IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 67,186

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REED A. BRYAN, III, et al.,

Petitioner,

vs.

CENTURY NATIONAL BANK OF BROWARD, as Personal Representative of the Estate of CAMILLE PERRY BRYAN, Deceased,

Respondents.
_____/

REED A. BRYAN, III, et al.,

Petitioners,

vs.

JAMES H. BRYAN, SR., and LUCY GARDNER OWENS,

Respondents.
_____/

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' HEIRS BRIEF ON THE MERITS

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PREFACE

This brief replies to the Brief on the Merits of Respondents/Heirs, the purpose of which is unclear. Do they seek a retrial of the myriad aspects of inequitable conduct attributed to petitioner in the shotgun allegations in the trial court? Or is the postiche simply intended to vilify petitioner or to create the false impression that petitioner victimized or mislead the voluntary ward?

While the trial judge, having heard all the evidence as a whole, was not mislead by these arguments, apparently petitioner dismissed too lightly the misleading nature of the presentation of facts by appellants in the Fourth District, because the appellate court was mislead into accepting at least some of the "facts" as set forth by the "heirs" and adopted by the bank. A more direct and specific response to respondents' factual distortions which are either unsupported by or contradicted by the record, including those adopted in the appellate opinion, would seem in order.

The Record references are denoted "R." References to exhibits and depositions are by "PX#" or "DX#". References to the transcripts of the proceedings in the guardianship court are denoted "GT" followed by the date of the hearing referenced, name of the witness, and the transcript page number. All emphasis is supplied unless otherwise noted.

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FACTUAL DISPUTES AND ARGUMENT

The first misstatement of fact adopted in both briefs and in the Fourth District opinion is that petitioner, who was a nephew of and attorney for Camille Perry Bryan, "had her execute a deed . . . " (Heirs' brief 1), and "also had Camille Perry Bryan execute a petition for order confirming sale" (Heirs' brief 2). See Century National Bank of Broward v. Bryan, 468 So.2d 243, 244 (Fla. 4th DCA 1985). It is taken as "fact" that these instruments were signed "at the urgings of Petitioner" (Bank's brief 6). The record is silent as to the circumstances by which the instruments came into being and came to be executed by Camille Bryan because the dead man's statute was invoked by the very parties who now would have this court accept as "fact" that these instruments were procured and that the motive for the creation of the instruments and the transaction was petitioner's and not Camille Bryan's (R. 25, 27, 125-126, 182). Respondents and the Fourth District at various points characterized petitioner's communications with Camille Bryan with respect to the estate plan mentioned in the guardian's petition as a "misrepresentation" (Bank's brief 6). It is stated as fact that Camille Perry Bryan "was informed that the transfer of the house was purportedly for tax planning, and the erroneous tax consequences were explained to her . . . " (Heirs' brief 5) Century case, 468 So.2d at 247. Here again the dead man's statute was invoked specifically by the respondents to keep any testimony regarding those communications out of evidence at the trial level (R. 136, 141, 143-147, 170-175, 208, 209, 225; GT,

4/1/81, Meeks, 4). The preparation of the deed and petition were not the idea of the petitioner (R. 183-184) and this fact is consistent with all other expressions of Camille Bryan's intent as related by the witnesses, Burhop, Braithwait, Bell, Elizabeth Bryan, Frazier, Young, et al. The testimony of the witnesses to the execution of the petition and deed (Burhop and Jennings), indicates that the ward herself at the time of the execution of the petition and deed was less concerned with the tax planning and tax consequences of the transfer than with effectuating her intent in making the transfer and there is absolutely no dispute in the record as to what that intent was (R. 59-60, 74-76, 185). The tax advantages were properly the concern of and explained to the bank as guardian in accordance with Section 744.441(17) (R. 332, 334; GT 4/29/81, Mott, 56-57).

The bank and the heirs suggest that the petition and deed were done secretly and without notice, suggesting a sinister context. The Fourth District also was apparently persuaded. 468 So.2d at 247. But the facts show that the transaction had been discussed for years (R. 198-199) and certainly the whole of the testimony relating to the ward's intent shows that her general intent had been in effect steadily over a period of a number of years. Very specifically with reference to this transaction in early February, 1980 Camille called a meeting with the members of her family who resided in Broward County to discuss the disposition of her home (PX#10, Anne Bell, 15-18; GT 4/29/81, Bryan 119; R. 140, 177-179, 263). Jim Bryan, who was the only "heir"

in apparent opposition to this transaction, had discussions with Camille and with REED BRYAN, III relating to the transaction in February and March, 1980 (R. 255-257, 262-263, 367-370). 1/

By July, 1980 Camille Bryan had made up her mind to effectuate the transfer by inter vivos deed which would be part sale, part gift (PX#10 Anne Bell, 20-21, 41, 50-51). Lowell Mott, the bank officer primarily concerned with the Camille Bryan guardianship account, testified that in June of 1980, two months before the execution of the deed and petition, he had discussions with Bill Meeks and petitioner about a deed from the bank.2/

Something sinister in withholding the deed from record

1/ Although Jim's discussions in his testimony appear to concern a testamentary devise of the home rather than a transfer by deed, he nevertheless acknowledges that the subject matter was discussed with Camille Bryan and others including REED BRYAN, III. Again, Jim's attorneys joined by counsel for the bank, invoked the dead man's statute to, keep evidence regarding her testamentary intentions and her proposed change of her will out of evidence (R. 136, 141, 143-147, 170-175). The letters contained in the heir's appendix showed that she wanted to change her will to leave the home in question to REED BRYAN, III and certainly a number of facts circumstantially corroborate her overt action to effectuate this intent, and REED BRYAN, III declined to redraft the will because it would have involved his becoming a major beneficiary and a fiduciary of Camille Perry Bryan (GT 4/29/81, 110-111, 118-119, 120-121; See also R. 56, 64, 69-71, 231) but at every opportunity the dead man's statute was invoked (GT, 4/29/81, 93, 96-105, 108-109).

2/ Petitioner acknowledges that those discussions referred to a guardian's deed rather than a ward's deed. But respondents use this conversation as a basis to argue that the ward's deed requires court approval because Lowell Mott said it did. Lowell Mott's testimony in the guardianship proceeding and in the trial, in the context of the bank's position, was that the bank's deed, as guardian, would require a court order; and, indeed, it does. See, §744.441.

from August until March was suggested. 468 So.2d at 247. But while Lowell Mott says that he was personally unaware that the deed had been executed by the ward for several months, BRYAN testified that the existence of the deed and petition were made known to the bank before and immediately after they were signed (R. 198-199). The degree to which the bank remained in ignorance was at least in part a result of never making any inquiry of Camille concerning her desires or intent even though her competence and ability to defend her deed extended for over two months after the execution of the deed and one month after execution and delivery of the petition by the voluntary guardian. Whatever the bank's actual knowledge of Camille's deed prior to February 18, 1981, ignorance beyond that date cannot be claimed because the deed itself was discussed in open court in the first guardianship hearing (GT, 2/18/81, 20-21). While the deed was not recorded until March of 1981, the delay it was occasioned by a request from Jim Bryan (R. 258, 261).

The heirs suggest that REED BRYAN and Bill Meeks operated in a conflict of interest situation and the Fourth District thinks it worthy of note that the situation created a appearance of conflict of interest, but the guardianship proceeding was initially ex parte and no objections were ever filed to the petition or to the deed itself, (GT, 2/18/81, 9). As soon as Jim Bryan made his potential resistance to the guardianship court approval known through having his attorney attend the first hearing on February 18, 1981, William Meeks withdrew his representation of the bank. The bank's suggestion

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that the successor attorney, Ronald Anselmo, was in league with REED BRYAN, III or specially selected to somehow misadvise the bank on proceeding with the petition is absurd. The record shows that Mr. Anselmo represented the bank from February, 1981 through April of 1981, and Mr. Mikos and his firm represented the bank for the remainder of the guardianship and during the probate of Camille Bryan's estate after her death. This representation continued through the trial court and the Fourth District and continues in this court. The bank as voluntary guardian knew about the ward's deed at least from February 18, 1981, through November 29, 1981 when the guardianship terminated at the voluntary guardian's behest. Yet the bank never objected or attacked the deed in any way. At that point the ward had transferred title by deed and with the issue of the petition moot and termination of the guardianship there didn't appear to be a cloud on that title until the home in question was "marshalled" as an asset of the estate by the bank as personal representative (R. 338, 342-343).

The failure to obtain waivers or consents is another matter the Fourth District was persuaded to find questionable in the conduct of REED BRYAN, III. The bank knew of Camille Bryan's intent for five months before an accident rendered her incapable and knew that she had executed the petition for over two months prior to her accident and yet never sought to verify this intent - now suggesting in the face of all of the other evidence that somehow the intent was not there. What <u>did</u> the bank do? Requested consents from those who would be benefited by the

inclusion of this asset in the ward's estate under the then purported will, even though the potential benefit to these residuary beneficiaries had never been within the ambit of their voluntary ward's intent! (R. 340) The bank ignored the voluntary guardianship statute by requiring notice to those persons who constituted the purported residual beneficiaries of her then purported will (GT, 2/18/81, 9-12, 16-18). At the time of the first hearing in guardianship four of seven (excluding REED BRYAN) consents had been obtained (GT, 2/18/81, 20-21). The bank was the petitioner with the ward seeking court approval of the transfer to carry out her wishes and expressed the bank's agreement and approval of the transaction as long as the court, as was required under §744.441, would approve the guardian's joinder (GT, 2/18/81, 27-29). Through the entire guardianship proceeding Mr. Mott, (in his testimony on April 29, 1981), reported that the bank as voluntary guardian saw no reason to question the transaction in any way (GT 4-29-81, 67).

The bank acknowledged that it had no right to require consents. (GT, 4/29/81, Mott 49; R. 349-350). Petitioner, while regarding the procedure as objectionable, nevertheless saw the benefit in it of forestalling potential complaints or contests at a later time. (R. 212-216) The voluntary ward was competent and able to defend her deed at that point in time. 3/

The heirs blatantly state that with the exception of

3/ Many more deeds are executed in a given time than wills and yet there are many more will contests than deed contests in the courts. The numbers become even more revealing if deed contests are further excised of post-mortem attacks on the grantor's deed.

one letter to his sister petitioner solicited the consents after Camille Perry Bryan's accident. The evidence shows, however, that the soliciting of consents proceeded in due course after the bank's request for them (R. 212-216), and if the letters are inspected, with three exceptions, they were all prior to Camille's accident. The only letters written after her accident were those to Jim Bryan, to Stuart Bryan, and to Lucy Sawyer. Petitioner did not have current addresses for Stuart Bryan and Lucy Sawyer and needed to obtain those addresses from Jim Bryan who was out of town on an extended vacation and unavailable during nearly the entire month of October. (R. 216, 222-223, 357, 359). More telling is the conduct of the two "heirs" who responded and consented before Camille's accident but who (based upon representations made to the court by Mr. Maloney) withdrew their consents on April 29, 1981, less than two weeks before the death of Camille Bryan (GT, 4/29/81, 36-37, PX#10, Anne Bell, 48-49). In the briefs and the Fourth District's opinion it further appears to cast REED BRYAN's conduct in a sinister light because the filing of the petition is arguably unauthorized, but if there was a condition to the filing of the petition that certain parties agree to it, that condition was never communicated to petitioner (R. 214-215). Although the minutes of the trust committee meeting do seem to suggest that it was the bank's view that all consents be obtained before the petition would be authorized to be filed, the first time those minutes were revealed to petitioner was two weeks before the trial before

Judge Ferris, or approximately April 1, 1983, over a year and a half after the meeting occurred. 4/

The contents of the letters included in the appendix to the heir's brief are all supported. The Wade appraisal referred to is to be found as Petitioner's Evidentiary Exhibit No. 5 in the voluntary guardianship proceedings (included in PX#9, R. 33, 364-365, 375). While the bank may have obtained a new appraisal as of October 20, 1980, the record is silent as to when that appraisal was finally prepared and delivered and clearly shows that the appraisal was not delivered to petitioner until February of 1981 (R. 220, 228-230). And while the dead man's statute was invoked to exclude the evidence of Camille's discussions with REED BRYAN as to how the value of the property and the consideration for the transaction were arrived at (R. 208-209, 225, 256), nevertheless the value of the property as appraised was disputed (R. 193-194, 228-230, PX#10, Anne Bell 39-41), largely because of deterioration and age.

Respondents are committed to the proposition that court approval was desirable and the Fourth District adopted this position. Yet by insisting on consents, the court's inquiry would not have been brought fully to bear on the transaction, and

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4/ The court's attention is further drawn to the cover letters transmitting the petition for execution and transmitting the executed petition from the bank (PX#21 and 22). One wonders why, if the consents were conditional, the bank didn't simply say so or withhold either execution or delivery of the petition until the consents were in hand?

just so it is frustrated by respondents' seeking a termination of the proceedings without the merits ever having been reached. 5/

The heirs suggest something untoward about the lack of any formal tender of monies due pursuant to the promissory note during the lifetime of the voluntary ward, but the note was not payable by its terms until after the voluntary ward's death. While the note was delivered to the bank as voluntary guardian, it was never inventoried as an asset of the guardianship or the estate, though the bank retains the note to this day. Two tenders of payment of principal and interest were made prior to the petitioner's taking possession of the residence; the bank retained the check representing the second tender for over a month before returning it (R. 189-192).

Finally, the "questionable validity of the estate planning tool" (468 So.2d at 247), should be addressed. While the trial court found the statement in some of the letters to the residual beneficiaries that there would be a "substantial estate tax savings for all of us," to be "misguided" the factual conclusions drawn and argued by respondents miss the mark. The Fourth District's opinion stated that the guardianship court's business was to determine "the intent of the ward and whether the

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5/ The guardianship model informing the Fourth District's opinion seems much more akin to the old curatorship statutes where the lunatic determined to be in need of a curator became a ward of the court and was, it is true, wholly incapable of executing a deed or making a gift except after leave of court, granted after hearing after notice to the curator and such next of kin as the court designated; but that statutory restriction was clearly spelled out in the old statute. See Fla. Jur. 2d., Incompetent Persons, §172.

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proposed estate tax planning would likely be beneficial to the estate." 468 So.2d 245. Petitioner admits, in retrospect, that candor would perhaps have been better served by pointing out to the recipients of the letter that while there would be an estate tax savings to the estate, the proposal might not result in a greater number of dollars in their pockets if they ultimately became residuary beneficiaries under the then extant will. The heirs' argument as to the "misleading" nature of this omission is necessarily based upon a false premise: that the ward intended the home to pass to them under the residuary clause in the will. It would seem highly improper to suggest that the recipients' own estates be benefitted by frustrating the clear intent of Camille Perry Bryan.

Seldom does an estate plan come with a guarantee of a tax savings (R. 282). There was an estate planning purpose in the petition. (GT, 4/1/81, Meeks, 8). All three experts who testified, including Lowell Mott, recognized the viability of the estate tax plan. It is clearly set forth and even quantified at $41,000 as a tax saving in the testimony of William Meeks (GT 4/1/81, Meeks, 8-21, 29-34, 43-44). Mr. Wilson recognized the viability of the plan without quantifying the savings (he was testifying after the ward's death), but actually saw more tax savings in it than Mr. Meeks had, because in addition to removing the appreciation of the asset, the amount paid as gift tax would lessen the estate and, therefore, the estate tax — that is, two small bites by IRS would be less than one big bite, even if the unified credit were not used as Mr. Meeks suggested to justify no

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tax payment at the time of the transfer in 1980 (R. 277 et seq.). Mr. Wilson's opinion that this was not a good plan is based solely upon the voluntary ward's age at the time and her life expectancy as dictated by actuarial tables (R. 273-276); but, based upon discussions with her physician, actuarial tables did not apply in her case and it was anticipated that she would live more than three years (R. 204-207).

Mr. Wilson's testimony regarding the impact on the estate of Camille Bryan (exclusive of the Tom Bryan trusts includable in her estate for federal estate tax purposes) totally ignored the offset of the note and attributed the highest possible tax to this asset (R. 293-298).

Indeed, respondents do not argue that there was no benefit to the estate, they argue that there was no benefit to the residual beneficiaries because they were not able to effectuate a frustration of Camille Bryan's intent until the Fourth District Court of Appeal did so. Both Bill Meeks and Lowell Mott testified as to considerable additional benefits to the estate other than the tax saving (GT 4/1/81, Meeks 23-24, 28-29; 4/29/81, Mott, 27-33, 56-57, 66-67). The bank's definition of "benefit" changed dramatically when they discarded their guardian's cloak and put on their personal representative's cloak (Compare R. 458 where Mr. Mott took the position that the transaction was "not in the best interests of the Estate of Camille Perry Bryan . . . "). From the personal representative's point of view if "benefit" is solely limited to an action

incremental to the estate, then any time donative intent is frustrated a "benefit" results.

The question whether allowing Camille Bryan to reside in the home after this transfer would nullify the plan is highly debatable. (R. 207-212). There is a clear distinction to be drawn between retaining a life estate, in writing or not, and residing on the property. "[S]he could reside there. That is not a life estate." (GT 4/1/81, Meeks 31-32, 43-44). The heirs complain that a greater share of the tax burden is theirs unless they can frustrate Camille Bryan's intent, but also overlook the other benefits including the consideration being paid for the home as an offset to the tax burden. The Court's attention is also respectfully drawn to §733.817, Fla. Stat., by which the personal representative has evinced an intention, in the event the deed is ultimately approved, to claim from petitioner payment not only of the principal amount of the note together with interest from August 22, 1980 to date of payment, but all of the estate tax attributable to this asset. It is absurd to assume that the guardianship court would have found no likely benefit to the estate tax plan. Further, the personal representative (contrary to the advice of Mr. Wilson) elected not to take advantage of the secondary tax saving he testified to by reporting the residence on a gift tax return, but also the value of the asset itself is highly debatable. One wonders what evaluation the Internal Revenue Service would have accepted had they not taken stances as to evaluation invited by respondents to serve respondents' purposes: the bank's with a larger estate to

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administer and the heirs' with a windfall residual asset. (compare R. 280-281, DX#1 and DX#2 with GT 4/1/81, Meeks, 19-21).

SUMMARY

There can be no doubt as to what Camille Bryan, the competent voluntary ward, understood the voluntary guardianship law to be. She was both mentally and physically in excellent health for her age except for the advanced maculitis affecting her eyesight. She was persuaded to become a voluntary ward because she thought it in the nature of a voluntary guardianship that the voluntary guardian does what the competent voluntary ward instructs (R. 234-235). The purpose of the voluntary guardianship was less to affect the voluntary ward than to provide relief to petitioner in the assistance he was then being required to provide his Aunt Camille after the death of his father (R. 108, 120, 134-135). The legal opinion of attorney Meeks who recommended and initiated the proceeding and who represented the bank, was that the voluntary guardian was a "rubber stamp" to fulfill the wishes of the competent voluntary ward (GT 4/1/81, Meeks, 6-7, 40-42). The voluntary guardian's deed was needed only to remove any cloud on petitioner's title and the voluntary guardian's deed in turn required court approval (GT 4/1/81, Meeks, 24-27).

General property law holds that a deed by a competent person is presumed to be valid. The burden of proof is generally placed on one who attacks a deed. In this case, because of the confidential relationship existing between petitioner and the voluntary ward, that burden of proof shifted but it is not

irrebuttable. The alternative would be to disqualify any lawyer or anyone else who assists an elderly person, even a family member and natural object of the bounty of that person, from ever receiving a beneficence from the elderly person.

The effect of the Fourth District's interpretation is to strip basic and constitutional property rights from a voluntary ward without notice. A person who acknowledges the need for assistance with the care and management of his estate does not necessarily need or desire interference with the disposition of that estate. Authoritative expressions of the detrimental effects of such deprivations to the elderly abound. The abuse of guardianship to contain the will, largesse, judgment, and even spending of the elderly to protect expectancies has become epidemic (See, e.g., authorities cited in the supplemental briefs below).

No one is contending that the frail elderly do not need assistance, nor is anyone contending that the frail elderly should have "unfettered" freedom to convey. The legislature provided the voluntary guardianship to assist the competent but frail elderly. The underlying purpose of all guardianship is to provide help for those in need of help and not every person needs the same help. The ward's needs should be more important than the guardian's ease of administration.

The Fourth District's holding that under voluntary guardianship "the ward is not mentally incompetent so as to be legally incapable of transaction his affairs. . . . (r)ather. . . has been rendered actually incapable. . ." 468 So.2d at p. 245

creates a dichotomy which both places the decision out of harmony with guardianship and property law, and renders the opinion internally inconsistent. Camille Bryan was not only legally capable by the Fourth District's definition but was found to be actually capable at both the trial and appellate levels.

The court's suggestion of a way out of this dilemma was to have her revoke the voluntary guardianship, make the gift and then reinstate the voluntary guardianship. Aside from the "waste motion," doesn't that defeat the very purpose of a voluntary guardianship? If the voluntary ward, albeit competent, has been victimized by fraud or overreaching, shouldn't the voluntary guardian step in and protect her with due court approval under §744.441(10) and (11)? If the voluntary ward should become incompetent, shouldn't the voluntary guardian (who, it must be remembered, was selected by the then competent voluntary ward), step in and initiate proceedings under §744.331 for the ward's protection? The effect of the District Court's suggestion is to remove the protection of the voluntary guardian and to remove access to court supervision. This solution and the others suggested are based on head-in-the-sand logic, and seem more oriented to effectuate ease of administration for the guardian.

CONCLUSION

A straight jacket, though it no doubt makes the guardian's job easier, is hardly likely to be perceived as helpful by the competent elderly. It is respectfully submitted that the trial court's resolution of this case was correct and that the decision of the Fourth District Court of Appeal should

be quashed and the case remanded for the reinstatement of the original final judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed to: JOHN BERANEK, ESQ., Klein & Beranek, Suite 503, Flagler Center, 501 South Flagler Drive, West Palm Beach, FL 33401; H. T. MALONEY, ESQ., Patterson & Maloney, Post Office Box 030520, Fort Lauderdale, FL 33303; KENNETH R. MIKOS, ESQ., Friedrich, Blackwell, Mikos & Ridley, P.A., 2900 East Oakland Park Boulevard, Fort Lauderdale, FL 33306; and THOMAS M. ERVIN, JR., ESQ., Ervin, Varn, Jacobs, Odom & Kitchen, Post Office Drawer 1170, Tallahassee, FL 32302, this 28th day of February, 1986.

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