment relief is subject to *de novo* review).

ARGUMENTS

I. The trial court violated due process by exceeding the Petition to Reopen probate, making unsubstantiated findings on knowledge, notice, and heredity, 15½ months after a non-evidentiary hearing on time-barred claims.

a. The trial court's order granting relief outside the Petition to Reopen is void as a violation of due process, requiring reversal.

Under well-established Florida law, a trial court cannot grant relief that was neither requested by appropriate pleadings nor tried by consent—to do so is a violation of due process, and an order providing that relief is void. *Deutsche Bank Nat'l Trust Co. v. Patino*, 192 So. 3d 637, 638 (Fla. 5th DCA 2016) (reversing judgment granting relief outside the pleadings as void); *Bank of Am., N.A. v. Nash*, 200 So. 3d 131, 135 (Fla. 5th DCA 2016) (same).[11]

Here, the Petition to Reopen specifically and only requested <u>*reopening*</u> of probate, to later assert claims and evidence at a later evidentiary hearing or trial:

> WHEREFORE, the [Appellees] request an Order reopening the Helen Hicks Watkins probate for the presenting of evidence regarding the irregularities and permitting the affected heirs to be heard.

R. 15 (Petition to Reopen) (emphasis added). It was solely for this request that the trial court ordered the August 12, 2016 <u>*non*</u>-evidentiary hearing. R. 32 (order). It

[11] *See also Bayview Loan Servicing, LLC v. Newell*, 231 So. 3d 588, 590 (Fla. 1st DCA 2017) (same); *Fed. Home Loan Mortg. Corp. v. Beekman*, 174 So. 3d 472, 475–76 (Fla. 4th DCA 2015) (same, even without objection).

was solely for this request that Bernice Watkins Wallace and Rodney Strawter responded and prepared for non-evidentiary hearing. R. 51 (Response).

At the *non*-evidentiary hearing, the trial court repeatedly confirmed the limited proper scope of the Petition to Reopen and its non-evidentiary audience: "THE COURT: I have to decide first whether—I think I have to decide whether to open the estate to get further into it or not." R. 207 (Tr. 50, ln. 1–5).[12] As to the taking of any evidence, the trial court confirmed that: "the factual part of this is for another day and another dispute." R. 213 (Tr. 56, ln. 13–14).[13]

The trial court could hardly have been clearer, repeatedly iterating that it could only first determine whether to reopen at all, before any claims were made or evidence presented on a later date. *Id*. The trial court also recognized that because the only relief requested was to reopen, any factual findings and claims would have to instead occur through a civil action. R. 170 (Tr. 13, ln. 22–Tr. 14, ln. 2).

Appellees too acknowledged that this was only a petition *to reopen*, not a presentation of claims and evidence: "[APPELLEES]: This is not a claim against the estate. This is—this is a petition to reopen." R. 188 (Tr. 31, ln. 24–Tr. 32, ln.

[12] *See also* R. 209 (Tr. 52, ln. 9–10) ("THE COURT: I'll deal with whether or not I'm going to reopen the estate."); R. 213 (Tr. 56, ln. 16–18) ("THE COURT: The real question is whether or not after this period of time can heirs-at-law ask me to reopen an estate."); R. 191 (Tr. 34, ln. 1–2) ("THE COURT: I'm more concerned about how I handle whether or not I reopen it or I don't.").

[13] *See also* R. 212 (Tr. 55, ln. 12–18) ("THE COURT: Well—they may well [be] or not [be] well-founded, but they're for another day and another court.").

1). Out of prudence, Bernice and Rodney countered and objected to any relief outside of simply reopening, which they also opposed. R. 190 (Tr. 33, ln. 12) ("[BERNICE AND RODNEY]: I mean, [we] just object to that.").[14]

Nevertheless, 15½ months later, the trial court issued an order on the Petition to Reopen, failing to reopen but instead making factual findings as to Bernice's knowledge of an unproven 1963 adoption at its purported 1963 occurrence; Bernice's knowledge of the unproven 1963 adoption at the 2000 probate administration; lack of probate notices to creditors, public, and the Appellees in 2000; and Helen Mansell's knowledge of all this throughout. R. 149 (order). The trial court made these factual findings without any sworn testimony from the Appellees whatsoever, without any live testimony or cross-examination, and without an evidentiary hearing. R. 1–158. None of this relief was requested in the Petition to Reopen. R. 15 (Petition to Reopen).

The trial court then made legal findings that the heirs were Appellees, without mention of the decedent's biological children, Bernice and Mansell, or their 10 collective children. R. 150 (order). None of this relief was requested by

[14] *See also* R. 184 (Tr. 27, ln. 24–Tr. 28, ln. 1) ("You just can't switch it—try and sort of avoid this by just reopening."); R. 209 (Tr. 52, ln. 19–20) ("This really should be just in another court."); R. 208 (Tr. 51, ln. 11) ("I cited the burdens in [] to the petition to reopen, where those burdens lie, and where the assumptions lie."); R. 206 (Tr. 49, ln. 14–25) ("[W]e're ***not*** in a complaint stage where we assume on behalf of the petitioner. We're actually in the opposite where the burden is on the petitioner to prove that . . . The assumption is in my favor."); R. 27 (objections).

appropriate pleadings, nor was it tried by consent. R. 11 (petition). Thus, the trial court's order, findings, and ruling were in violation of due process, and are void. *Patino* at 638; *Nash* at 135; *Newell* at 590; *Beekman* at 475–76. Accordingly, Bernice Watkins Wallace and Rodney Strawter request reversal.

b. The trial court's excessive delay of 15½ months between hearing and order violated due process, requiring reversal.

Under well-established Florida law, an excessive delay between a hearing and its order requires reversal, where that delay appears to have created something amiss on the merits or findings. *Carnicella v. Carnicella*, 140 So. 3d 697, 699 (Fla. 5th DCA 2014) (six-month delay required reversal, as inconsistencies showed judge forgot or confused issues); *Walker v. Walker*, 719 So. 2d 977, 978 (Fla. 5th DCA 1998) (9½-month delay required reversal); *Polizzi v. Polizzi*, 600 So. 2d 490, 491 (Fla. 5th DCA 1992) (3½-month delay required reversal).[15] This rule applies to hearings and rulings by a probate trial court. *See Baker* at 610; and *Porter* at 89.

This rule against excessive delay expands upon Florida Rule of Judicial Administration 2.215(f) (formerly 1.050(f) (Duty to Rule Within a Reasonable Time) as a necessary backstop to judicial inactivity and the disorder it causes.

[15] *See also Baker v. Vidoli,* 751 So. 2d 608, 610 (Fla. 2d DCA 1999) (delay over one year required reversal); *Porter v. Estate of Spates*, 693 So. 2d 88, 89 (Fla. 1st DCA 1997) (delay over one year required reversal); *McKenzie v. McKenzie*, 672 So. 2d 48, 49 (Fla. 1st DCA 1996) (delay of one year required reversal); *City of Miami v. Tarafa Const., Inc.*, 696 So. 2d 1275, 1278 (Fla. 3d DCA 1997) (7-month delay required reversal); *Tunnage v. Bostic*, 641 So. 2d 499, 501 (Fla. 4th DCA 1994) (7-month delay required reversal).

Walker at 979. Where a hearing and its order are separated by a long period of time, the order tends to: (i) differ from the hearing's testimony, arguments, and pronouncements, and (ii) lack a sufficiently articulated factual basis. *Id*.

The rule against excessive delay ensures the trial court recalls the arguments, testimony, and demeanor of witnesses and counsels, as well as the dynamics of the hearing, in properly rendering an ultimate order. *Id*. Thus, excessively delayed orders must be reversed as a violation of due process, and remanded for rehearing and re-presentation of evidence. *Carnicella* at 699; *Walker* at 978; *Polizzi* at 491; *Baker* at 610; *Porter* at 89; *McKenzie* at 49; *Tarafa* at 1278; *Tunnage* at 501.

Here, the probate trial court improperly delayed 15½ months to enter its order after the non-evidentiary hearing on the Petition to Reopen probate—this was excessive. R. 32 and 149. The trial court gave no explanation for its 15½-month delay. *Id*. The record contained no explanation for it. R. 1–158. So much time elapsed, that Appellees' attorney was suspended during the excessive delay.[16]

The 15½-month excessive delay plainly caused lapses in the trial court's memory of the hearing, the record, and the matter for consideration. The trial court entered an order replete with unsubstantiated factual findings on the *knowledge* of Bernice and Mansell, relating back 17 years to the 2000 administration, and 55 years to a 1963 purported adoption. R. 149–50 (order) (finding adoption was

[16] *See* Notice of Suspension of Opposing Counsel Ochoa, filed with this Court on January 19, 2018. The Court can take judicial notice of these records.

known by Bernice in 1963 and 2000). The trial court also made factual findings as to *notice* of the estate administration to Appellees and the heredity of the parties. *Id*. (finding there was no notice, and that certain parties were related).

Determinations on knowledge, notice, and heredity required careful consideration of the credibility of witnesses at an evidentiary hearing, coupled with careful analysis of the law presented at oral argument. Yet, after 15½ months of excessive delay and without a transcript filed, the ultimate written order shows the trial court failed to recall that none of this occurred. R. 32; R. 11.

The lapses show throughout. The trial court failed to articulate any factual basis for its findings on knowledge, notice, or heredity. R. 149–50. Instead, the trial court merely pronounced its findings were "obvious" because Appellees alleged they were biologically related to Mansell in the *unverified* Petition. R. 150.[17] The trial court did not attempt to justify its findings on notice at all. R. 149.

Given that the trial court took no admissible evidence on biological relationship, actual adoption, events after adoption (including potential

[17] In evaluating what the trial court deemed is "obvious," this Court may note that what is subjectively obvious for the Wallaces, Mansells, and Watkinses is family-dependent and requires testimony. Likewise, what may appear obvious to us today was not obvious in 1963 when the purported adoption allegedly occurred, given the advent of split-second internet connections, smart phones, cheap DNA maternity/paternity/heredity testing, immediate online access to official records in all states and counties, de-stigmatization of adoption, psychology, and psychiatry, and wide-spread access to affordable long-distance transportation, unlike that which existed 55 years ago.

invalidation, rescission, or reversal), events at estate administration, and any person's actual knowledge or notice thereof, these findings must have manifested in a decayed and inaccurate recollection of the hearing 15½ months later.

Such an order on an inaccurate recollection of things cannot stand, as it violates the due process rights of Bernice Watkins Wallace and Rodney Strawter. *Carnicella* at 699; *Walker* at 978; *Polizzi* at 491; *Baker* at 610; *Porter* at 89; *McKenzie* at 49; *Tarafa* at 1278; *Tunnage* at 501. Accordingly, Bernice Watkins Wallace and Rodney Strawter request that this Court reverse.

c. The trial court lacked substantial competent evidence to support its order, or any evidence at all, requiring reversal.

Under well-established Florida law, if a trial court's decision is unsupported by substantial competent evidence, or against the weight of the evidence, it is the duty of this Court to reverse. *Brennan v. Honsberger*, 101 So. 3d 415, 416–17 (Fla. 5th DA 2012) (reversing on proponent's failure to present testimony for probate); *M.N. v. Dep't of Children and Families*, 826 So. 2d 445, 448 (Fla. 5th DCA 2002) (reversing where evidence did not support a finding on mental state).[18]

[18] *See also Hall v. Tungett*, 980 So. 2d 1289, 1293 (Fla. 2d DCA 2008) (reversing probate order lacking evidentiary basis); *Desvigne v. Downtown Towing Co.*, 865 So. 2d 541, 542 (Fla. 3d DCA 2003) ("where the court's decision is manifestly against the weight of the evidence, or unsupported by competent substantial evidence, it becomes this Court's duty to reverse"); *In re K.C.*, 87 So. 3d 827, 834–35 (Fla. 2d DCA 2012) (reversing where evidence insufficient to establish child risk); *Stewart v. Stewart*, 581 So. 2d 246, 248 (Fla. 3d DCA 1991) (reversing findings not supported by evidence); *Randy Int'l., Ltd. v. Am. Excess Corp.*, 501

Here, the trial court made factual findings on knowledge, notice, and heredity that were unsupported by substantial competent evidence, and manifestly against the weight of substantial opposing evidence, requiring reversal. R. 149–50.

As to the findings on notice, the trial court neither took nor requested evidence at the non-evidentiary hearing. R. 1–158. None was submitted by Appellees, including whether there was proof of publication of a notice of administration, proof of notice to creditors, or proof that notice was given to Appellees. *Id*.[19] Thus, there was no substantial competent evidence in the record to sustain the trial court's factual findings that no such proof exists and no such notice occurred. R. 149. These findings must be reversed. *Brennan* at 416–17; *M.N.* at 448; *Hall* at 1293; *Desvigne* at 542; *In re K.C.* at 834–35; *Stewart* at 248; *Randy Int'l* at 670 (Fla. 3d DCA 1987); *In re Perez' Estate* at 59.

Likewise as to the findings on knowledge, the trial court neither took nor requested evidence at the non-evidentiary hearing. R. 1–158. Again, none was submitted by Appellees, including whether Bernice or Mansell knew of the purported adoption, when that knowledge occurred if at all, any events thereafter (re-adoption, reversal, rescission), and actual biological relationship. R. 1–158.

So. 2d 667, 670 (Fla. 3d DCA 1987) (reversing "because there is no competent substantial evidence"); *In re Perez' Estate*, 206 So. 2d 58, 59 (Fla. 3d DCA 1968) (court can reverse a probate order lacking substantial competent evidence).

[19] To the contrary, Bernice and Rodney submitted evidence that Appellee Joyce Watkins was a signatory witness to the deed from Helen Mansell to Bernice Wallace. R. 66 at ¶¶ 28 and 35 (affidavit with deed exhibit).

The same as to the findings on heredity, as the trial court neither took nor requested evidence at the non-evidentiary hearing. R. 1–158. Again, none was submitted by Appellees, including whether Appellees are actually the children of Mansell or the decedent, biologically or legally, or were so in 2000. R. 1–158.

Thus, there is no substantial competent evidence in the record to sustain the trial court's factual findings on knowledge, notice, and heredity. R. 149. The trial court's erroneous pronouncement that such key facts and events are "obvious" or assumed does not cure the lack of substantial competent evidence. *Brennan* at 416–17; *M.N.* at 448; *Hall* at 1293; *Desvigne* at 542; *In re K.C.* at 834–35; *Stewart* at 248; *Randy Int'l* at 670 (Fla. 3d DCA 1987); *In re Perez' Estate* at 59. Thus, Bernice Watkins Wallace and Rodney Strawter request reversal.

d. The trial court misinterpreted the legal effect of the statute of repose, pleading failures, and a bona fide purchase, requiring reversal.

Under well-established Florida law, if a trial court's decision is contrary to the legal effect of the record under Florida law, it is the duty of this Court to reverse. *Zinger v. Gattis*, 382 So. 2d 379, 380 (Fla. 5th DCA 1980) (reversing where ruling contrary to the legal effect of the record); *Estate of Kester v. Rocco*, 117 So. 3d 1196, 1201 (Fla. 1st DCA 2013) (reversing probate order that misconceived the legal effect of the record); *Randy Int'l* at 670; *In re Perez' Estate*

at 59.[20] To determine legal effect, the Court must look at the applicable Florida law and compare the record to that law. *Id*.

As to the applicable law, any belated claim against or upon an estate becomes barred by the statute of repose after two years—the lapse automatically removes the trial court's jurisdiction over an estate, bars untimely claims, and is not subject to waiver or extension in probate proceedings despite allegations that delay was induced improperly. §§ 733.702(5) and 733.710, Fla. Stat. (2017); *May v. Illinois Nat'l Ins. Co.*, 771 So. 2d 1143, 1157 (Fla. 2000) (holding estate claim untimely and barred); *Rice v. Greene*, 941 So. 2d 1230 n.2 (Fla. 5th DCA 2006) (estate claims barred by two-year jurisdictional statute of non-claim).[21]

The Florida Supreme Court and every District Court of Appeal uphold this statute of repose without exception, and reverse attempts to exercise jurisdiction over a claim despite this jurisdictional time-bar. *Id.*, *e.g.*, *In re Estate of Fleming* at

[20] *See also Brennan* at 416–17; *M.N.* at 448; *Hall* at 1293; *Desvigne* at 542; *In re K.C.* at 834–35; *Stewart* at 248.

[21] *See also Bush v. Webb*, 939 So. 2d 215, 216 (Fla. 1st DCA 2006) (claims by decedent's children time-barred after two years); *Interim Healthcare of NW Fla., Inc. v. Estate of Ries*, 910 So. 2d 329, 329–30 (Fla. 4th DCA 2005) (claimant barred from moving probate court to vacate after 2-year repose period); *In re Estate of Fleming*, 786 So. 2d 660, 661 (Fla. 4th DCA 2001) (wife's estate claim time-barred); *Becklund v. Fleming*, 869 So. 2d 1, 9 (Fla. 2d DCA 2003) (estate claims time-barred); *Dobal v. Perez*, 809 So. 2d 78, 79–80 (Fla. 3d DCA 2002) (estate claims barred by 2-year statutory period).

661 (wife's claim time-barred despite being induced to delay her claim); *Bush* at 216 (claims by decedent's children time-barred despite decedent's directives)).[22]

This statute of repose prohibits a court from reopening or granting an extension on grounds of fraud, estoppel, or insufficient notice. *May* at 1157 (Fla. 2000) (discussing that fraud, estoppel, and insufficient notice cannot extend the 2-year statute of repose). This is because enlarging the repose period "would be contrary to the structure and text of . . . the probate code" and "would also frustrate the obvious purpose underlying section 733.710 to provide an absolute bar date" for claims to an estate. *Id*. at 1156.

Even where a petitioner *timely* seeks relief on an estate, the petitioner must meet burdens of pleading and proof under the Florida Probate Rules. *Pacheco v. Indymac Fed. Bank, F.S.B.*, 92 So. 3d 276, 277 (Fla. 4th DCA 2012) (unsworn motion to vacate on fraud, with no authenticated evidence, must be denied); *Copeland v. Capital Bank of Miami*, 372 So. 2d 1149, 1151 (Fla. 3d DCA 1979) (burden on movant). Thus, the trial court cannot vacate a probate administration order just as an exercise of the trial court's discretion or under the Florida Rules of Civil Procedure and its attendant case law. *Steele v. Brown*, 197 So. 3d 106, 110 (Fla. 3d DCA 2016) (same).[23]

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[22] *See also Estate of Ries* at 329–30 (time-barred); *Dobal* at 79–80 (time-barred).

[23] The Florida Rules of Civil Procedure do not apply to these non-adversarial probate proceedings. *Estate of Ries* at n.1; *Steele* at 108 n.1. Even if they did, Fla.

Thus, even where fraud is alleged in a proper probate proceeding,[24] Florida law requires showing that: (1) a party made a false statement regarding a material fact; (2) the party knew that the statement was false when he made it; (3) the party intended the recipient to rely and act on the false statement; and (4) the recipient justifiably relied on the false statement to its detriment. *Simon v. Celebration Co.*, 883 So. 2d 826, 832 (Fla. 5th DCA 2004) (dismissing insufficient claim for fraud).

All these elements must be shown using specific, ultimate facts, including the exact damages incurred, the specifically identified misrepresentation, and the time, place, and manner in which they were made. *Id*.; *Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 2d 914, 917 (Fla. 3d DCA 2009). Even a timely petition is not entitled to an evidentiary hearing if it does not sufficiently show fraud and explain why it would allow the court to set aside the order at issue. *Pacheco* at 277.

Lastly, bona fide purchasers for value take estate property free of all claims of creditors of the decedent and all rights of the surviving spouse and all other beneficiaries. § 735.206(4)(c), Fla. Stat. (2017). This is the applicable law.

R. Civ. P. 1.540(b) prohibits a motion to vacate after one year upon mistake, neglect, newly discovered evidence, fraud, or misconduct. Fla. R. Civ. P. 1.540(b). Further, the 15-year delay here is unreasonable. Fla. R. Civ. P. 1.540(b); *Steele* at 109 (motion on time-barred 8 years after order).

[24] Rule 1.540 does not apply to reopen an estate for purported beneficiaries who allege they did not receive notice of administration, as the disputed order was not entered in an adversary proceeding and beneficiaries were not parties or legal representatives to that proceeding. *In re Estate of Clibbon*, 735 So. 2d 487, 488 (Fla. 4th DCA 1998) (aff'ing denial of petition to reopen on fraud and notice).

Here, the trial court erroneously concluded that the legal effect of the above Florida law to the *unverified* Petition to Reopen and record of bona fide purchase, 16 years after final judgment of administration, was to allow the *sua sponte* redetermination of the heirs with factual findings of knowledge, notice, and heredity, 15½ months after a *non*-evidentiary hearing, without actually re-opening the probate or allowing testimony and cross-examination. R. 149–50.

However, the true and proper legal effect of Florida law on this record was to time-bar any reopening of the probate. §§ 733.702(5) and 733.710, Fla. Stat. (2017); *May* at 1157; *Rice* at n.2; *Bush* at 216; *Estate of Ries* at 330; *In re Estate of Fleming* at 661; *Becklund* at 9; *Dobal* at 80.

The trial court had no jurisdiction to consider the Petition, and it was reversible error to do so. § 733.710, Fla. Stat. (2016); *May* at 1157. The Appellees' *unverified* allegations of lack of notice, intentional exclusion, and lack of awareness as to value (R. 12 at ¶¶ 11 and 13) could not circumvent the statute of repose. *Id*. There were no exceptions.

In addition, the record and original probate administration order showed that diligent efforts by title professionals and attorneys were made to find legal heirs during the 2000 administration, and that the Appellees had knowledge of the administration events. R. 51–96. Bernice and Rodney provided an affidavit and other evidence showing that Appellees were at all times involved with the Property

and the family, and frequently living at the Property to observe its management, possession, and use. R. 62–67. One of the Appellees even witnessed[25] and signed the deeds transferring the Property in estate administration, confirming notice. *Id*.; R. 66 at ¶ 28. This confirms accrual of the statute of repose and its time-bar.

Further, the record showed that Rodney was a bona fide purchaser for value who took the Property free from all rights of beneficiaries. § 735.206(4)(c), Fla. Stat. (2017); R. 51–96 (Response, in particular Exhibits A–K). The record showed that he purchased the Property through a check payable to Mansell's title attorneys, with confirmed HUD, title, and purchase documents. *Id*. The legal effect of this record was to bar Appellees from reopening the estate, obligating the trial court to deny the Petition, and nothing more. *Id*. Failure to do so was reversible error.

Even if the statute of repose had not run and the Property had not transferred to a bona fide purchaser, which it had, Appellees failed to carry their burden to properly plead and evidence grounds to reopen under fraud, lack of search for true legal heirs, lack of notice, or otherwise. R. 1–158; R. 158–221 (transcript).

The Petition was unverified and attached no affidavits. R. 11. Petitioners only provided one uncertified, unverified, and unauthenticated document

[25] Where a person is privy to the transfers of estate property and waits over a year to petition to reopen, the Court should deny the petition. *See, e.g., In re Estate of Gleason*, 631 So. 2d 321, 323 (Fla. 4th DCA 1994) (affirming order denying petition to reopen because petitioner was aware of transfers and waited 14 months to move to reopen, and discovery of a new or later will does not constitute grounds for reopening an estate).

purporting to be an adoption decree from 1963, which the trial court could not locate in the County's Official Records. R. 1–158; R. 195 (Tr. 38, ln. 12–16).

Appellees failed to allege fraud with particularity, its elements, or supporting facts. R. 11–15. The Petition was merely a set of conclusory and sweeping legal conclusions. *Id*. Appellees then confirmed in answers to interrogatories that they had no evidentiary or factual basis for their unverified allegations. R. 100. The legal effect was to obligate the trial court to deny the Petition, and nothing more.[26] Its failure to do so was reversible error. *Id*. Accordingly, Bernice Watkins Wallace and Rodney Strawter request that this Court reverse with instructions to deny the Petition to Reopen as time-barred.

e. The trial court's failure to hold an evidentiary hearing at all violates due process, requiring reversal.

Even in estate administration and probate matters, "[d]ue process requires that a party be given the opportunity to be heard and to testify and call witnesses on his [or her] behalf, and the denial of this right is fundamental error." *Fleming v. Demps*, 918 So. 2d 982, 984 (Fla. 2d DCA 2005) (quoting *Pettry v. Pettrey*, 706 So. 2d 107, 108 (Fla. 5th DCA 1998)); *Edel*, 727 So. 2d at 360–61 (Fla. 5th DCA

[26] *Zinger* at 380; *Estate of Kester* at 1201; *Randy Int'l* at 670; *In re Perez' Estate* at 59; *May* at 1157; *Rice* at n.2; *Bush* at 216; *Estate of Ries* at 330; *In re Estate of Fleming* at 661; *Becklund* at 9; *Dobal* at 80; *Pacheco* at 277; *Copeland* at 1151; *In re Estate of Clibbon* at 488; *In re Estate of Gleason* at 323.

1999) (reversing on fundamental error that trial court did not have evidentiary hearing and substantial competent evidence on family law issues).

Thus, the trial court is required to conduct an evidentiary hearing to evaluate competing factual allegations and claims to an estate before entering any order that may affect the claimants' rights in the estate. *Delbrouck v. Eberling*, 177 So. 3d 66, 68 (Fla. 4th DCA 2015) (reversing as trial court required to conduct evidentiary hearing on decedent son's right to possession of real property); *Kountze v. Kountze*, 20 So. 3d 428, 433 (Fla. 2d DCA 2009) (reversing as evidentiary hearing required to determine estate beneficiaries).[27] Failure to do so requires reversal. *Id*.

Here, the probate trial court openly contemplated the need for an evidentiary hearing, and Bernice and Rodney confirmed that there were evidentiary issues requiring an evidentiary hearing:

> THE COURT: The real question is . . . You need to decide whether or not you want me to have a full evidentiary hearing just to determine the relationship, or your client can tell you the relationship and that can be decided probably very quickly. I mean, either—she knows whether or not these three children were adopted by their mother or not.
>
> [COUNSEL FOR BERNICE AND RODNEY]: Well, Bernice does not [know], because she's not the biological mother.

[27] *Vazza v. Estate of Vazza*, 144 So. 3d 698, 698 (Fla. 4th DCA 2014) (same); *Zulon v. Peckins*, 81 So. 3d 647, 647 (Fla. 3d DCA 2012) (same); *Bennett v. Berges*, 32 So. 3d 771, 771–72 (Fla. 4th DCA 2010) (same); *Hall v. Tungett*, 980 So. 2d 1289, 1293 (Fla. 2d DCA 2008) (same); *Seal v. Brown*, 801 So. 2d 993, 994–95 (Fla. 1st DCA 2001) (same).

R. 208 (Tr. 51, ln. 15–24).

> THE COURT: Their knowledge may be compromised by age and things associated with age and things associated with age or it may not be, but it is something that if I do have to have an evidentiary hearing, you know, you're dealing with the—other than the three children, one of whom I believe has issues herself and can't be here.

R. 218 (Tr. 61, ln. 5–11).

> [COUNSEL FOR BERNICE AND RODNEY]: My only concern was I don't really know what else is out there, and so I wanted to have the time or opportunity to sort of piece together whatever happened.

R. 198 (Tr. 41, ln. 19–22).

> [COUNSEL FOR BERNICE AND RODNEY]: They just attached a document . . . And because I haven't talked to Ms. Mansell, I don't know anything more about it.

R. 180 (Tr. 23, ln. 10–22).

Notwithstanding, the probate trial court failed to call an evidentiary hearing, and instead entered an order making factual findings on knowledge, notice, and heredity without the presentation of evidence, tested by cross-examination. The trial court's choice to do so violated the constitutional due process rights of Bernice and Rodney. *Demps* at 984; *Pettry* at 108; *Edel* at 361; *Delbrouck* at 68; *Kountze* at 433; *Vazza* at 698; *Zulon* at 647; *Bennett* at 772; *Hall* at 1293; *Seal* at 995. Thus, Bernice Watkins Wallace and Rodney Strawter request reversal.

CONCLUSION

The probate trial court violated due process by exceeding the proper scope of the Petition to Reopen probate, making unsubstantiated findings on knowledge, notice, and heredity, 15½ months after the Petition's non-evidentiary hearing on time-barred claims. Thus, this Court should reverse and remand with instructions to deny the Petition to Reopen as time-barred.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that, in accordance with Fla. R. Jud. Admin. 2.516, a copy of this document was served by email on March 5, 2018, to: Christopher M. Ochoa, Esq., c.ochoa@lawofficeofchrisochoa.com; Kenneth L. Spears, Esq., KSpearsLaw@gmail.com.

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing document is in compliance with the Rule's font requirements [Times New Roman 14].

/s/ Andrew J. Bernhard, Esq.