IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2147
Lower Tribunal No. 1D10-3110

James M. Aldrich,
petitioner,

vs.

Laurie Basile, Et.Al.,
respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FIRST DISTRICT

AMICUS CURIAE BRIEF
OF
THE REAL PROPERTY PROBATE & TRUST LAW SECTION
OF THE FLORIDA BAR
(supporting the decision under review)

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STATEMENT OF IDENTITY OF AMICUS CURIAE

The Real Property, Probate & Trust Law Section of The Florida Bar ("Section") is a group of Florida lawyers who practice in the areas of real estate, trust and estate law, and who are dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally appear as *amicus curiae* to assist courts on issues related to our fields of practice. Our Section has over 10,500 members.

The question certified to this Court as a question of great public importance is a fundamental issue with a potentially significant impact on estate planning and the administration of estates in Florida. The Section has no interest in the underlying issues of the parties involved in the case, only the certified question. The Section is concerned with the certified question, because the answer to it could significantly impact the practice of law in the probate and estate planning fields and the testamentary transfer of property by Floridians. The Section believes that as a policy matter, courts should not be able to add words and testamentary intent to a will where the testator was silent. To do otherwise is to put the fabled triplets (conjecture, speculation and surmise) in charge of will construction cases, creating

confusion and potentially inconsistent results in what should be the certain and efficient testamentary transfer of assets.[1]

We believe section 732.6005, Florida Statutes, requires that Floridians making wills express their intent in their wills and affords them a way to do that that includes after-acquired or forgotten assets. Absent the inclusion of language expressing their intent to dispose of assets, the laws of intestacy provide for the disposition of those assets. Accordingly, for briefing purposes, we believe our position, though neutral as to the parties in the case, is more aligned with the side of the respondents.

[1] We believe the "fabled triplets" phrase was coined in *Pena v. Allstate Ins. Co.*, 463 So. 2d 1256 (Fla. 3d DCA 1985) (Schwartz, C.J., dissenting).

SUMMARY OF ARGUMENT

The intent of a testator expressed in his or her will controls the disposition of the testator's assets. Except in cases involving the reformation of a will because of a mistake proven by clear and convincing evidence, courts are not permitted to add words to a will. If a will does not include words disposing of certain assets, those assets pass in accordance with the laws of intestacy. These rules of law were designed to avoid putting courts in the position of having to speculate about the testator's intent.

ARGUMENT

This is not a case involving a mis-identified property or beneficiary or some other ambiguous expression of testamentary intent that is properly subject to judicial interpretation. From the opinion of the district court of appeal, we understand the will in this case made certain specific bequests and one general bequest of personalty in a specific home. There were no other words disposing of the testator's assets.

We respectfully suggest the certified question should be re-worded as follows:

> If there is no clause in a will generally disposing of assets that are not specifically referenced in the will, can a court nevertheless construe the will and the testator's intent in a manner that disposes of those assets other than in accordance with the laws of intestacy?

To that question, the Court should respond with a holding that, absent proper reformation, if a will lacks a clause generally disposing of assets not specifically referenced in the will, a court cannot construe the will and the testator's intent in a manner that disposes of those assets other than in accordance with the laws of intestacy. Neither section 732.6005, Florida Statutes, nor any other law authorizes a court to add words and intent to a will. This policy is also expressed in a long, unbroken chain of Florida cases. *See Rewis v. Rewis*, 84 So. 93, 94 (Fla. 1920); *Howe v. Sands*, 194 So. 798, 800 (Fla. 1940); *Brickell v. Di Pietra*, 198 So. 806, 811 (Fla. 1940); *Wallace v. Julier*, 3 So. 2d 711, 716 (Fla. 1941); *Iles v. Iles*, 29 So. 2d 21, 22 (Fla. 1947); *Estate of Pratt*, 88 So. 2d 499, 504 (Fla. 1956); *Estate of Barker*, 448 So. 2d 28, 31-32 (Fla. 1st DCA 1984); *Estate of Scott*, 659 So. 2d 361 (Fla. 1st DCA 1995); *Pajares v. Donahue*, 33 So. 3d 700 (Fla. 4th DCA 2010).

In 2011, the legislature created section 732.615, Florida Statutes, which allows a court to reform mistakes made by a testator in his or her will even if the mistake does not appear on the face of the will. The law appears to apply to cases pending on July 1, 2011. *See* 2011 Laws of Fla. 183, §§3, 14. The law provides:

> Upon application of any interested person, the court may reform the terms of a will, even if unambiguous, to conform the terms to the testator's intent if it is proved by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. In determining the testator's original intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plain meaning of the will.
>
> Even this law does not permit the speculative inclusion of words and intent.

See Morey v. Everbank, 2012 WL 3000608, 7 (Fla. 1st DCA July 24, 2012) (interpreting equivalent reformation statute for trusts and holding reformation cannot be used to adjust to changed circumstances or after-thoughts of a settlor). Under the new statute, an actual mistake must be proven by clear and convincing evidence. We do not know whether this new law is useful in this case where there does not appear to be a will drafter other than the decedent to present appropriate evidence of a mistake. Even in a case where a drafting attorney "fell on his sword" and admitted to a drafting mistake, the court appeared reluctant to employ reformation. *See Reid v. Estate of Sonder*, 63 So. 3d 7 (Fla. 3d DCA 2011) (reformation of trust not permitted despite drafting attorney's unrebutted testimony that he made a drafting mistake).

THE LAW OF TESTAMENTARY DISPOSITIONS

Testators in Florida generally have the right to dispose of their property as they wish. *See Shriners Hosps. For Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990) ("The right to devise property is a property right protected by the Florida Constitution."). There are some statutory limitations, however, such as the family allowance and elective share. More importantly for this case, there are statutory default testamentary dispositions in those cases where a testator does not make a will or makes a will that fails to dispose of all of his or her property. *See* §732.101(1) Fla. Stat. ("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."); §§732.102-.108, Fla. Stat. (default intestacy provisions).

In our experience, it is not unheard of for wills to have no dispositive provisions or limited dispositive provisions, resulting in intestacy. *See* §731.201(40), Fla. Stat. (defining will to include instruments that do not devise property); *Estate of Corbin*, 645 So. 2d 39 (1994).

The polestar in deciding how a decedent wanted to dispose of his or her property at death is his or her intent. This is not the intent the decedent had in his

or her mind but what he or she actually expressed in a properly executed will. Courts are not empowered to divine the intent of the decedent. Where the decedent fails to leave a properly executed will or the valid will fails to dispose of a property, the law provides a disposition of the decedent's asset or assets. There is no guess work. There is no chance of conflicting court decisions on the disposition of property through speculation, conjecture and surmise. Indeed, " 'the law of wills is calculated to avoid speculation as to the testator's intent and to concentrate on what he said rather than what he might, or should, have wanted to say.'" *Pajares v. Donahue*, 33 So. 3d at 703, *quoting from Estate of Pratt*, 88 So. 2d at 504.

If a Floridian wants to exercise the right to dispose of all of his or her property as he or she wants, that Floridian must meet the law half-way and create a valid will expressing the intent to dispose of all of his or her property. That fundamental rule is expressed in 732.6005:

> (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 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.

(Emphasis supplied.). The language of the statute is refreshingly clear. And, even if a court were to mistakenly attempt to employ subpart (2) of the statute alone, the language of the law will not let the court do it as it expressly states that subpart (2) is subject to subpart (1)'s mandate that the intent expressed in the will governs.

THE DISSENTING OPINION

The dissenting appellate court judge opined that "[i]n effect, the majority opinion determines that section 732.6005 does not apply to wills that do not contain general devises or a residuary clause." *Basile v. Aldrich*, 70 So. 3d 682, 689 (Fla. 1st DCA 2011). We could not discern that rule from the majority opinion and it is clearly not an accurate statement of the law. The dissent also asserted that the majority decision stands for the legal proposition that a residuary clause is required in order to dispose of property acquired after the will is executed. 70 So. 3d at 690. Examples of expressions of testamentary intent that would cover properties not specifically listed in will and acquired after the will was created (none of which are necessarily residuary clauses[2]) include:

- I leave the monies in all of my bank accounts to my children.

[2] "Residuary devise is defined in the probate code. §731.201(35), Fla. Stat.

- I leave all of my real estate to my friend, John Little.
- I leave all of my tangible personal property to my son and daughter.
- I leave my estate to the following persons in the following percentages.

Ironically, it appears the majority did apply the statute and correctly applied only the testator's intent "expressed in the will." The dissenting judge, on the other hand, in effect failed to apply section 732.6005 because of the absence of a sufficient general devise or residuary devise disposing of the testator's property acquired after the execution of her valid will. Indeed, rather than being governed by the testator's intent expressed in the will, the dissenting judge erroneously added words and intent of his own design.

CONCLUSION

For these reasons, we believe the district court of appeal reached a result consistent with the law of wills, even if it perhaps took the long road to arrive there. In order to bring clarity to the fundamental issue presented by this case, we respectfully suggest that the holding of this Court be as follows:

> Absent proper reformation, if a will lacks a clause generally disposing of assets not specifically referenced in the will, a court cannot construe the will and the testator's intent in a manner that disposes of those assets other than in accordance with the laws of intestacy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this motion was served email and U.S. Mail on James J. Taylor, Jr., Taylor & Taylor, P.A., jtaylor@taylorandtaylorpa.com, P.O. Box 2000, Keystone Heights, FL 32656-2000; and Jonathan D. Kaney, III, Kaney & Olivari, P.L., jake@kaneyolivari.com, 55 Seton Trail, Ormond Beach, FL 32176-6524 this ___day of September, 2012.

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Robert W. Goldman, FBN339180

CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the font requirement of rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

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