

IN THE SUPREME COURT OF FLORIDA

IN RE: ESTATE OF

CASE NO. SC04-_____
Lower Tribunal No. 2D03-110

ALVARADO KELLY,

Deceased.

_____/

SARAH D. CUEVAS, as Personal
Representative of the Estate of
Alvarado Kelly, deceased

Respondent/Appellant,

v.

WILLIAM R. KELLY, SR.,

Petitioner/Appellee.

_____/

PETITIONER WILLIAM R. KELLY, SR.'S
BRIEF ON JURISDICTION

ON PETITION TO INVOKE DISCRETIONARY
JURISDICTION FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

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STANDARD OF REVIEW

The standard of review in this cause is de novo. The order under appeal was one granting summary judgment, which is considered de novo on appeal. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126 (Fla. 2000).

Further, the question subject to review is the proper application of the law. Belcher v. Kier, 558 So.2d 1039 (Fla. 2d DCA 1990).

STATEMENT OF FACTS AND CASE

References to the appendix to this brief will be represented by the symbol "A".

The pertinent entities are:

(a) WILLIAM R. KELLY, SR. (Kelly), who is the Petitioner in the trial court, appellee in the court below, and sole heir of the decedent.

(b) ALVARADO KELLY (the Decedent), who was adjudicated an incompetent in Florida, which order (A2) remained in effect from 1960 until his demise in 2002 (A4).

(c) SARAH D. CUEVAS (Cuevas), who is the Respondent in the trial court and appellant in the court below.

(d) CITY BANK AND TRUST COMPANY OF ST. PETERSBURG which was appointed Guardian of the decedent's property. Decedent's assets were held in a guardianship account in Hillsborough County, Florida.

The caption in the District Court of Appeal decision reflects the appellant below is "Sarah Cuevas, as personal representative of the estate of Alvarado Kelly." However, the trial court proceedings concerned Sarah Cuevas in her individual capacity, as did the notice of appeal.

Cuevas petitioned a Mississippi court to admit to probate a purported will, which left the decedent's entire estate to her. That petition was not served on Kelly. (A2)

Kelly then filed a petition for intestate administration in Florida. Certified mail notice was served on Cuevas (A2) and she personally appeared in the Florida proceedings. (A3)

Subsequently, Cuevas filed a further petition in Mississippi to admit the will to probate, which was served on Kelly in the State of Florida. Kelly did not respond to that petition and did not participate in the Mississippi proceeding. The Mississippi court then admitted the decedent's will to probate. (A3)

The District Court of Appeal decision does not reflect that Kelly was never served with process within the jurisdictional limits of Mississippi. The court declined to clarify the decision in that regard. However, the record on appeal reflects, without dispute, that Kelly was never served with process in Mississippi.

The trial court granted Kelly's motion for summary judgment and found the decedent's domicile remained in Florida, because no order had been entered in the guardianship permitting a

change of the decedent's domicile. (A4) The trial court further found the Florida court possessed jurisdiction over the decedent's assets held by the Florida appointed guardian. (A4)

The District Court of Appeal expressly construed Article IV, Section 1, of the *United States Constitution*, by holding that Kelly was bound by the Mississippi order, notwithstanding that Kelly was never served in Mississippi and did not participate in the Mississippi proceedings. (A7) The Court further held that Mississippi had jurisdiction over the decedent's property held in a Florida guardianship account and the right to determine the distribution of that property. (A8)

SUMMARY OF ARGUMENT

The issue in this cause is whether a foreign probate judgment determining domicile is entitled to full faith and credit, when the foreign court had:

- (a) No in personam jurisdiction over a respondent, and
- (b) The decedent was a Florida adjudicated incompetent whose assets are held in Florida by a Florida appointed guardian.

It is submitted that the issue of domicile and jurisdiction over the res may be raised by a party who is not subject to in personam jurisdiction of a foreign court, at his choice, either in the state where the action is filed, in which event he is bound by that court's determination, or as an original matter de novo in the subsequent state.

The common thread in the reported cases concerning whether an order of a foreign court determining domicile and disposition of property is conclusive in Florida rests on:

(a) Whether the foreign court had in personam jurisdiction, and if it did not,

(b) Did the contestant actively appear in the foreign court and litigate the issue of domicile on the merits, and

(c) Did the foreign court have jurisdiction over the decedent's assets?

The question and issues in this cause are significant in determining the rights of Florida residents.

JURISDICTION ARGUMENT

This is a proceeding by Kelly requesting the Supreme Court to invoke its discretionary jurisdiction under *Florida Rules of Appellate Procedure* 9.030(a)(2)(A)(ii), to review a decision of the District Court of Appeal, Second District of Florida, dated March 26, 2004, which was rendered May 4, 2004, upon denial of timely motion for rehearing.

Timely petition to invoke the discretionary jurisdiction of the Supreme Court was filed on May 17, 2004, on the ground the decision expressly construes the full faith and credit clause under Article IV, Section 1, of the *United States Constitution*.

ISSUE 1

A respondent who is not subject to in personam jurisdiction of a foreign court and does not participate in the foreign court proceedings is not barred under the full faith and credit clause and has the right to litigate a determination of domicile and jurisdiction by a foreign court in Florida.

There appears to be no prior Florida cases considering the question of giving full faith and credit to a foreign probate proceeding determining domicile, in which the Florida litigant was not subject to in personam jurisdiction of the foreign court and elected not to appear or participate in the foreign proceeding, after being served outside the jurisdictional limits of the foreign court.

While there are cases which speak of application of the full faith and credit clause when the respondent has been given "notice and opportunity to be heard," such cases uniformly involve factual situations in which the respondent had actively participated in the foreign proceeding. The cases cited in the District Court of Appeal decision on this issue all involve active participation by the contesting party in the foreign jurisdiction.

Other cases support the proposition that one who is not subject to in personam jurisdiction is not bound by a determination of domicile or distribution of Florida property entered by a foreign state.

In Miller v. Nelson, 35 So.2d 288 (Fla. 1948), ancillary proceedings were filed in Florida after the legatees were served

with notice of California domiciliary proceedings. One of the questions submitted was whether the legatees were estopped to apply for domiciliary probate of the will in Florida, which the Court answered in the negative. The dispute became a federal one involving the contrary and irreconcilable findings of domicile by the two state Courts. In Nelson v. Miller, 201 F.2d 277 (9th Fed. Cir. 1952), the Court held that each state could stand on its own findings of domicile and apply its law to all property situated within the respective states.

The distinction concerning in personam versus constructive service in determining issues of domicile is demonstrated by the contrasting decisions in Haddock v. Haddock, 201 U.S. 562 (1906) and Davis v. Davis, 305 U.S. 32 (1938), both of which involved the domicile issue.

In Haddock, the respondent was served by constructive service and did not appear or participate in a foreign court proceeding determining domicile. The Court held the foreign court decree was not entitled to full faith and credit.

Conversely, in Davis, the respondent was served in her home state, but elected to appear and participate in the foreign state proceeding. The Court held that by litigating the issue of domicile in the foreign state, the respondent was bound by the foreign state's determination.

While Haddock and Davis were cases in which the subject matter was a marital relationship, the principal appears equally applicable when the subject matter involves probate. In both

situations, the respective state courts had subject matter jurisdiction to adjudicate the type of case, but the exercise of that jurisdiction was dependent upon a determination of domicile.

It would also appear that the Mississippi order is in contravention of the public policy of the State of Florida, which provides the domicile of an incompetent may be changed only by order of court. *Florida Statute* § 744.10 (1959), 744.2025 (2000), 744.524 (2000), *In re Estate of Phillips*, 190 So.2d 15 (Fla. 4th DCA 1966).

ISSUE 2

The Mississippi probate court had no jurisdiction entitled to full faith and credit over the assets of the decedent held in Florida by a guardian of the property.

It has been held that a finding of domicile in a foreign state is irrelevant when the rem involved is Florida real property, even if the contestant had previously contested the decedent's domicile in the foreign state and lost. To that extent, a foreign probate court proceeding is not entitled to full faith and credit in Florida. *In re Estate of Roberg*, 396 So.2d 235 (Fla. 2d DCA 1981). There is no reason why the same effect should not be given to other Florida assets of a decedent which are uniquely under the direct control and supervision of a Florida guardianship court. "Property" is defined as both real and personal property, *Florida Statute* § 731.201(28)(2000).

In the present case, the District Court of Appeal held that the decedent's Florida assets were simply intangible personal property subject to the jurisdiction of the Mississippi probate court proceedings, based upon its determination of domicile.

It would seem that Court appointment of a guardian of property is analogous to court appointment of a receiver, both of whom are accountable to the Court.

In Wood v. Provident Trust Co. Of Philadelphia, 152 So. 186 (Fla. 1934), the Court considered a receiver's administration of receivership assets and stated:

"The controversy here relates to a distribution of property in custody of the Court." (Page 191) (emphasis added)

While a guardian or receiver may be in possession of the property, the custody of that property is in the Florida Court and is uniquely a Florida asset over which the Court should have the same exclusive authority and jurisdiction as is applicable to Florida real estate.

Further, the legislature has declared that the Laws of Florida govern all aspects of a Florida fiduciary account. *Florida Statute* § 655.55(1) provides:

"(1) The law of this state, excluding its law regarding comity and conflict of laws, governs all aspects, including without limitation the validity and effect, of any deposit account . . . in this state . . . regardless of any provision of any law of the jurisdiction of the residence, location, or domicile of such other party, whether or not such deposit account bears any other relation to this state. . ."

"Deposit account" is defined under *Florida Statute* § 655.55(3)(b) to include a custodial or fiduciary account. A guardianship account is clearly a fiduciary account.

It is respectfully submitted the District Court of Appeal erred in determining the Mississippi Court had jurisdiction over the assets in Florida which were held by a guardian of property in a fiduciary account and subject to the exclusive control and supervision of the Florida court. The full faith and credit clause is inapplicable when a foreign court attempts to exercise jurisdiction over such assets.

CONCLUSION

The ruling of the District Court of Appeal places an unreasonable and unjustified burden on the citizens of Florida, by compelling Florida citizens, who are not subject to in personam jurisdiction, to appear in foreign jurisdictions to protect their interests in assets located solely in Florida. The full faith and credit clause does not require a foreign order be given extraterritorial effect upon assets located in Florida, or upon a respondent who was not subject to in personam jurisdiction, did not participate in the foreign proceedings, and the foreign court's determination of domicile and jurisdiction was never fully and fairly litigated in the foreign state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner William R. Kelly, Sr.'s Brief on Jurisdiction, has been furnished by U.S. Mail to BARRY F. SPIVEY, ESQUIRE, Post Office Box 49017, Sarasota, Florida 34230, Attorney for Appellant, by U.S. Mail on this ____ day of May, 2004.

GEORGE F. WILSEY, ESQUIRE

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SECOND DISTRICT

IN RE: ESTATE OF

ALVARADO KELLY,

Deceased.

SARAH D. CUEVAS,

Respondent/Appellant,

v.

DCA CASE NO. 2D03-110
L.T. NO. 00-CP-003111

WILLIAM R. KELLY, SR.,

Petitioner/Appellee.

CERTIFICATE OF COMPLIANCE
WITH APPELLATE RULE 9.210(a)(2)

I HEREBY CERTIFY that Appellee's foregoing Petitioner, William R. Kelly, Sr.'s Brief on Jurisdiction was computer-generated in Courier New 12-point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Certificate of Compliance was mailed by U.S. regular mail to BARRY F. SPIVEY, ESQUIRE, Post Office Box 49017, Sarasota, Florida 34230, Attorney for Appellant, by U.S. Mail on this ____ day of May, 2004.

GEORGE F. WILSEY

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