

IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC 10-823

SOLVEIG EDNA HILL,

Petitioner,

vs.

DCA Case No. 1D09-4020

L.T. No. 07-185 PR

DOUGLAS DAVIS, as Personal  
Representative of the Estate  
of Kristine E. Davis, deceased,

Respondent.

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

**RESPONDENT'S AMENDED ANSWER BRIEF REGARDING JURISDICTION**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents . . . . .	i
Table of Citations. . . . .	ii
Preliminary Statement . . . . .	iii
Statement of the Case and Facts . . . . .	1
Summary of Argument . . . . .	2
Argument	
THIS COURT SHOULD DECLINE TO EXERCISE DISCRETIONARY JURISDICTION, BECAUSE THE DECISIONS IN <i>ANGELUS v PASS</i> AND IN THE DISTRICT COURT BELOW ARE NOT IRRECONCILABLE.	3
Conclusion. . . . .	6
Certificate of Service. . . . .	6
Certificate regarding font. . . . .	6

TABLE OF CITATIONS

<u>Cases</u>	<u>Pages</u>
Angelus v. Pass, 868 So.2d 461 (Fla. 3d DCA 2004)	<i>in passim</i>
Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983)	3
Gibson v. Maloney, 231 So.2d 823 (Fla. 1970)	3
Hill v. Davis, 31 So.2d 921 (Fla. 1 <sup>st</sup> DCA 2010)	<i>in passim</i>
 <u>Statutes:</u>	
Fla. St. section 733.212	2,3
Fla. St. section 733.304	2,3,5

**PRELIMINARY STATEMENT**

This is a review taken from a decision of the First District Court of Appeal in *Hill v. Davis*, 31 So.2d 921 (Fla. 1<sup>st</sup> DCA 2010). In this brief, petitioner SOLVEIG EDNA HILL will be referred to as petitioner. Respondent DOUGLAS DAVIS, as Personal Representative of the Estate of Kristine E. Davis, deceased, will be referred to as DOUGLAS or "the Personal Representative". The decedent will be referred to as "the decedent" or KRISTINE. References to the pleadings in the record on appeal will be to "R-[volume number]-[page number]".. Unless otherwise stated, the author of this brief has not supplied any emphasis to quotes.

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts omits the First District's recognition of material factual distinctions between *Hill* and *Angelus*:

In her Statement (p. 3), petitioner quotes only a portion of the decision in *Hill* below. The remainder of the decision reflects that the panel below "disagreed with the sweeping holding in *Angelus*."

The First District, below, noted that

. . . [t]his is not a situation where the factual basis for the claim of disqualification was concealed from appellant or arose after the three-month period [in Fla. St. section 733.212(3)] had expired . . . ,"

distinguishing the case at bar from *Angelus*.

The respondent does, however, acknowledge that the district court below itself certified conflict with *Angelus*.

## SUMMARY OF ARGUMENT

THIS COURT SHOULD DECLINE TO EXERCISE DISCRETIONARY JURISDICTION, BECAUSE THE DECISIONS IN *ANGELUS v. PASS* AND IN THE DISTRICT COURT BELOW ARE NOT IRRECONCILABLE. In *Angelus v. Pass*, 868 So.2d 571 (Fla. 3d DCA 2004), relied on for conflict by petitioner and the district court below, (a) the personal representative, in order to procure his appointment, falsely stated under oath that he was a nephew of the decedent, and (b) the personal representative was never qualified to serve, because he was a non-resident and related only by collateral consanguinity (rather than lineal consanguinity as required under law).

In the case at bar, as expressly reflected in the decision below, this case does not present a situation where (a) the factual basis for the disqualification was not known to petitioner, was concealed from the petitioner or the trial court, or the appointment procured by false statements under oath, or (b) the Personal Representative was disqualified *ab initio* under the requirements of section 733.304.

Because of these material factual distinctions, there is no irreconcilable conflict between *Angelus v. Pass* and the district court decision herein, and jurisdiction should be declined.

## ARGUMENT

In her petition and brief supporting this Court's jurisdiction, petitioner contends that the decision below irreconcilably conflicts

with *Angelus v. Pass*, within the meaning of Article V, Section 3(b)(4) of the Florida Constitution. It is a conflict of "decisions", rather than of opinions or reasoning, which supplies jurisdiction for review by certiorari. *Gibson v. Maloney*, 231 So.2d 823 (Fla. 1970). Where a cause is before this Court based on an apparent conflict between the decision therein and that of another district court, but the action is distinguishable on its facts from the case cited in conflict, this Court should decline jurisdiction. *Department of Revenue v. Johnston*, 442 So.2d 950 (Fla. 1983). Because of case-dispositive differences between the operative facts of *Angelus* and those in the case at bar, no irreconcilable conflict exists, and jurisdiction should be declined.

The "decision" in *Angelus* can properly be characterized as this: Where an unqualified non-resident personal representative procures his appointment by falsely stating (under oath) that he is related within the necessary degree to the decedent, then the three-month period in Fla. St. section 733.212 does not operate to bar the removal of the fraudulently-appointed unqualified person under section 733.304. In arriving at that result, the *Angelus* panel expressly noted that there was a continuing statutory and procedural obligation on the personal representative - a "fiduciary" obligation, in the words of the Third District panel - to provide notice in the event that s/he is not qualified to serve. *Angelus*, 868 So.2d at 572-573.

Fla. Probate Rule 5.310 places the burden on the personal representative, as a fiduciary, to provide notice in the event the personal representative is not qualified to

serve.

Thus, in *Angelus*, not only did the unqualified personal representative fraudulently induce the probate court to appoint him in the first place, by false statement under oath, but he failed to live up to his obligations to provide notice to the probate court and interested parties of his lack of qualification, a fact apparently known only to him.

Conversely, in the case at bar, the relationship of the personal representative as the son of the decedent's deceased spouse was well understood by the petitioner and the probate court from the inception of the case. Further, the respondent personal representative made no misstatement of fact to the probate court in order to gain his appointment, or to induce the petitioner HILL to forego her right to challenge that appointment, or to delay petitioner HILL in the assertion of her rights.

This distinction was noted by the panel below:

This is not a situation where the factual basis for the claim of disqualification was concealed from appellant [petitioner HILL] or arose after the three-month period had expired.

*Hill*, 31 So.3d at 924.

The decision below was that, where the personal representative did not procure his appointment fraudulently, the three-month time period in section 733.212 should apply. The decision in *Angelus* was that, where the unqualified personal representative obtained his position by false statement under oath, the time for correcting that

fraud upon the court cannot run when the personal representative has not complied with his fiduciary obligation under rule to report his lack of qualification to all interested parties and to the probate court.

Furthermore, *Angelus* holds that "the three-month statute of limitations period contained in Section 733.212(3) does not apply to bar *Angelus*'s petition because Pass was never legally qualified to serve as personal representative at any time." Pass was never legally qualified because, as nephew-in-law, he was related only by collateral consanguinity to decedent's spouse. In the case at bar, the Personal Representative, as ~~son-in-law~~ *step-son* of decedent, is legally qualified because he is related by lineal consanguinity to decedent's spouse as required under Fla. St. section 733.304.

There is no irreconcilable conflict between the decisions in *Angelus* and in the case at bar, and jurisdiction should therefore be declined.

**CONCLUSION**

This Court should decline to exercise jurisdiction, as there is no irreconcilable conflict between the decision in *Angelus v. Pass* and the case at bar.

**CERTIFICATE OF SERVICE**

I CERTIFY that a copy of the foregoing was furnished by regular U.S. mail to H. Guy Green, Esq., 4387 Clinton Street, Marianna, FL 32446, and to Louis K. Rosenbloum, Esq., 4300 Bayou Blvd., Suite 36, Pensacola, FL 32503-2671, co-counsel for petitioner Hill, this June 4, 2010.

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**CERTIFICATE OF COMPLIANCE REGARDING FONTS**

I HEREBY CERTIFY that the foregoing brief complies with the font and form requirements of Fla. R. App. P. 9.210(a)(2).

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