

IN THE SUPREME COURT OF OHIO

VICKI RADZISEWSKI,	)	On Appeal from the Cuyahoga County
EXECUTRIX, et al.	)	Court of Appeals, Eighth Appellate District
	)	
Appellee	)	
	)	Court of Appeals No. 12-097795
v.	)	
	)	Supreme Court No.: 12-1241
MIROSLAW SZYMANCZAK	)	
	)	
Appellant	)	
	)	

**MOTION FOR RECONSIDERATION OF DENIAL OF JURISDICTION  
IN DISCRETIONARY APPEAL OF APPELLANT ZUZANNA SZYMANCZAK**

TEDDY SLIWINSKI., ESQ.  
(S. Ct. No. 0024901)  
Counsel of Record  
5800 Fleet Ave.,  
Cleveland, Ohio 44105  
(216) 641-9191

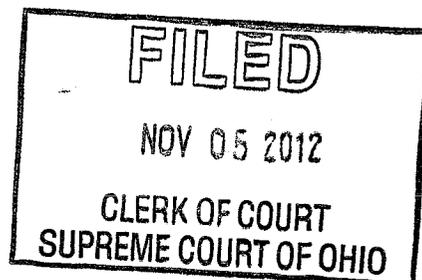
Attorney for Appellee

Vicki Radziewski, Executrix

CHRISTINA M. JOLIAT, ESQ.  
(S. Ct. No. 0077439)  
Counsel of Record  
P.O. Box 391531  
Solon, Ohio 44139  
(440) 941-5036;  
cmjoliatlaw@gmail.com  
Attorney for Appellees  
Kowalski, Olszewska-Sulek, Polkowski-Sulek  
Sas, Stankiewicz and Maciszewska

ROSS S. CIRINCIONE, ESQ.  
(S. Ct. No. 0024774)  
Counsel of Record  
5306 Transportation Blvd.  
Garfield Heights, Ohio 44125  
(216) 587-2120  
(216) 587-2131 ("fax")  
rsc@rgm-law.com

Attorney for Appellant  
Zuzanna Szymanczak



MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION  
OF APPELLANT ZUZZANA SZYMANCZAK

Now comes Appellant Zuzzana Szymanczak pursuant to Ohio Supreme Court Rule of Practice No. 11.2 and hereby moves this Honorable Court for reconsideration of its denial of jurisdiction in the case sub judice. Rule 11.2 states in relevant part:

**“S.Ct. Prac.R. 11.2 Motion for Reconsideration.**

- (A) Except as provided in S. Ct. Prac. R. 10.9(B), any motion for reconsideration must be filed within ten days after the Supreme Court’s judgment entry or order is filed with the Clerk.
- (B) A motion for reconsideration shall not constitute a reargument of the case and may be filed only with respect to the following:
  - (1) The Supreme Court’s refusal to grant jurisdiction to hear a discretionary appeal or the dismissal of a right as not involving a substantial constitutional question...”

The Court’s entry declining to accept jurisdiction to hear the instant case was filed with the Clerk of Court of the Supreme Court of Ohio was filed on October 24, 2012. The instant Motion for Reconsideration is timely pursuant to S. Ct. Prac. R. 14.3(A) which governs the computation of deadlines for filing documents with in the Supreme Court of Ohio.

That sections states:

**“S. Ct. Prac. R. 14.3. Computation and Extension of Time.**

**(A) Computation of time**

(1) In computing any period of time prescribed or allowed by these rules or by an order of the Supreme Court, the day of the act from which the designated period of time begins to run shall not be included and the last day of the period shall be included. If the last day of the period is a Saturday, Sunday, or legal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.”

As indicated previously herein, the Supreme Court’s entry denying jurisdiction

of this discretionary appeal was filed with the Clerk on October 24, 2012. The last day for filing a Motion for Reconsideration of said order was Saturday, November 3, 2012. Thus, the last day for timely filing of the instant Appellant's Motion for Reconsideration is Monday, November 5, 2012.

The Court may recall that the facts and history of this case are as follows below. On December 16, 2009, Appellee Vicki Radzisewski was appointed as Executrix of the Estate of Zofia Sulek, deceased. Decedent's Will was admitted to the Probate Court of Cuyahoga County on December 16, 2009. The Estate was assigned Probate Court Case No. 2009 EST 0153693. Item II of the subject Will provided for a specific bequest of "household" and other personal property and belongings. Item IV of the Will provided specific instructions for the sale of decedent's real property located at 144 East Dawnwood, Seven Hills, Ohio with a specific bequest of the proceeds to Appellee named beneficiaries. The will contained no residuary clause directing the transfer of any other real or personal property of the decedent.

Accordingly, Appellee Executrix, Vicki Radzisewski, filed an action in the Probate Court to construe the Will. This action was assigned Cuyahoga County Probate Court Case No. 2009 ADV 016606 on February 23, 2011. All beneficiaries under the Will were joined as parties as was the Decedent's sole heir, her brother, Miroslaw Szymanczak. All parties were served or filed waivers of service. All Defendants filed answers asserting their respective positions and the matter was set for hearing. Prior to

the disposition of the case, the sole heir Defendant-Appellant Mirosław Szymanczak died. His estate was substituted as a party defendant represented by his spouse Zuzanna Szymanczak.

The hearing on the construction of the Will occurred on July 5, 2011 before Cuyahoga County Probate Court Magistrate Perdexter H. Williams. At said hearing, only Executrix Vicki Radzisewski appeared and testified. Exhibits introduced included a certified copy of the Will, judicial notices of the appointment of the executrix and an affidavit of Attorney Markiewicz, who had prepared the decedent Zofia Sulek's will.

Magistrate Poindexter issued her decision on October 6, 2011. She concluded that once the specific bequests to the named beneficiaries were satisfied, absent a residuary clause in the Will, the residuary property (two parcels of real estate owned by the decedent in the Country of Poland) passed intestate to the estate of the decedent's brother, i.e. the Estate of Mirosław Zymancyk and its representative, his surviving spouse, Zuzanna Zymancyk. Nonetheless, Probate Court Judge Russo, after reviewing the Magistrate's decision overruled the objections and entered his judgment entry on December 1, 2011. From that decision, the Appellants below filed an appeal to the Eighth District Court of Appeals on December 30, 2011. Although the Appellants failed to file "Assignments of Error" with their Appellant's Brief on the Merits, the Court of Appeals treated the two "issues" delineated by Appellants as substitute for assignments of error. On June 14, 2012, after all parties briefed the case, the Court of Appeals issued its judgment entry reversing the Magistrate's decision and remanded

the case to the Probate Court of Cuyahoga County. From that judgment, Appellant herein, Zuzanna Zymanczyk timely filed her Notice of Appeal to the Ohio Supreme Court along with a Memorandum in Support of Jurisdiction of the Court in Case No. 2012-1241.

The standards for the granting of a Motion for Reconsideration were discussed in *State ex rel Gross v. Industrial Commission*, 115 Ohio St. 3d 249, 2007-Ohio 4914 (2007):

“The standard for reconsideration is nebulous, but we have suggested that we grant such motions when persuaded, ‘upon reflection,’ to deem our prior decision as having been made in error’. See *State ex rel. Huebner v. W. Jefferson Village Council* (1996), 75 Ohio St. 3d 381, 383, 662 N.E. 2d 339. ‘As set forth in our rules, a motion ...shall not constitute a reargument of the case...’”[citing Sup.Ct. R.XI, Section 2].

This Honorable Court has recently recognized its authority to reconsider a prior decision when persuaded that upon reflection it deems its prior decision as having been made in error. See *Acordia of Ohio, LLC v. Fishel*, Slip Opinion No. 2012-Ohio-4648, (October 11, 2012).

Appellant Szymanczak recognizes that a Motion for Reconsideration is not designed to be a “reargument of claims already considered by the Court, but rather a request that the Court, upon reflection, consider whether or not it has erred in its prior disposition of the issues.

In the case, *sub judice*, Appellant Szymanczak respectfully requests that the Court examine the effect of the Court of Appeals decision on the application of the State of Ohio’s descent and distribution statute, *i.e.*, R.C. Sec. 2105.06. The Ohio Supreme Court has consistently held that a Court cannot insert provisions in a will which are not present

under the guise of interpreting that Will. See *Somers v. Doersam*; 115 Ohio St. 139, 150 (1926) *Cleveland Trust Co., Trustee v. Frost, et al*, 166 Ohio St. 329 (1957) and *Townsend's Exrs v. Townsend*, 25 Ohio 477 (1874).

In *Neidler v. Donaldson*; 9 Ohio Misc. 208, 224 NE2d 404 (Probate, Seneca Co., 1967) the Court stated: However, the court cannot make for the testator a will which, for whatever cause, he himself did not make.”

For the convenience of the Court, Appellant Szymanczak cites the relevant portions of decedent's will which 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 OLSZEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ and AGATA MACISZEWSKA**, absolutely and in fee simple share and share alike.

#### ITEM III

In the event **MALGORATA POLKOWSKA-SULEK, KATARZYNA OLSZEWSKA-SULEK, RADOSLAW KOWLASKI, 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 OLSZEWSKA-SULEK, RADOSLAW KOWALSKI, WIEWSLAWA SAS, IRENA STANKIEWICZ AND AGATA MACISZEWSKA, share and share alike.**

The Will contained no reference to the parcels of real estate in Poland owned by the testator. The Will contained no residuary clause which would have provided for the transfer of property either real or personal which was not specifically devised or bequeathed in the Will. The only mention in the will to a residuary clause is located in Item I of the Will which states that all "taxes levied or assessed by reason of my death, shall be paid by my executor, out of my residuary estate". Item I of the Will clearly does not however, identify the individuals who thereunder.

The issue of the identity of the individual[s] or entity[ies] who shall inherit property in the event of the failure to name those individuals or entity[ies] in a valid residuary clause or other clause of a Will is precisely the reason that the State of Ohio has adopted the statute of descent and distribution (R.C. 2105.06). Omissions as to whom said property is to be bequeathed or devised is a subject is specifically addressed by statute precisely to avoid the arbitrary application of rules of construction to insert language into a Will which does not exist. In the case sub judice neither the real property nor the identity of who was to take said real property was addressed in the Sulek Will. If this is to be the law in Ohio going forward, it is respectfully submitted that this Honorable Court should accept jurisdiction of this case in any event to clarify the instances in which R.C. 2105.06 can validly be bypassed by a Court by the insertion

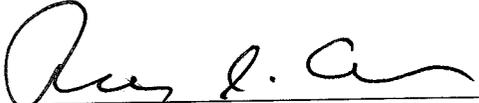
of missing provisions in a Last Will and Testament such as those in the instant case.

**Conclusion.**

Appellant Szymanczak respectfully requests that this Honorable Court reconsider its October 24, 2012 decision declining jurisdiction in the case *sub judice*..

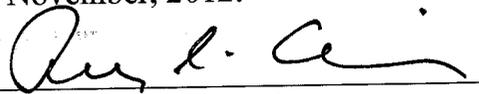
Appellant further requests that this Court enter its Order directing that jurisdiction is accepted herein to consider the issues of this case on the merits.

Respectfully Submitted:

By:   
Ross S. Cirincione, Esq.,  
(S. Ct. No. 0024774)  
Attorney for Appellant Szymanczak

SERVICE

A copy of the foregoing "Appellant Szymanczak's Motion for Reconsideration of Denial of Jurisdiction" was forwarded to Attorney for Appellee Executrix Vicki Radzisewski, Teddy Sliwinski, Esq. at 5800 Fleet Ave., Cleveland, Ohio 44105 and to Attorney for Appellees Beneficiaries, Christina M. Joliat at P. O Box 391531, Solon, Ohio 44139 by Regular U.S. Mail this 5<sup>th</sup> day of November, 2012.

  
Ross S. Cirincione, Esq.  
Attorney for Appellant