

IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC04-430

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FRANK A. McCLUNG, JR.,  
et al,

Petitioners,

vs.

Fifth District Court of Appeal  
Case No. 5D02-2328  
L.T.Case # H-27-CP-20-00076-RT

GLENN SHANNON McCLUNG,  
et al,

Respondents.

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**ON PETITION FOR DISCRETIONARY REVIEW  
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA  
FIFTH DISTRICT**

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**PETITIONERS' AMENDED BRIEF ON JURISDICTION**

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**PRELIMINARY STATEMENT**

This Amended Brief on Jurisdiction is submitted in accordance with this Court's Order entered April 8, 2004. Petitioners intend full compliance with Fla. R. App. P. 9.120(d) and the said Order.

Petitioners herein, Appellants below, are Petitioners in the will contest proceedings pending in Hernando County, Florida. Petitioners are presently before this Court in Case No SC02-366, in which they seek mandamus to the Fifth District Court of Appeals, Case No. 5D00-3286, to re-hear the Court's affirming the admission of decedent's will to probate, a summary determination of the homestead issue raised below by Petitioners, and other trial court orders. This Court in Case No. SC02-366, by show cause order dated January 16, 2003, has jurisdiction over a purported settlement agreement reached at court-ordered mediation, which Petitioners contend was void *ab initio*.

Petitioners herein, pursuant to Fla. R. App. P. 9.030 (a)(2)(A)(iv), seek to invoke the discretionary jurisdiction of this court to review the decision of the Fifth District Court of Appeal, Case No. 5D02-2328, which invades the jurisdiction of this court with regard to the settlement agreement, misapplies case law, and affirms a so-

called "stipulated" final judgment to which Petitioners objected, orally and in writing, prior to its entry, and appealed.

The Decision of the Fifth District Court of Appeals, Case No. 5D02-2328, is in the Appendix to this Brief. References herein to applicable documents in the Record on Appeal will be by an "RA \_\_\_" or "Transcript \_\_\_". Petitioners herein will be referred to as Petitioners and Respondents herein will be referred to as Respondents in all proceedings below, as well as this Court's Case No. SC02-366.

### **STATEMENT OF THE CASE AND FACTS**

On January 17, 2000, Petitioner FRANK A. McCLUNG, JR., filed a Caveat with the Clerk of the Circuit Court, Hernando County, Florida (R 17-18), just nine days after his father's death on January 8, 2000, by suicide from a self-inflicted gunshot wound, according to the death certificate, (R 12). Decedent's will and codicil were filed by Respondents just ten days after decedent's death. On January 27, 2000, Petitioners petitioned for revocation of probate and amended their Petition January 28, 2000 (R 21-24), specifically referring to the real property on which decedent resided at the time of his death as "homestead." On January 31, 2000, Petitioners filed an Emergency Motion to Appoint Curator, because the primary beneficiaries under the contested Will were also the named Personal Representatives. Although the Motion was granted, on February 11, 2000, the Hon. Richard Tombrink recused himself, the attorney who opened the estate withdrew, and Ms. Anderson, decedent's former associate, appeared as counsel for the beneficiaries and designated personal representatives. An out-of-county judge, Hon. Patricia V. Thomas, was appointed February 15, 2000.

On September 1, 2000, the trial court admitted the will to probate (R 1235-1236) and thereafter discharged the Curator. Both substantive and procedural decisions

were summarily made on the homestead issue (R 1218-1219 and 1228-1230), and Petitioners appealed six orders to the Fifth District Court of Appeals, Case No. 5D00-3286. Commencing November 2, 2000, counsel for Appellees, referring to herself as counsel for the Personal Representatives, repeatedly noticed and re-noticed this case for trial, and the case was set and re-set for trial (R 1356-1364; R 1582-1583; R 1600-1607) during the pending appeal, Case No. 5D00-3286. Pre-trial hearings were scheduled, requiring Petitioners' personal appearance to avoid default or even contempt.

On November 16, 2001, in Case No. 5D00-3286, the Fifth District Court of Appeals affirmed the order admitting will and other orders. *McClung v. McClung*, 804 So. 2d 459 (Fla. 5th DCA 2001). Eleven days later, during a hearing, counsel for Respondents said there was the "issue dangling out there about the ranch as homestead" which could be tried along with "undue influence." (Transcript, November 27, 2001 hearing, Pg 11 Lines 2-4, 19-20), confirming that triable issues remained long after the will was admitted to probate.

On March 22, 2002 the trial court entered a fourth Order re-setting trial and requiring mediation (R 1631-1638). Court ordered mediation before a certified mediator took place April 20, 2002. The Mediator never filed a report of mediation, so counsel for Respondents unilaterally approached the Supreme Court, in Case No. SC02-366, with a "Notice of Successful Mediation." Petitioners responded, alleging among other things that the purported settlement agreement was void *ab initio* due to bad faith on the part of the attorneys involved in inducing them to sign with the promise of the mortgage the next working day, but never provided. On September 6, 2002, this Court relinquished jurisdiction temporarily for fact finding purposes on an issue involved in the settlement. On January 16, 2003, this Court issued a Rule to Show Cause, to which Petitioners' responded. All issues raised in Case No. SC02-

366 are pending.

During a trial court hearing June 18, 2002, over Petitioners' oral objections, the Hon. Patricia V. Thomas decided to enter a judgment, purportedly because Respondents were unable to comply with the requirements they imposed upon themselves during mediation April 20, 2002. (Transcript, R 1760-1772). On June 25, 2002, Petitioners filed objections to proposed judgment (R 1743-1749). On June 28, 2002, Petitioners filed a Verified Motion for Withdrawal or Revocation of Stipulation for Settlement. (R 1750-1754). On July 15, 2002, Petitioners filed objections to a revised proposed judgment entitled "Stipulated," and Renewed Objections to Entry of Judgment (R 1827-1831). Without further hearing on either the motion or objections, on July 18, 2002, the trial judge signed a "Stipulated Final Judgment in Adversarial Proceeding" (R 1837-1846). On July 29, 2002, Petitioners moved to deposit settlement funds received into the Court Registry (R 1860-1861). Petitioners appealed the judgment. During the course of the appeal, counsel for Respondents advised that the conditionally proffered settlement funds would be returnable if the Fifth District Court of Appeal denied Respondent's Motion to Dismiss. The Motion to Dismiss was denied. Notwithstanding, on December 19, 2003, following oral argument, the Fifth District Court of Appeal affirmed the "stipulated" judgment as well as the contested settlement agreement, (Appendix), rehearing denied February 11, 2004. This proceeding ensued.

### **SUMMARY OF ARGUMENT**

In this probate proceeding involving a will contest, Petitioners allege that this Court has jurisdiction based upon (1) conflict with decisions of this and other appellate courts, (2) misapplication of case law, and (3) deciding an issue over which the Court had no jurisdiction; all of which constitute a (4) departure from the essential requirements of law over which this Court may take jurisdiction.

## ARGUMENT

### JURISDICTION ISSUE I

DOES AFFIRMING AN ORDER ENTITLED "STIPULATED FINAL JUDGMENT IN AN ADVERSARIAL PROCEEDING," ON APPEAL BY PRINCIPALS THERETO, CONFLICT WITH WITH THIS COURT'S DECISION IN ***KRAMER v. CITY OF LAKELAND?***

The Petitioner in ***Kramer v. City of Lakeland***, 38 So. 2d 126, 131-132, (Fla. 1949), found himself faced with a decree arising from an agreement between attorneys to which he was not a party. In the within cause, the "stipulation" between counsel to reduce to judgment a contested settlement agreement was never agreed to by Petitioners, as evidenced by their objections of record and appeal of the said judgment. Under ***Kramer, supra***, even an authorized attorney cannot stipulate to entry of a final decree on the merits for the client.

Conflict exists when an appellate court decision on its face "collides" with a decision of this court or another district court of appeal. ***Kincaid v. World Insurance Company***, 157 So. 2d 517, 518 (Fla. 1963). Petitioners submit that the decision of the Fifth District Court of Appeal in Case No. 5D02-2328 (Appendix hereto), on its face collides with this Court's decision in ***Kramer, supra***, for it affirms a so-called "stipulated" final judgment which was appealed by those principals whose names appear on the face of said decision as Appellants. Although ***Kramer, supra***, was briefed by Petitioners, discussed at oral argument, and specifically raised by motion for rehearing, the Fifth District Court of Appeal did not address the decision.

### JURISDICTION ISSUE II

WAS THE TRIAL COURT OBLIGATED TO RESOLVE ALL WILL CONTEST ISSUES PRIOR TO ADMITTING THE WILL TO PROBATE AND APPOINTING PERSONAL REPRESENTATIVES UNDER ***IN RE ESTATE OF LAURA L. HARTMAN,***?

Petitioners submit that the proceedings below collide full force with the clear holding and intent of *In Re Estate of Laura L. Hartman*, 836 So. 2d 1038 (Fla. 2nd DCA 2002). Petitioner's Rule 5.260 Caveat was filed in January, 2000, nine months prior to the admission of the will to probate. The Caveator moved to revoke probate long before the will was admitted. One of the two primary will contest issues was summarily decided September 1, 2000. The decision was appealed, and remains on review before this Court in Case No. SC02-366. Another primary issue was purportedly preserved for later consideration.

The Second District Court of Appeal in *Hartman, supra*, p. 1039, citing *Grooms v. Royce*, 638 So. 2d 1019, 1021 (Fla. 5th DCA 1994), found that if a caveat pursuant to Rule 5.260, Fla. Prob. R., and Section 731.110, Florida Statutes, is filed, Florida Statutes 733.2123 mandates a determination of will contest issues before issuance of letters, stating:

The implication of the notice mandate for section 733.2123 entitled "Adjudication before issuance of letters" is that will contests and rights of caveators must be determined prior to letters of administration being issued. ... In this case Appellants argue that because they filed caveats and objections, the probate court was obliged to make a determination on their challenge to the will prior to appointing a personal representative and admitting the will to probate. Based on our reading of sections 733.2123 and 733.203 and rule 5.260, we agree.

In direct conflict with *Kaufman, supra*, the Fifth District Court of Appeal affirmed entry of of a seven-page final judgment entitled "Stipulated Final Judgment in an Adversarial Proceeding," knowing that (1) a caveat had been filed, (2) the will had been admitted over Petitioners' objections, (3) the order admitting will was appealed, with review pending in this court, (4) the trial court had repeatedly set and re-set trial after the will was admitted to probate, and (5) the judgment followed court ordered mediation pursuant to a trial order.

Petitioners submit that the decision below collides full force with *Kaufman, supra*, and vests conflict jurisdiction in this court.

### JURISDICTION ISSUE III

#### WERE THE CASES CITED IN THE OPINION BELOW MISAPPLIED TO THE WITHIN CAUSE?

In *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520, 521 (Fla. 1980), this Court stated:

This court has certiorari jurisdiction based on conflict when a district court of appeal misapplies the law by relying on a decision which involves a situation materially at variance with the one under review.

Similarly, in *Belcher v. Belcher*, 271 So. 2d 7, 13, (Fla. 1972), the district court of appeal was found to have misapplied the law by relying on a case involving merely the amount of alimony, when the issue was waiver of alimony.

The Fifth District Court of Appeal cited *Paulucci v. General Dynamics*, 842 So. 2d 797 (Fla. 2003), which held that after judgment approving a settlement is entered a trial court could only enforce the terms of a settlement agreement, but could not award damages not provided for in the settlement agreement. In *Paulucci, supra*, the judgment itself was not at issue, as it is in the within cause. Citing *Paulucci, supra*, is misleading.

The second case relied upon the by Fifth District Court of Appeal was *Nagymihaly v. Zipes*, 353 So. 2d 943 (Fla. 3rd DCA 1978), in which the Defendants did not timely repudiate an agreement. Unlike the claimants in *Nagymihaly, supra*, Petitioners herein filed a sworn motion for withdrawal or revocation of the settlement agreement approximately two months after it was entered into, and contend to this day it was void *ab initio*. Further, the claimants in *Nagymihaly, supra*, apparently received full consideration for the agreement, and kept it. Petitioners herein received absolutely nothing under the judgment on appeal. Counsel for Respondents only

conditionally forwarded funds payable to attorney trust accounts, and those funds are now subject to recall. Petitioners moved to deposit into the Registry of the Court the small initial payment they received prior to Respondent's breach of the agreement. That amount may be more than offset by their expenses in connection with compelled attendance at pretrial hearings following admission of the will to probate. *Nagymihaly, supra*, is therefore misapplied to the facts of the within cause.

Misapplication of *Paulucci, supra*, and *Nagymihaly, supra*, to the within cause provides this Court with conflict jurisdiction under *Gibson, supra*, and *Belcher, supra*.

#### JURISDICTION ISSUE IV

ARE THE COURTS BELOW WITHOUT JURISDICTION TO AFFIRM AND ENFORCE THE SETTLEMENT AGREEMENT WHILE THIS COURT HAD JURISDICTION OF THE ISSUE OF ITS VALIDITY PURSUANT TO A SHOW CAUSE ORDER?

On January 16, 2003, in Case No. SC02-366, this court issued a show cause order with reference to the settlement agreement reached at mediation. As of December 19, 2003, the date of entry of the decision at issue, and at present, the settlement issue in the show cause order remains pending before this Court.

The Fifth District Court of Appeal knew that the Supreme Court was involved in the settlement agreement issue. On September 6, 2002, this Court entered an order temporarily relinquishing jurisdiction to the trial court for fact finding, as occurred in *General Capital Corporation v. Tel Service Co.*, 212 So. 2d 369, 381-382 (Fla. 2nd DCA 1968). The Fifth District was asked to do so also.

Under *Payne v. State*, 493 So. 2d 1104 (Fla. 1st DCA 1986) approved 498 So. 2d 413 (Fla. 1986), once discretionary review in the supreme court is sought, the courts below lose jurisdiction over the cause to the extent that the lower court's acts

will affect the subject matter of the appeal, including enforcement. Even more particularly, in *Allen v. State*, 579 So. 2d 200 (Fla. 2nd DCA 1991), the court held that once a show cause order is issued in a discretionary proceeding, the court below is divested of jurisdiction. Notwithstanding the pending show cause order, the Fifth District Court of Appeals enforced the settlement agreement.

Petitioners submit that the Fifth District Court of Appeal acted without jurisdiction in affirming and enforcing the settlement agreement in its decision, which materially effected an issue on review before this Court. As a result, that crucial portion of the order below is a nullity under *Jones v. Jones*, 703 So. 2d 501 (Fla. 1st DCA 1997).

#### JURISDICTION ISSUE V

DOES THE DECISION ON REVIEW EVIDENCE A  
DEPARTURE BY THE APPELLATE COURT FROM THE  
ESSENTIAL REQUIREMENTS OF LAW?

Petitioners submit that the action of the court below in affirming a so-called stipulated judgment strenuously objected to and appealed, which judgment was entered nearly two years after decedent's will was admitted to probate, together with the validation of a contested settlement agreement which was the subject of a show cause order pending in this Court, and the misapplication of case law in the decision, can best be described as a departure from the essential requirements of law by the Fifth District Court of Appeal in Case No. 5D02-2328. This Court may take jurisdiction if it so finds. *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987).

#### CONCLUSION

Petitioners seek a level playing field, and a day in Court. Four years of litigation and appeals have not resulted in one fact finding, evidentiary hearing in the proceedings below, heavily weighted toward Respondents after admission of the will. The contrast with the claimant in *Mann v. Etchells*, 182 So. 198 (Fla. 1938) could

hardly be greater. If the Supreme Court still has the duty and responsibility "not only to administer the law impartially but to see that in all cases right and justice shall prevail," *Mann, supra*, p. 201, Petitioners respectfully petition this Court to do so herein.

Respectfully submitted,

\_\_\_\_\_  
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son and heir of decedent, Petitioner

\_\_\_\_\_  
MARIAN E. TELLMAN McCLUNG, pro se  
Assignee of CATHERINE M. WEISS,  
daughter & heir of decedent, Petitioner

#### **CERTIFICATE OF COMPLIANCE**

Petitioners certify that the foregoing Request for Enlargement of Time complies with the font requirements of Fla. App. R. P. 9.100(l), and state that this document has been prepared in Times New Roman Font, 14-Point.

#### **CERTIFICATE OF SERVICE**

Petitioners certify that copy hereof has been mailed to Patricia F. Anderson, Esq., Attorney for Appellees Glenn Shannon McClung and Christine Frazier, 447 Third Avenue North, Suite 405, St. Petersburg, Florida 33701, to Joseph M. Mason, Esq., McGee and Mason, Attorney for Virginia Solomon and Heather High, daughters of decedent, 101 South Main Street, Brooksville, FL 34605-1900, to Craig J. Freger, Esq., 1162 Croton Court, Weston, FL 33327; to Dean McClung, son of decedent, 401 Longwood Drive, Brooksville, FL 34601-2208, to Kenneth Brown, nephew of decedent, 6513 West Ost Street, Homosassa, FL 34446; and to Sharon Rags, niece of decedent, 1540 Broad Street, Brooksville, FL 34604; this 26th day of April, 2004.

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\* The assignment of all rights and obligations with regard to decedent's estate was formalized in accordance with the trial court's directions at the March 1, 2000 hearing. See, *Giles v. Sun Bank, N.A.*, 450 So. 2d 248 (Fla. 5th DCA 1984); *Dove v. McCormick*, 698 So. 2d 585, 589 (Fla. 5th DCA 1997).

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FIFTH DISTRICT**

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**A P P E N D I X  
TO  
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