

IN THE SUPREME COURT OF FLORIDA

WILLIAM R. KELLY, JR.

Petitioner,

vs.

Case No. SC04-878

SARAH D. CUEVAS,

Respondent.

RESPONDENT-S BRIEF ON JURISDICTION

On Petition for Discretionary Review of
Decision of the Second District Court of Appeal
In Case No. 2D03-110

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STATEMENT OF THE CASE AND FACTS

Alvarado Kelly died in Hancock County, Mississippi, on November 1, 2000, where he had resided for the last 40 years of his life. His 1992 will was admitted to informal probate in Mississippi in the same month. That will left his entire estate to the respondent, Sarah Cuevas, with whom he had resided for 25 years.

Alvarado's brother, William Kelly, the petitioner, although aware of the Mississippi probate proceeding, filed a Petition for Intestate Administration of his brother's estate in the probate division of the Circuit Court for Hillsborough County on December 27, 2000. Upon receiving notice of that proceeding, Sarah Cuevas filed a petition for probate of the decedent's will in solemn form (formal probate) in the Chancery Court for Hancock County, Mississippi. She also filed a response to William's petition in the Florida proceeding.

William Kelly was personally served in Hillsborough County with a summons and copy of the Mississippi petition for formal probate on January 31, 2001. Proof of service was filed in the Mississippi court. William did not contest the Mississippi court's jurisdiction and did not file any responsive pleading, motion, or other paper in that proceeding. On March 9, 2001, the Mississippi probate court entered its judgment admitting Alvarado's will to probate and finding, in part, that Alvarado was a resident citizen of Hancock County, Mississippi and died a resident of that county. That judgment was not appealed.

The Florida probate court on December 13, 2002, entered an order appointing SunTrust Bank as intestate administrator of Alvarado's estate, which consisted of securities and cash held by that bank. No one had

offered Alvarado's will for probate in Florida, but the Second District Court of Appeal recognized in its opinion that the probate court's order impliedly found that the will was invalid.¹

On these facts the Second District Court of Appeal determined that William Kelly had been afforded adequate notice and opportunity to be heard in the Mississippi proceeding, and that the Florida probate court should have given full faith and credit to the judgment of the Mississippi probate court.

The district court of appeal denied William's motions for rehearing, for clarification, and for certification of its decision to this court.

¹ No contest of Alvarado Kelly's will ever took place in any court.

SUMMARY OF ARGUMENT

The court should deny jurisdiction in this case because the decision of the Second District Court of Appeal did not expressly construe any provision of the federal or Florida constitutions. The decision merely applied recognized constitutional principles of due process and full faith and credit to the facts of the case. It did not explain, define, or otherwise eliminate existing doubts arising from the language or terms of the constitutional provisions.

The petitioner does not contend otherwise, but points to a set of facts and contends that the district court of appeal failed to apply correctly a recognized provision of the Constitution.

ARGUMENT

This court has held, even before insertion of the word expressly in Article V, section (3)(b)(3) of the Florida Constitution, that it has no jurisdiction to review decisions of the district courts of appeal that merely apply recognized constitutional principles to the facts of a particular case. Armstrong v. City of Tampa, 106 So.2d 407 (Fla. 1958); Page v. State, 113 So.2d 557 (Fla. 1959). The district court of appeal must expressly construe a constitutional provision in order for this court to have jurisdiction to review its decision (It is not sufficient to sustain our jurisdiction merely to point to a set of facts and contend that the trial judge failed to apply correctly a recognized provision of the Constitution. Armstrong, 106 So. 2d at 410).

The requirement of express construction has itself been strictly construed by this court in holding that a district court of appeal decision is not reviewable simply because it inherently construes a constitutional provision where there is no express construction. Miami Herald Publishing Co. v. Brautigam, 121 So.2d 431 (Fla. 1960). Actual construction of a constitutional provision was explained in the Armstrong case as an undertaking by the lower court to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. Armstrong, 106 So.2d at 409. As the court said in the Miami Herald case, which involved a judgment awarding damages for libel, accepting jurisdiction in a case that inherently involves constitutional principles would mean accepting jurisdiction in all cases of that class (for example, all eminent domain cases, all cases involving search and seizure, etc.).

For the reasons given in Miami Herald and Armstrong, the court should decline jurisdiction in this case. It is a case in which the district court

of appeal applied settled constitutional principles of due process and full faith and credit to a set of facts without expressly construing the underlying constitutional provisions. The case presents no novel issues under the federal or Florida constitutions, and Kelly does not contend that it does. His jurisdictional brief is not directed to this court's jurisdiction, but is limited to argument that the district court of appeal erred in its decision with respect to the effect of the Mississippi court's judgment. **B** erred, in other words, in applying recognized constitutional principles to the facts of this case.

The district court of appeal described the **A** central issue to be whether the Florida probate court was required to give full faith and credit to a Mississippi probate court's prior judgment. If it was required to do so, petitioner Kelly had no right to litigate the validity of his brother's Mississippi will in a Florida probate court when he had declined the opportunity to do so in Mississippi and the will had already been admitted to probate there. Whether the Florida court was required to give full faith and credit depended, in turn, upon whether Kelly had been given notice and an opportunity to be heard in the Mississippi court that comported with due process for an *in rem* probate proceeding. The district court of appeal held that Kelly had been afforded due process, and that the Mississippi judgment was entitled to full faith and credit, based on the following operative facts:

1. Kelly was personally served by a process server in Hillsborough County, Florida, with a summons and petition for probate of his deceased brother's will in solemn form (formal probate) issued by the Chancery Court of Hancock County, Mississippi, where the decedent had resided for the last 40 years of his life.

2. Kelly chose to spurn the Mississippi court's process, intentionally declining to contest that court's jurisdiction and filing no

pleading or other paper in that court. Instead, Kelly filed a Petition for Intestate Administration in Hillsborough County, where he resided, notwithstanding his knowledge of the Mississippi will and probate proceeding.

3. On April 12, 2001, The Mississippi court entered a judgment finding that the decedent died a resident citizen of Hancock County, Mississippi, admitting the decedent's will to probate, and appointing respondent Cuevas as executrix. That judgment was not appealed.

4. On December 13, 2002, the Florida probate court entered an order directing issuance of Letters of Intestate Administration to SunTrust Bank despite there having been no contest of the decedent's will, which had never been offered for probate in Florida.

The Second District Court of Appeal first determined that because of the decedent's long residence there, the Mississippi court had initial subject matter jurisdiction to determine the jurisdictional fact of the decedent's domicile, and, once it had determined domicile there, to administer his estate and supervise the distribution of his intangible personal property, wherever located (citing Biederman v. Cheatham, 161 So.2d 528 (Fla. 2^d DCA 1964) and Saunders v. Saunders, 796 So.2d 1253 (Fla. 1st DCA 2001) *rev. den.* 819 So.2d 139 (Fla. 2002)). Secondly, the court determined that Kelly had been afforded due process, finding that the personal service of process from the Mississippi court gave him notice and an opportunity to be heard in an *in rem* proceeding that satisfied Florida's own jurisdictional and due process requirements under Florida's equivalent procedure of service of formal notice by certified mail under section 731.301(2), Florida Statutes (2003), and the Florida Probate Rules. The court concluded that Kelly was bound by the Mississippi judgment because he was a party in the Mississippi proceeding

notwithstanding his failure to appear, and that the judgment was therefore entitled to full faith and credit in the courts of Florida.

Kelly persistently maintains that he could not have been a party in the Mississippi probate proceeding or be bound by the court's judgment there because he was not personally served with process within the State of Mississippi. The argument was given short shrift by the district court of appeal because it was, and is, absolutely wrong.

Probate is an *in rem* proceeding in both Mississippi and Florida. In re Will of Hickman, 374 So.2d 239 (Miss. 1979); ' 731.105, Fla. Stat. (2003). The Mississippi probate proceeding involved no relief sought against Kelly personally, and required no jurisdiction over his person. All probate proceedings involve the interests of the parties in the *rem*, which is the will and the property to be disposed of by the will. The property to be disposed of in this case consisted solely of Alvarado's tangible personal property in Mississippi and securities allocated in a Florida guardianship account. This court stated in Loewenthal v. Mandell, 170 So. 169, 173 (Fla. 1936), that probate at the domicile is binding on all questions as to the legality of the will *with regard to personal estate elsewhere*.@ [emphasis added]. The Second District Court of Appeal added in In Re Estate of Biederman, 161 So.2d 538 (Fla. 2d DCA 1964), that A[t]he validity of a testament which passes personal property is determined by the law of the testator's domicile at the time of his death.@ *Id.* at 542. Florida's own probate code recognizes that *in personam* jurisdiction is not required in formal probate proceedings to determine validity of a will. *See* ' 733.2123, Florida Statutes (2003) (requiring service on interested persons by formal notice, which may be by certified mail as provided in Fla.Prob.R. 5.040).

Having determined that the Mississippi judgment was entitled to full

faith and credit, it was unnecessary for the district court of appeal to consider the correctness of other rulings of the probate court. Argument on issues that could have been raised by Kelly in the Mississippi probate proceeding, had he chose to make them there, is also irrelevant to this court's jurisdiction.

CONCLUSION

Jurisdiction should be denied in this case because the opinion of the Second District Court of Appeal merely applied settled constitutional law to the facts of this case and did not construe, expressly or otherwise, any

provision of the federal or Florida constitutions.
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, to George F. Wilsey, Esq., 275 Fourth Street North, St. Petersburg, Florida 33701, this _____ day of June, 2004.

Barry F. Spivey, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in compliance with, and satisfies the requirements of, Fla.R.App.P. 9.100(1) and 9.210(a)(2).

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