IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC19-1957
L.T. CASE NO. 3D18-2325

JANET M. RENO,

Petitioner,

vs.

JAMES ALAN HURCHALLA, as Successor Trustee of the Janet Reno Revocable Trust dated May 17, 2008, ROBERT HUNTER HURCHALLA, JANE ELIZABETH HURCHALLA, GEORGE HURCHALLA, KARIN HUNTER RENO, and DOUGLAS MARK RENO,

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

On Discretionary Review from the Third District Court of Appeal
of the State of Florida

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STATEMENT OF THE CASE AND FACTS

This case is about the constitutionally protected rights of Floridians to devise their assets in the manner they choose. Petitioner seeks review of this issue from the Third District Court of Appeal's opinion in *Reno v. Hurchalla*, 44 Fla. L. Weekly D2130 (Fla. 3d DCA, August 21, 2019) ("Opinion") and the order denying rehearing and certification entered on October 14, 2019 ("Order").

Respondent James Alan Hurchalla ("Hurchalla"), as Successor Trustee of the Janet Reno Revocable Trust ("Trust"), sued Petitioner Janet M. Reno (a niece of the Decedent Janet Reno) and the other beneficiaries of the Trust asserting that the *cy pres* doctrine applies to the Trust and therefore he is allowed to modify it to transfer the Decedent's homestead to Miami-Dade College ("MDC") in *fee simple* even though the Trust contains language "obligating" Respondent to sell the homestead and to distribute the proceeds to the Decedent's nieces and nephews once she and her two brothers, Mark and Robert, passed away (which indisputably occurred).

Of significance is the language in Art. V.D.[1] of the Trust which states, "**Upon the death of MARK and ROBERT, in the event the homestead is still owned by the Trust, such property shall be sold and the proceeds of the sale, together with any other corpus and undistributed income still owned by the Trust shall be distributed to Settlor's nephews and nieces, share and share alike, free of any**

[1] Article V of the Trust is titled, "*Dispositive Provisions Upon Death of Settlor*."

Trust….The Trustee at any time shall have the authority to sell the homestead but shall be obligated to sell the homestead upon the death of MARK and ROBERT." (Emphasis added.) This plain language shows the Decedent's testamentary intent regarding the homestead. Instead of honoring this language, Respondent sought to modify the Trust to distribute the homestead to an entity he chose – Miami Dade College ("MDC") – which was not named in the Trust.

The Trust also contains language in Art. III which states that it is the Settlor's intent that "**upon the death of Settlor and the death of MARK and ROBERT that this Trust shall terminate and the remaining assets of the Trust be distributed to Settlor's nephews and nieces.**" (Emphasis added.)

Article VI.C. of the Trust contains language **omitted** from the Opinion[2] which shows that the Decedent's intent was not to transfer the homestead to any entity in *fee simple*. Article VI.C. conditions any transfer of the homestead to the University of Miami ("UM") – not MDC -- upon the Trust's ability to recover the homestead "at any time" and to sell it "at any time." The Opinion ignores this part of the Trust.

Despite the plain language of the Trust, the law regarding application of the *cy pres* doctrine, and the law setting forth the rules of construction of wills and trusts, the trial court granted summary judgment in favor Respondent. On appeal, the Third

[2] Petitioner highlighted the importance of the Trust language omitted from the Opinion in the Motion for Rehearing and/or Certification.

District affirmed and then denied Petitioner's Motion for Rehearing and/or for Certification.

SUMMARY OF THE ARGUMENT

The Opinion expressly and directly conflicts with Florida appellate decisions regarding when the *cy pres* doctrine may be applied. The Opinion, if allowed to stand, would allow Florida courts and fiduciaries to alter the testamentary intent of Floridians after they pass away thereby eroding their constitutional right to freely devise their assets. This issue is of great public importance to the people of our state, with its high population of elderly citizens, as well as the trust and estate bar. *See, e.g., Smith v. State*, 497 So. 2d 910, 912 (Fla. 3d DCA 1986) (opinion with "far-reaching possible consequences" appropriate for certification of great public importance).

The Opinion also expressly and directly conflicts with the long line of Florida appellate decisions which require Florida courts to interpret wills and trusts by giving life to every provision – a heretofore bedrock principle of Florida trust and estate jurisprudence.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V, Section 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). This conflict

jurisdiction exists where holdings conflict but also where prior holdings are misapplied. *See, e.g., Wallace v. Dean*, 3 So. 3d 1035, 1039-40 (Fla. 2009).

ARGUMENT

I. Discretionary review is appropriate because the Opinion expressly and directly conflicts with current law regarding the *cy pres* doctrine

Pursuant to well-established Florida case law, the *cy pres* doctrine can only be applied where there are no alternative distribution provisions. *See Sheldon v. Powell*, 128 So. 258, 263 (Fla. 1930) (declining to apply the cy pres rule where the provisions of the will can be carried out by its terms); *Jewish Guild for the Blind v. First Nat'l Bank in St. Petersburg*, 226 So. 2d 414, 416 (Fla. 2d DCA 1969) ("When the dominant intention of the settlor of a trust can be substantially complied with by the alternatives expressly set forth in the trust, the Cy pres doctrine is not necessary to aid in the execution of the trust and is therefore inapplicable."); *SPCA Wildlife Care Ctr. v. Abraham*, 75 So. 3d 1271, 1276 (Fla. 4th DCA 2011) ("The cy pres doctrine, however, does not apply when the provisions of the will can be carried out, such as where the will provides an alternative that can be performed.").[3]

Article V.D. of the Trust specifically "obligates" the trustee to sell the homestead after the Decedent and her brothers pass away, which is an alternative distribution provision (in fact, it is the *dominant* distribution scheme). Despite these

[3] This requirement also exists in the laws of other states.

undisputed facts, the Opinion allows modification of the Trust based on the *cy pres* doctrine and thus, squarely conflicts with the above cited cases.

The Opinion's application of the *cy pres* doctrine wholly ignores the language in Art. V.D. because if the facts in this case (*i.e.*, when the Decedent passed, both her brothers had already passed) do not compel compliance with the terms of the Trust, then there can be no set of facts or circumstances under which the Trustee is obligated to sell the homestead. The Opinion appears to assert that the language in Art. V.D. obligating the Respondent to sell the homestead can be ignored based on another provision in Art. V.D. which requires Art. V.D. to "not be deemed inconsistent" with Article VI.C. However, this provision does not allow the plain language of the Trust to be ignored (the Trust must instead be reconciled), and the Opinion's holding obliterates major, material portions of Art. V.D. **and** parts of Art. VI.C., thereby disregarding the Decedent's testamentary intent for her homestead.

And while *Jewish Guild* and *Sheldon* predate the enactment of §736.0413, Fla. Stat.[4], in 2006, *SPCA Wildlife Care Ctr.*, which was subsequently decided in 2011, reaffirmed the prior holdings of those cases when it stated, "The cy pres doctrine, however, does not apply when the provisions of the will can be carried out, such as where the will provides an alternative that can be performed." *SPCA Wildlife Care Ctr.*, 75 So. 3d at 1276. In other words, these cases, along with the

[4] This is the *cy pres* statute in the Florida Trust Code.

requirements in the statute that the charitable gift be unlawful, impracticable, impossible or wasteful to achieve, provide the full set of legal requirements before the *cy pres* doctrine may be imposed.

When §736.0413, Fla. Stat., was enacted, the Florida Legislature intended it to serve as a codification of common law and not a modification of same, and thus the common law which predate its enactment still applies. *See*, Staff of Fla. S. Comm. On Judiciary, SB1170 (2006) Staff Analysis (March 10, 2006) ("Section 736.0413 codifies the common law *cy pres* doctrine."). This position is also supported by §736.0106, Fla. Stat. ("The common law of trusts and principles of equity supplement this code, except to the extent modified by this code or another law of this state"), which was also enacted along with §736.0413, Fla. Stat., when the Florida Legislature promulgated the current Florida Trust Code (Chapter 736, Florida Statutes).

By ignoring the alternative distribution provision in Art. V.D. (which we argue is the dominant distribution scheme), the Opinion casts doubt on whether those Florida cases which impose additional requirements before the *cy pres* doctrine can be applied are still controlling authority in Florida. Accordingly, an opinion by this Court is needed in order to clarify the law regarding the *cy pres* doctrine because the holdings in *Jewish Guild*, *SPCA Wildlife Care Ctr.*, and *Sheldon* conflict with the Opinion.

Moreover, the Opinion conflicts with the well-reasoned public policy established by this Court that Floridians have a constitutional right to devise their assets as they deem fit. *See, e.g., Shriners Hospital for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990) ("[T]he phrase 'acquire, possess and protect property' in article I section 2 [(of the Florida Constitution)], includes the incidents of property ownership: the '[c]ollection of rights to use and enjoy property, *including [the] right to transmit it to others*.'") (Emphasis in original.). This Court understood the value of this constitutional right when it recently stated:

> [I]t is the intention of the testator as expressed in the will that the court should carry into effect, and where the meaning of the words used by the testator is clear, it must be adopted, whatever the inclination of the court may be. The court may not alter or reconstruct a will according to its notion of what the testator would or should have done. Moreover, in the absence of clear legislative intent, the courts will not create or destroy testamentary disposition on the theory that the result accords with the natural desires of the deceased. The court must assume that the testator meant what was said in his will. **It is not the purpose of the court to make a will or to attempt to improve on one that the testator has made. Nor may the court produce a distribution that it may think equal or more equitable.**

Aldrich v. Basile, 136 So. 3d 530, 536-7 (Fla. 2014) (*citing In re Estate of Barker*, 448 So. 2d 28, 31-32 (Fla. 1st DCA 1984)) (emphasis added); *see also Owens v. Estate of Davis ex rel. Holzauser*, 930 So. 2d 873 (Fla. 2d DCA 2006).

The Opinion also conflicts with Florida law regarding the *cy pres* doctrine by imposing the doctrine where there is no evidence of a *general* charitable intent regarding the homestead. *See, e.g., Christian Herald Ass'n v. First Nat. Bank of*

Tampa, 40 So. 2d 563, 568 (Fla. 1949) ("it is the principle that equity will make specific a *general* charitable intent of a settlor, and will, when an original specific intent becomes impossible or impracticable of fulfillment, substitute another plan of administration which is believed to approach the original scheme as closely as possible.") (Emphasis added.); *SPCA Wildlife Care Ctr.*, 75 So. 3d at 1276 ("The cy pres doctrine is the principle that equity will make specific *general* charitable intent of a settlor, and will, when an original specific intent becomes impossible or impracticable to fulfill, substitute another plan of administration which is believed to approach the original scheme as closely as possible.") (Emphasis added.)

The Opinion applies the *cy pres* doctrine despite the fact that there was no *general* charitable intent expressed by the Decedent with regard to the homestead because the Decedent: 1) required the homestead to be sold and distributed to her nephews and nieces (Art. V.D.); 2) placed a time limit on when UM had to accept the homestead with no alternative recipient named (Art. VI.C.iv.); 3) required the Trustee to retain the right to sell the homestead "at any time" and to reclaim it "at any time" as a condition of any transfer (Art. VI.C.v.); 4) had knowledge that UM did not want the homestead and refused to name an alternative recipient; and 5) knew how to name alternative recipients if that was her true intentions as she did with the donation of her personal papers (Art. V.A.1.). The facts show that there was no *general* charitable intent regarding the homestead and thus the imposition of the *cy*

pres doctrine conflicts with *SPCA Wildlife Care Ctr.* and *Christian Herald Ass'n* and is an improper expansion of that limited doctrine.

II. Discretionary review is appropriate because the Opinion expressly and directly conflicts with the long line of Florida appellate decisions controlling how Florida courts construe wills and trusts

Of all the rules of construction that exist, primary among them is the rule that requires that all provisions of a trust must be given meaning and that the court must not do violence to the settlor's language. *See, e.g., Royal Am. Realty, Inc. v. Bank of Palm Beach & Trust, Co.*, 215 So. 2d 336, 338 (Fla. 4th DCA 1968) ("[R]ules of construction require that no word or part of an agreement is to be treated as a redundancy or surplusage if any meaning, reasonable and consistent with other parts, can be given to it, and where a contract contains apparent inconsistencies they must be given such an interpretation as will reconcile them if possible."); *Vigliani v. Bank of America, N.A.*, 189 So. 3d 214, 220 (Fla. 2d DCA 2016) ("It was error for the trial court not to consider Articles VII and VIII in their entirety in ruling on the parties' motions for summary judgment."); *Hulsh v. Hulsh*, 431 So. 2d 658, 664 (Fla. 3d DCA 1983) (trial court must not "do violence to the testator's language"); *Roberts v. Sarros*, 920 So. 2d 193, 196 (Fla. 2d DCA 2006) (no word or part of an agreement is to be treated as a redundancy or surplusage if any meaning, reasonable and consistent with other parts, can be given); *Luxmoore v. Wallace*, 199 So. 492, 495 (Fla. 1940) ("[T]he intent of the testator as it may be revealed by what he has

written…[is] to be measured by the language he selected and used, not in isolated words, clauses or paragraphs, but in the entire instrument from the first letter to the last period."); *In re Estate of Barker*, 448 So. 2d at 31-32 (court must assume that the testator meant what was stated in the will); *Barrett v. Kapoor*, 278 So. 3d 876, 879 (Fla. 3d DCA 2019) ("The testator's intent is determined by construing the language of the entire instrument, not isolated words or clauses."). This rule is the gatekeeper for proper construction because it prohibits courts or others from reading a will or trust as the reader wants and instead commands them to interpret the instrument based on the actual language in the document.

The Opinion overlooks and expressly and directly conflicts with these and other Florida appellate cases when it ignored the plain language of the Trust, specifically the language in Art. III, V.D., and VI.C.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that this Honorable Court accept jurisdiction and consider this case on its merits so that it may issue a much needed opinion detailing the contours of the *cy pres* doctrine in Florida, and also to reaffirm the rules of construction applicable to wills and trusts. This case is about the Decedent's testamentary intent – no one else's – and her intent should control the disposition of her assets.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via e-mail to the following: **Charles H. Johnson, Esq.**, e-mail: cjohnson@daypitney.com; and by U.S. Mail to the following: **Robert Hunter Hurchalla**, 5775 S.E. Nassau Terrace, Stuart, FL 34997; **George Hurchalla**, 5775 S.E. Nassau Terrace, Stuart, FL 34997; **Karin Hunter Reno**, 5806 S.W. 35th Street, Miami, FL 33155; **Douglas Mark Reno**, 3035 Kirk Street, Coconut Grove, FL 33133; **Jane Elizabeth Hurchalla**, 525 Saddle Drive, Nashville, TN 37221; on this 22nd day of November, 2019.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Fla. R. App. P. 9.100(l).

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