

Case Number. **22-6354**

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS JAMES MCNULTY,

Petitioner,

VS.

ROSE OLIVO, ANTHONY OLIVO,
RENE COLEY

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT**

Legal Mail
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OCT 19 2022
Dade C.I.

TJ

THOMAS JAMES MCNULTY, PRO SE
Dc# 010308
DADE CORRECTIONAL INSTITUTION
19000 S.W. 377th Street
FLORIDA CITY, FLORIDA 33034

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QUESTIONS PRESENTED

1. Whether a lawful sole heir/beneficiary to an interstate estate, who is a convicted felon, awaiting the appointment of a personal representative, would be procedurally barred from petitioning the court, pro se, in an attempt to protect his or her lawful inheritance and the estate assets, which is his or hers by operation of law, from theft, fraud, etc, or any other improper means of unlawful procurement or unlawful distribution of the estate assets?
2. What are the rights of a sole heir/beneficiary before a personal representative is appointed or as in this case, when the court fails to appoint a personal representative, after rejecting all applicants?
3. Whether §733.303(1)(a) (the disqualification of a person for appointment as personal representative based on a felony conviction) is unconstitutional as applied in that it denies the lawful sole heir/beneficiary his or her First Amendment right to pursue claims pro se while appointment of a personal representative is pending or if no appointment occurs?
4. Whether §733.303(1)(a) (the disqualification of a person for appointment as personal representative based on a felony conviction) is unconstitutional as applied when it prevents the sole heir, who is a convicted felon and indigent, from instituting any civil actions on behalf of the decedent, the estate or him or herself, to recover property and other assets unlawfully procured before and after the decedent's death?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no cases in other courts that are directly related to the case in this Court.

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

PRAYER

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the District Court of Appeal of the State of Florida Fourth District appears at Appendix A to the petition and is unpublished. The opinion of the Circuit Court of the Nineteenth Judicial Circuit in and for St. Lucie, County, Florida appears at Appendix B to the petition and is also unpublished.

JURISDICTION

The date on which the District Court of Appeal of the State of Florida Fourth District decided my case was July 21, 2022. No petition for rehearing was filed. Jurisdiction is conferred by 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, the following:

Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, the following:

... nor shall any State deprive any person of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

Petitioner's legal issues started on May 28, 2018, when his mother (the decedent) passed away intestate and thereafter learning that the decedent monies and properties were misappropriated by forgery and theft. This resulted in petitioner filing a civil complaint on December 7, 2018 in the St. Lucie county Circuit Court, against his daughter and various other named defendants, alleging that prior to the death of the decedent and for months after her death, monies, properties, bank accounts, money market accounts and a motor vehicle title, totaling in excess of \$950,00.00 (nine-hundred and fifty-thousand dollars) were misappropriated and procured by fraud, breach of contract, fraud by inducement, conversion, breach of a

fiduciary duty and exploitation of the elderly. (SR-pg.-127 at paragraph-1) & (SAR-pg.-144 at paragraphs 4 & 5).

Petitioner being incarcerated at the time of the decedent's death and attempting to protect his intestate inheritance as a direct descendant to the decedent and lawful heir to the estate, petitioner filed a pro-se complaint in his own name and in the name of the decedent, against (8) individual defendants. The case was assigned to Honorable Judge Barbara W. Bronis, under Civil case Number 2018-CA-2262 (SR-PG.-127 at paragraph-1) & (SR-PG. 779 at paragraph-3).

After a copy of this complaint was served upon defendants and their attorneys, all of the defendants filed motions seeking dismissal on the pleadings, alleging that petitioner "lacked standing" to bring suit because he was not the personal representative of the estate and that a dead person could not be named plaintiff (SR-pg.-145 at paragraph-4).

After an evidentiary hearing, it was determined by Judge Bronis that petitioner lacked standing to commence action without an active In rem proceeding being before the court. Judge Bronis relied on, IN RE: 73-Engle-Related cases, 239 So.3d 166 (Fla. 1st DCA 2018), to support dismissal (SR-pg.-127 at paragraph-1).

On July 9, 2019, petitioner's civil complaint under case number 2018-CA-2262 was dismissed without prejudice. The action was stayed for 90-days with specific instructions from Judge Bronis on how petitioner was to gain standing.

Petitioner was directed by order, that within this 90-day stay, petitioner would open up a probate proceeding and file his amended complaint within this 90-day stay; petitioner's failure to do so would result in this civil action being dismissed with prejudice and petitioner would then be forever barred from filing suit (SR-pg.-127 at paragraph-1). (SR-pg.-146 at paragraph-2, 3).

Petitioner complied with Judge Bronis' order to the letter. Within this 90-day stay, on September 24, 2019, the Petition for Formal Administration for the Estate of Betty Jane Contillo was opened under probate file number 2019-CP-1191 and petitioner's amended civil complaint was filed on October 7, 2019 under the same case number 2018-CA-2262, the probate proceeding was assigned to Judge Bronis as well (SR-pg.-1100-103) & (SR-pg.-127 at paragraph-1).

At the January 2020 hearing conducted by Judge Bronis, after petitioner's standing was established, Judge Bronis directed petitioner under related civil case number 2018-CA-2262 to restyle the caption of his amended complaint from "McNulty an individual to the estate." (2nd SR-pg. 789).

On June 4, 2020, petitioner served a Demand for Discover pursuant to Florida Probate Rule (Fla.Prob.R.) 5.080 (a)-(12) & (c) upon Mrs. Plain who was an interested party within the estate administration, demanding documents to aid in the proper administration of the estate (SR-pgs.-263-267).

On August 25, 2020, Mrs. Plain's counsel filed objections to petitioner's demand for discovery claiming that petitioner "lacked standing" because petitioner was not the "personal representative" of the estate. Mrs. Plain's counsel further argued that petitioner would need to have an adversarial proceeding pending in order to engage in any discovery (SR-pgs.-244 & 260-at paragraphs-6, 7, 8, 9 10, 11 & 12).

On September 4, 2020, based on Mrs. Plain's objections, petitioner filed a motion to compel Discover pursuant to Fla.Prob.R. 5.080(a)(12) & (c). On September 9, 2020, by Notice of Hearing, an evidentiary hearing was set for September 16, 2020 at 1:30 p.m. for 30 minutes before Judge Bronis, with respect to these unresolved discover issues. (SR-pgs.-261 & 269) & (SR-pgs.-270-271).

On September 9, 2020, petitioner filed a pro-se application on behalf of the estate seeking an order based on the improper distribution of payment liability of distributee or payee pursuant to §733.812 (2014) Florida Statute (2014) against fellow beneficiary, Scott E. Werth, seeking to invalidate the decedent's 2009 Nissan Rogue motor vehicle title based on forgery, as part of petitioner's attempts to return numerous assets back into the estate for proper distribution in accordance with the law (SR-pgs.-280 at paragraph-1) & (SR-pgs.-28, 281 & 282).

Also on September 9, 2020, petitioner filed a pro-se application on behalf of the estate seeking a clerk ordered default against fellow beneficiary Scott E. Werth

pursuant to Florida Ruled of Civil Procedure 1.500(a) and Fla.Prob.R 5.025, based on his willful failure to file or serve any documents within the probate proceedings as required by law. By order of the Deputy Clerk of Court dated September 14, 2020, petitioner's application seeking default was granted in its entirety (SR-PGS.-283-285).

On September 16, 2020, an evidentiary hearing was held with respect to petitioner's discovery demands and based on petitioner previously been granted standing by Judge Bronis, these objections were overruled and by order of the court Mrs. Plain was ordered to comply with the discovery demand within 30-days of the hearing (SR-pgs.-293-294).

On September 22, 2020, petitioner filed a second pro-se application on behalf of the estate seeking court ordered default against beneficiary Scott E. Werth pursuant to Fla.Prob.R. 5.025, 5.080(a)(12) & (c) and Fla.R.Civ.P. 1.500(a) (SR-pgs.-285 & 286). An evidentiary hearing was scheduled for September 29, 2020 at 1:45 p.m. for 30 minutes in from of Judge Bronis (SR-pgs.-300).

On September 30, 2020, by order based on this evidentiary hearing petitioner's pro se application on behalf of the estate seeking court ordered default pursuant to Fla.Prob.R. 5.025, 5.080(a)(12) & (c) and Fla.R.Civ.P. 1.500(a) and petitioner's application for improper distribution pursuant to Fla. Stat. §733.812 was decided by Judge Bronis and the application was granted in part, beneficiary

Scott E. Werth was held in formal default based on his failure to file or serve any response to the Amended Petition for Administration as required by law (SR-pgs.-309-310).

Judge Bronis further ruled that petitioner's application for improper distribution pursuant to §733.812 was neither granted nor denied, petitioner was ordered to formally serve beneficiary Scott E. Werth by formal notice, then after 20 days if he fails to responds then the court would entertain the application(SR-pgs.-309-310).

On October 2, 2020, in conformity with Judge Bronis September 30, 2020 order, petitioner served formal notice upon beneficiary Scott E. Werth in compliance with Fla.Prob.R. 5.040(a) and filed proof of service with the court on October 12, 2020 (SR-pgs.-367 & 369).

On October 15, 2020, counsel for Mrs. Plain filed a "Motion for Clarification and Response to Petitioner's Request for Emergency Case Management Conference" again, attempting to challenge Judge Bronis' authority and discretionary powers with respect to petitioner's standing and the "leeway" Judge Bronis was affording petitioner as a "pro se litigant" (SR-pgs.-374-377).

On October 16, 2020, petitioner filed and served a formal complaint against Mrs. Plain on behalf of the estate pursuant to Fla. Stat. §733.107(2) with formal

notice of an adversary proceeding pursuant to Fla.Prob.R. 5.040(a), 5.025(a) (SR-pgs.-378-391).

On October 30, 2020, after a 2-hour evidentiary hearing conducted by Judge Bronis she decided the following issues resulting in two separate fact specific orders being issued on November 2, 2020, the issues decided were as follows

1. Lisa Fener's objections to Compel Deposition;
2. Lisa Fener's Petition seeking appointment as the Personal Representative to the estate of Betty Jane Contillo;
3. Thomas McNulty's Emergence Case Management;
4. Thomas McNulty's petition for Improper Distribution;
5. Kristin Plain's motion for clarification and response to McNulty's Request for Emergency Case Management Conference. (SR-pgs.-457-460).

On December 14, 2020, by stipulation /settlement agreement of dismissal with prejudice as to any and all claims against Kristin Jo Plain and Benjamin Benton Plain was executed by petitioner on behalf of the estate of Contillo (SR-pgs.-478-481).

On December 16, 2020, by order of dismissal with prejudice by Judge Bronis declaring that the parties to the stipulation/Settlement Agreement included only interested persons Kristin Jo Plain and Benjamin Benton Plain and only the beneficiaries to the estate and on behalf of the estate (SR-pgs.-482).

On January 13, 2021, Attorney George E. Reres, Esquire, filed a request for appointment as Administrator Ad-Litem in case number 2019-CF-001191, informing the trial court that petitioner was incarcerated and was the only remaining interested heir to this estate (SR-pgs.-483 at paragraphs-3 & 4).

On January 20,, 2021, 'Attorney Reres' application for appointment as Administrator Ad-Litem was granted by successor Judge Buchanan acknowledging petitioner "as the only lawful heir of the decedent's estate (SR-pgs.-485 at paragraph-2).

On March 22, 2021, Attorney Reres filed a motion to withdraw as Administrator Ad-Litem for the estate of the decedent with a Waiver of Consent from petitioner (SR-pgs.-515-518 at paragraphs-1-5).

On March 23, 2021, an order was issued granting Attorney Reres' motion to withdraw as Administrator Ad-Litem in its entirety by successor Judge Buchanan, and directing that all communication including service of pleadings and other documents shall be sent to petitioner (SR-pg.-524).

On April 2, 2021, a petition was filed to re-nominate POA-Fener as the personal representative of the estate of the decedent (SR-pgs.-528-547).

On April 22, 2021, an order was issued denying petition to re-nominate POA-Fener as the personal representative of the estate of the decedent (SR-pg.-558).

On the 23rd day of August 2017, respondents Rose and Anthony Olivo entered into a Rental Lease Contract with the decedent through their designated realty agent respondent Rene Coley for a residential rental property located at 629 S.W. Jeanne Street, Port St. Lucie, Florida (R-pg.-10 at paragraph-8), (R-pg. 18 at paragraph-1).

On the 23rd day of May 2018, while the decedent was incapacitated and on her deathbed, Mr. and Mrs. Plain contacted respondent Rene Coley to inquire how they could obtain the last month's rent and security deposits for the decedent's rental residence. In addition, Mr. and Mrs. Plain asked respondent Rene Coley, what the proper procedure would be to vacate the premises on behalf of the decedent (R-pg.-10 at paragraph-14) (R-pg.-31, 32).

Respondent Rene Coley advised Mr. and Mrs. Plain that on the advice of her "legal department" that they should 'forge' the decedent's name on the rental release documents and vacate the premises immediately, that Mr. and Mrs. Plain should not wait or attempt to go through the probate court, for that process could and would most likely take forever. (R-pg.-10 & 11 at paragraph-15).

On the 23rd day of May 2018, after respondent Rene Coley advised Mr. and Mrs. Plain to forge the decedent's name on the document entitled "General Release by tenant," respondent Rene Coley then returned the decedent's last month's rent and security deposit to Mr. and Mrs. Plain, totaling two-thousand and four-hundred

dollars (\$2,400.00); in addition, respondent Rene Coley permitted Mr. and Mrs. Plain to make illegal entry into the decedent residence, where they removed all of the decedent's personal property (R-pg.-18 at paragraph -1).

Mr. and Mrs. Plain were not parties to the Rental Lease Contract, nor did they fit the description of the decedent's heirs, estate, or legally appointed representatives, then or anytime thereafter (R-pg.-28).

Sadly, within 15-days after the decedent being diagnosed with untreatable terminal stage (4)-lung cancer, she was released from Tradition Medical Center and on the 28th day of May 2018, Betty Jane Contillo was pronounced deceased from her illness (R-pg.-10 at paragraphs-11, 12 & 13) (R-pg.-30, 31).

The actions of respondent Rene Coley caused the decedent's estate and the petitioner as the sole heir to incur losses in the amounts of fifty-thousand dollars (\$50,000.00) in jewelry from the decedent's safe, and another twenty-thousand dollars (\$20,000.00) in household furniture and accessories that was unlawfully removed from her residence (R-pg.-10 at paragraph-14) (R-pg.-31, 32).

Hospice records confirm that the decedent was incapacitated and unable to self-report and was incapable of rendering her signature on the 23rd day of May 2018. Petitioner as a lawful beneficiary within the estate, attempted to contact respondent Anthony Olivo in writing and actually served respondent Anthony Olivo with a lawful subpoena in his attempt to obtain the details and the whereabouts of

the decedent's personal property. This correspondence and subpoena went unanswered. (R-pg.-11 at paragraphs-18, 19) & (R-pg.-30 & 31).

Since petitioner's attempts to contact respondent Anthony Olivo, were unsuccessful, petitioner had his Power of Attorney (POA-Fener) contact respondent Anthony Olivo by phone at his New York residence, in his attempt to obtain the information regarding the whereabouts of the decedent's monies and personal property that were supposed to be located at her 629 S.W. Jeanne Street rental residence at the time of her death. Respondent Anthony Olivo instructed (POA-Fener) to contact respondent Rene Coley at Atlantic Shores Realty Inc., who was his lawful realty agent in regard to the rental documents, related to petitioner's inquires (R-pgs.-11, 12 at paragraph-19, 20 & 21).

POA Fener made email contact with respondent Rene Coley informing her that she had spoken with respondent Anthony Olivo and at his direction respondent Rene Coley was authorized to provide the requested information that was demanded in the subpoena that was lawfully served upon respondent Anthony Olivo.

Respondent Rene Coley's response to POA-Fener's email was that on the advice of her "legal department" in order to obtain any rental documents from her personally she would need to be served with a lawful subpoenas. As requested, respondent Rene Coley was immediately served with a lawful subpoena and that's

when petitioner received and discovered the forged document by Mr. and Mrs. Plain (R-pgs.-11, 12 at paragraph-20, 21 & 22), (R-pg.-28) & (SAR-pg.-311).

On April 23, 2021, petitioner filed his complaint against the herein named respondents in the St. Lucie County Circuit Court (R-PGS.-8-31).

On May 2, 2021 POA-Fener's motion seeking a rehearing (SR-pgs.-570-579) and was denied on _____ SR-pg.-586).

On June 8, 2021, respondents filed their motion to dismiss on the basis that petitioner was not the personal representative of the estate therefore he lacked standing to bring the action (R-pg.-49 at paragraph-16).

On July 8, 2021, petitioner filed a response in opposition to the respondents' motion to dismiss claiming to be the real party in interest, pursuant to Florida Rules of Civil Procedure 1.210(a) (R-pgs.-58 at paragraphs 4-6 & 59 at paragraphs 1-2).

On August 30, 2021, the trial court dismissed petitioner's complaint with prejudice for lack of standing based upon petitioner not being the personal representative to his deceased mother's estate (R-pg.-64).

On September 29, 2021, petitioner filed his notice of appeal.

On July 21, 2022, the District Court of Appeal, Fourth District, per curiam affirmed without an opinion or citation to any authority.

REASONS FOR GRANTING THE WRIT

The main reason for granting this writ is because this is a case of first impression whereas this Court would be the first to determine the constitutionality of §733.303(1)(a), Florida Statutes, as applied to cases that are in the same legal posture as the present case when the convicted felon is the 'sole heir' of the decedent's estate. At the present time, under Florida law, see Crosby v. Sumter Cnty., No. 5:06cv217, 2007 U.S. Dist. LEXIS 67799, 2007 WL 2700976, at *4 (M.D. Fla. Sept. 13, 2007) (stating "[u]nder Florida law the Plaintiff cannot prosecute the personal claims of his grandmother against these Defendants because Florida law expressly prohibits convicted felons from serving as personal representatives of an estate."), this does not make much sense in light of the circumstances present in this case, and others in the same circumstances.

The applicable probate statutes require only that persons seeking to qualify to act as a personal representative not be "incompetent to discharge the duties of a personal representative" as a result of "sickness, intemperance, or want of understanding," section 733.302, Florida Statutes (1993) or not be "mentally or physically unable to perform the duties," section 733.303(1)(b), Florida Statutes (1993).

Although the probate statutes do not expressly impose a general requirement of "good moral character" for persons seeking to qualify as a personal

representative, the circuit court has the inherent authority to consider a person's character, ability and experience to serve as personal representative and, if the record supports the conclusion that the person lacks the necessary qualities and characteristics, the discretion to refuse to appoint even a person occupying a position of statutory preference who is not specifically disqualified by the statute.

In re the Estate of Snyder, 333 So. 2d 519 (Fla. 2d DCA 1976).

Thus, this Court grant certiorari and determine whether §733.303(1)(a), Florida Statutes is unconstitutional as applied to this case and case in the same posture as the present case.

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Dated: October 19, 2022.

Respectfully submitted,

Thomas James McNulty

Thomas James McNulty-010308
Dade Correctional Institution
19000 S.W. 377th Street
Florida City, Florida 33034-6409