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## INTRODUCTION

On September 8, 2009 Zofia Sulek executed her Last Will and Testament as prepared by Grazyna K. Markiewicz. Mrs. Sulek retained Attorney Markiewicz. specifically because she is fluent in Polish and Mrs. Sulek was not fluent in English. Mrs. Sulek prepared a handwritten "Testament" in Polish on August 25, 2009 where she clearly stated her desires regarding the distribution of her estate in her native language. This Testament specifically listed the same six beneficiaries as the admitted Last Will: Maglforzata Polkowska-Sulek, Katarzyna Olszewska-Sulek, Radoslaw Kowalski, Wieslawa Sas, Irena Stankiewicz and Agata Maciszewska nee Sulek.

Prior to the signing of the will Mrs. Sulek verbally confirmed that her desires were properly written and she was assured by her attorney that they were. In fact Attorney Markiewicz executed an affidavit indicating that she drafted the will and that during the execution of the will it was the intent of Ms. Sulek to bequeath and devise all of her real properties and personal properties, tangible and intangible, to her family and friends in Poland. Affiant further states that it was Mrs. Sulek's specific intent to bequeath and devise all of her properties to the following: Maglforzata Polkowska-Sulek, Katarzyna Olszewska-Sulek, Radoslaw Kowalski, Wieslawa Sas, Irena Stankiewicz and Agata Maciszewska to share and share alike. The affiant further stated that Mrs. Sulek was of sound mind and memory and was not acting under the undue influence of any person.

The relevant portion of Mrs. Sulek's will, as prepared by Attorney Markiewicz, states:

I, Zofia Sulek, ... do hereby make, publish and declare this instrument to be my Last Will and Testament, hereby revoking and making null and void all other Wills heretofore made by me.

#### **ITEM I**

I DIRECT that all of my debts, funeral and administrative expenses be paid out of my estate.. and any and all... taxes, levied or assessed by reason of my death, shall be paid by my Executor out of my residuary estate...

#### **ITEM II**

I give, devise and bequeath all of my household, clothing, jewelry, books, works of art and similar articles of tangible personal belongings I give and bequeath [sic] to my family residing in Poland: MALGORZATA POLKOWSKA-SULEK, KATARZYNA OLSEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ and AGATA MACISZEWSKA, absolutely and in fee simple, share and share alike.

#### **ITEM III**

In the event MALGORZATA POLKOWSKA-SULEK, KATARZYNA OLSEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ and AGATA MACISZEWSKA, predecease me or fail to survive me..., leaving child or children surviving said child or children shall take the share of the deceased parent as if the deceased parent survived me.

#### **ITEM IV**

I direct that the Real Property located at 144 East Dawnwood, Seven Hills, Ohio be sold and the proceeds divided among my family and friends: MALGORZATA POLKOWSKA-SULEK, KATARZYNA OLSEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ and AGATA MACISZEWSKA, share and share alike.

Mrs. Sulek died on November 23, 2009. On December 16, 2009 Vicki R was appointed as Executrix of the Estate of Zofia Sulek, deceased and the Will was admitted to probate.

Executrix filed a will construction complaint on February 23, 2011 stating that the will did not contain a rest and remainder clause. This action joined all six appellee beneficiaries and Mirosław Szymanczak, nephew of Mrs. Sulek. A Suggestion of Death was later filed by the Executrix and Zuzanna Szymanczak, spouse of decedent's nephew, was joined. A hearing was held on July 5, 2011 where only the executrix and her counsel appeared as all the other parties reside in Poland. The exhibits introduced included a certified copy of Will, the affidavit of Attorney Markiewicz and the holographic will or "Testament" prepared by decedent on August 25, 2009 in Polish and translated into English.

The Magistrate's decision was issued on October 6, 2011 concluded that the evidence was inconsistent and that the residuary estate should pass intestate. However the magistrate clearly believed the language Sulek used in the will "created doubt as to the meaning" of her will, i.e., that a latent ambiguity existed, this was adopted in the Judgment Entry. *Radzisewski v. Szymanczak*, 2012-Ohio-2639 at ¶17. The Magistrate's Decision stated that the "Testament" was inconsistent with the other evidence as it did not include the name of Agata Maciszewska. However this is inaccurate as the name "Agata Sulek, second daughter Sulek" was clearly written by Mrs. Sulek in her Testament but the name was not numbered separately, but together with the name "Katarzyna Olszewska Sulek... daughter of Andrezej and Bozena Sulek".

Objections to the Magistrate's Decision were timely filed on October 25, 2011, with leave of court. Probate Court Judge Russo overruled objections and entered judgment entry on December 1, 2011. Appellee beneficiaries timely filed an appeal to the Eighth District Court of Appeals on December 30, 2011.

The Eighth District Court of Appeals issued its unanimous judgment entry reversing and remanding the case to the Probate Court of Cuyahoga County on June 14, 2012. From that judgment Appellant Zuzanna Szymanczak has filed her Notice of Appeal in the instant case.

**THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

A direct appeal as of right and a discretionary appeal are dramatically different as the Supreme Court of Ohio "sits to settle the law, not to settle cases," and does not engage in "'error correction' regarding the application of settled law" to the facts of a particular case. *Baughman v. state Farm Mut. Auto Ins. Co.* (2000), 88 Ohio St. 3d 480, 492 (Cook, J., concurring and citing Oh. Const. Art. IV Sec. 2). This Court only hears appeals that present "substantial"

constitutional questions or questions of “public or great general interest.” Sup. Ct. Prac. R. III Sec. 6; Oh. Const. Art. IV Sec. 2(B).

*In Obtaining Certification in the Supreme Court of Ohio: Cases of Public or Great General Interest*, 18 Case W. Res. L. Rev. 32, 33 (1966), the Honorable Justice Paul M. Herbert wrote that the phrase “public or great general interest” in the Ohio Constitution denotes two separate classes of cases (1) those of public interest and (2) those of great general interest. No governmental bodies, boards, or commissions are parties to this case. Therefore it cannot be deemed a matter of public interest under Justice Herbert’s interpretation of that phrase. *Id.*

“[T]he sole issue for determination at the hearing [on a motion for jurisdiction] is whether the cause presents a question or question of public or great general interest *as distinguished from question of interest primarily to the parties.*” *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254. Emphasis added.

Furthermore this case does not present a question of great general interest as it presents no substantial constitutional questions nor does it question any constitutional standards. This case provides no meaningful guidance to other courts nor will it result in a flood of claims because it is so fact specific. Appellant states that the general interest is an interest in reasonable and consistent application of the law. Here both the Probate Court and the Court of Appeals applied the same longstanding law regarding will construction. The Court of Appeals arrived at a different opinion due to the weight of evidence, not in changing the application of the law. Appellee submits that case is merely a question of interest to the parties.

The Eighth District reversed the probate court’s judgment in this action because “the magistrate misapplied the law to this case and did not properly consider the facts presented at the hearing.” *Radziewski* at ¶14.

Appellate courts review the probate court decisions regarding the construction of a will de novo. *Church v. Morgan*, 115 Ohio App.3d 477, 481, 685 N.E.2d 809 (4<sup>th</sup> Dist. 1996). Further, the appellate court reviews the judgment independently and without deference to the probate court's determination. *Belardo v. Belardo*, 187 Ohio App.3d 9, 2010-Ohio-1758, 930 N.E.2d 862, ¶7 (8<sup>th</sup> Dist.).

As this Court has frequently stated, “[i]n the construction of a will, the *sole* purpose of the court should be to ascertain and carry out the intention of the testator. Such intention *must* be ascertained from the words contained in the will. The court may consider extrinsic evidence to determine the testator's intention *only* when the language used in the will creates doubt as to the meaning of the will.” *Oliver v. Bank One, Dayton, N.A.* (1991), 60 Ohio St.3d 32, 34 (emphasis added). The Eighth District applied these principles faithfully. Its decision will not cause uncertainty amongst the Ohio courts.

A latent ambiguity is one that is not apparent from the language used or from the face of the instrument. *Conkle v. Conkle*, 31 Ohio App.2d 44, 285 N.E.2d 883 (5<sup>th</sup> Dist. 1972). A latent ambiguity can arise even if the language of the instrument is unambiguous and suggests only a single meaning, but some extrinsic fact or evidence creates the necessity for interpretation or a choice between two or more possible meanings, or if the words apply equally well to two or more different subjects or things. *Id.*

The words questioned here are the use of the phrase “all of my household” in conjunction with the phrase “fee simple” in the Last Will and Testament of Zofia Sulek. There is no “ordinary” use of these words because “all of my household” is an ambiguous phrase, as “all of my household *goods*” is commonly used to distribute personal property and the phrase “fee

simple” exclusively indicates real property. A latent ambiguity exists as both courts allowed and examined the aforementioned extrinsic evidence.

The same evidence was submitted to the appellate court, and the Eighth District stated that “[t]he magistrate nevertheless decided this evidence, even in light of the affidavit of the attorney who had drafted Sulek’s Ohio will, was somehow ‘inconsistent’ with the language Sulek used in her Ohio will. In this the magistrate erred.” *Radzisewski* at ¶22 citing *Shay v. Herman*, 85 Ohio App. 441, 83 N.E.2d 237 (1948).

Applying long-settled principles of law to construe a will does not give rise to an issue of public or great concern- it simply qualifies as the act of adhering to the law. The instant matter is a fact specific and narrow case with language issues and international components. The evidence is unique especially the attorney affidavit regarding the testator’s intent, as well as the handwritten will that was made about two weeks prior to the execution of her Last Will where Mrs. Sulek verbally confirmed that the same six beneficiaries would inherit her entire estate.

### ARGUMENT

**Appellant’s Proposition of Law No. 1: In construing the language of a will a court can only consider the four corners of the will to construe the testator’s intent and may not insert missing language in the will based upon construction of extrinsic facts.**

In the instant case the Eighth District clearly appropriately applied canons of will construction that have existed in Ohio for at least the past 138 years. Those canons are as follows:

1. In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator.
2. Such intention must be ascertained from the words contained in the will.

3. The words contained in the will, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appears from the context that they were used by the testator in some secondary sense.
4. All the parts of the will must be construed together, and effect, if possible, given to every word contained in it.
5. If a dispute arises as to the identify of any person or thing named in the will, extrinsic facts may be resorted to, in so far as they can be made ancillary to the right interpretation of the testator's words, but for no other purpose.

*Townsend's Executors vs. Townsend* (1874), 25 Ohio St. 477, 477 at syllabus.

These principles have guided Ohio's courts and formed the basis of many appellate decisions. These principles were reaffirmed as "the basic law guiding will interpretation" in *Polen v. Baker* (2001), 92 Ohio St.3d 563, 565, where, citing *Townsend*, it stated that "[i]t is axiomatic that [i]n the construction of a will the sole purpose of the court should be to ascertain and carry out the intention of the testator. This intent is to be gleaned from the words used. These words, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appear(s) from the context that they were used by the testator in some secondary sense.

The lack of a residuary clause and the language of the will, specifically the phrases "all of my household" used in conjunction with "fee simple", gave rise to a latent ambiguity thereby enabling both the probate court and the appellate court to employ the use of extrinsic evidence. The Eighth District also noted that Last Will provided that her funeral expenses should be paid out of her "residuary estate" although only the Ohio property was specifically bequeathed. Her Last Will only named the six appellees as beneficiaries.

The extrinsic evidence considered included the aforementioned attorney affidavit, the Last Will and the handwritten "Testament" dated August 25, 2009. The Testament and the Last

Will both only name the six beneficiaries. The attorney affidavit specifically states that it was Mrs. Sulek's intent to distribute her entire estate to the six beneficiaries. The Eighth District stated that "[b]ecause the magistrate failed to correctly apply the law to the facts adduced at the hearing, the probate court improperly adopted the magistrate's decision." *Radzisewski* at ¶23.

"It is the duty of the Court to construct a will. However the Court may only construe the language in the will. The Court cannot amend, insert, or interpolate a provision which was not written in the will." *Moore v. Deckeback*; 46 O.A. 381, 1933. The Court's actions were appropriate here: the latent ambiguity in the language construed was not limited to the term "household" as Appellant would have this Court believe. The devise stated "I give, devise and bequeath all of my household... absolutely and in fee simple, share and share alike." This phrase has no ordinary or technical meaning. Both the Probate Court and the Appellate Court agreed to this latent ambiguity in the language used.

The Court in this instance did not rewrite the Last Will and Testament of Zofia Sulek. Extrinsic evidence was properly considered to determine the meaning of the above cited phrase. The Magistrate's Decision specifically relies on the inaccuracy of the evidence presented in stating that the same six beneficiaries were not named in both the Last Will and the handwritten "Testament."

The Appellate Court specifically stated that the magistrate erred in considering the evidence presented as does Appellant- the translated handwritten will specifically names Agata Sulek, married name Agata Maciszewska. The numbering of the beneficiaries in this "Testament" listed Agata's name with Katarzyna under number 2 as from the same parents. The affidavit of Attorney Markiewicz clearly states that Mrs. Sulek intended to bequeath and devise all of her real and personal properties, tangible and intangible, to the named six beneficiaries.

The Court of Appeals reached the appropriate decision in this matter and so this Court should decline its discretionary jurisdiction.

**Appellant's Proposition of Law No. 2: When a party fails to timely object to a magistrate's decision under Civil Rule 53, the party waives the right to assert those objections as assignments of error in an appeal.**

The Magistrate's Decision was issued on October 16, 2011. Appellee beneficiaries reside in Poland. Their local attorney, Jakub Bonowicz, was given leave via telephone by the Court to nominally extend their time to file due to the time difference and service issues involved in the case and so the Objections were timely filed on October 25, 2011. Furthermore neither the probate Court nor the Appellate court found failure to timely file said objections.

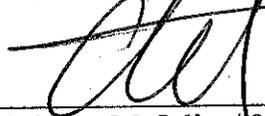
The Objections were timely filed and so Civil Rule 53(D)(3)(b)(iv) which states that a party shall not assign as error on appeal a court's adoption of any factual finding or legal conclusion of a magistrate... unless the party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b) as argued by Appellant is inapplicable.

### **CONCLUSION**

This is a basic will construction case. The probate court erroneously construed Mrs. Sulek's Will and the Eighth District unanimously reversed its judgment. Appellant is dissatisfied with that outcome and now wants this Court to review it, but this Court should decline to do so. Nothing about this case warrants invoking this Court's discretionary jurisdiction.

This Court should decline to assume jurisdiction over this appeal.

Respectfully submitted,



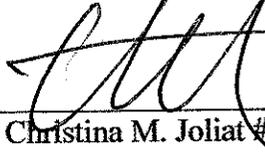
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Memorandum in Opposition of Jurisdiction of Appellees was sent this 21<sup>st</sup> day of August, 2012, via ordinary USD mail , postage pre-paid, to:

Teddy Sliwinski  
5800 Fleet Ave  
Cleveland, OH 44105

Ross S. Cirincione  
5306 Transportation Blvd.  
Garfield Heights, OH 44125



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