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FILED
SID J. WHITE
JUN 18 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

SUPREME COURT OF FLORIDA

THERESA H. CARMAN,

Appellant,

v.

ROY GILBERT, BASIL SANTANA, and NENET C. HEISER n/k/a NENET M. CATLE,

Appellees.

Case No. 81,209

District Court of Appeal
2nd District - No. 92-00832

7/16

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ANSWER BRIEF OF APPELLEES

Appeal from Per Curiam Opinion of Second District Court of Appeal, State of Florida, affirming Circuit Court, Probate Division, for Pinellas County; Robert F. Michael, Judge

GEORGE M. OSBORNE, ESQ.
433 4th Street North
St. Petersburg, FL 33701
(813)823-1519
SPN 00001835 FBN 092597
Attorney for Appellees, SANTANA and CATLE

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE

Appellant's statement of the case is generally acceptable, but there are several matters that are incorrect, not in full perspective, or misleading.

The Decedent's Will did not contain a devise of his father's former home. It gifted "any and all" interest he may have in the same. That interest was a one-half interest in the net proceeds of its sale, i.e., a sum of money.

It is true that Appellant filed a voluntary dismissal of her Petition to Revoke Probate of the Will on July 30, 1991, but it is also true that none of the Appellees or other beneficiaries had any notice of dismissal or intended dismissal before the time for final hearing upon the merits. The announcement was made in open Court at the last moment before trial was to begin, which, of course, was after full defenses had been asserted by responsive pleadings, and after investigation, discovery, preparation and appearance with counsel and witnesses for the trial.

Appellant does not acknowledge or mention that her original renunciation was under oath and was unqualified, and that her Amended Petition also contained the same sworn and unqualified disclaimer of any and all interest under the Will.

The lower court's Order for Renunciation of Benefits (R.195-197) "...found and determined as follows:

> 1. Said Petition is meritorious and should be granted. Theresa Carman is not entitled to take under the Last Will and Testament of the Decedent upon the facts and

events in this matter.

2. By her Petition and Amended Petition for Revocation of the Last Will and Testament of Charles K. Carman, Jr., Theresa Carman renounced all benefits provided to her by said Last Will.

3. All property given to Theresa Carman by the terms of the Decedent's Will should therefore be, and are hereby found to be residue, and the Personal Representative should transfer the same to residue and distribute it accordingly.

STATEMENT OF THE FACTS

Appellant's statement of the facts, although very limited, is not in error, except that as in the Statement of the Case it purports to suggest an interest in property, a former residence, was involved, when in fact the interest was merely a sum of money.

Appellant asserts what she, Theresa Carman, purportedly believed. What others knew and believed is not a mattter of record because the case was not tried. There is no evidence in the record that any of the Appellees were "vulchers", much less guilty of any conduct which would have invalidated their gifts.

Appellant never adduced any evidence showing that any of her claims had any merit as a matter of fact or law or that any justiciable issue was raised.

Nevertheless, Appellant's attack on the Will and on every beneficiary did produce a settlement with one residuary beneficiary, and hence Appellant will take one-half of that beneficiary's share of a residue which, according to the decisions below, will include Appellant's specific bequest.

SUMMARY OF ARGUMENT

The lower court properly determined that Appellant's gift under the Will should be transferred to residue. The Second District Court of Appeal found no reversible error and concluded that Appellant must be bound by her chosen words of absolute renunciation.

These decisions were correct because: Appellant got relief consequential to her petition(s) to revoke probate by means of a settlement, thereby taking contrary to the terms of the Will; she twice under oath unconditionally disclaimed any and all interest under the Will; there was ample authority from the Second District Court of Appeal and the Supreme Court of Florida, plus guidance from the Florida Bar, both holding that a qualified renunciation is sufficient and showing how it may be done. Not only has Appellant managed to obtain a part of the bounty of another beneficiary, she has diminished the Estate and the shares of Appellees by her meritless action. It is patently unjust to permit Appellant to now conveniently make self-serving expressions of intent contrary to her prior clear and absolute renunciation.

Appellees also urge that on the facts of this case there is no conflict between the sister District Courts of Appeal.

POINT ONE

THE TRIAL COURT DID NOT ERR IN GRANTING APPELLEES' MOTION FOR DETERMINATION OF RENUNCIATION OF BENEFITS.

Appellant has not only failed to demonstrate reversible error, but the record and the authorities relied on show that the trial court was correct in deciding that the specific bequest to Appellant should be transferred to residue.

Appellees rely upon the authority of the following cases (in alphabetical order) for their positions that: only a conditional renunciation of benefits under a will is a condition precedent to a remedy in derrogation of its terms; a person may make an unconditional renunciation; one who wants to take under a will should obtain nothing contrary to the provisions of the Will in consequence of making an attack upon it:

> Barnett Bank of Jacksonville v. Murray, 49 So. 2d 535 (Fla. 1950); In Re Estate of Filion, 353 So. 2d 1180 (2 DCA 1977); In Re Estate of Gaspelin, 542 So. 2d 1023 (2 DCA 1989); In Re Estate of Harby, 269 So. 2d 433 (2 DCA 1972); In Re Estate of Wood v. Chowning, 271 So. 2d 42 (3 DCA 1973)

Appellees respectfully urge both that In Re Estate of Stein, 301 So. 2d 120 (3 DCA 1974), is distinguishable and that Stein is not in conflict with the instant case. The Court in Stein found it "clear from reading Appellant's Petition to revoke probate of Will... that the renunciation was put in solely for the purpose of complying with the statute and that no

further purpose was intended." Appellees submit that not only was no such conclusion made in the instant case, but also none such could have been made. Appellant here simply ignores what happened in the trial court below and the pronounced opinion of the Second District Court of Appeal.

The per curiam opinion of the Second District Court of Appeals states: "After hearing, the trial court found the renunciation was unconditioned in its terms and intent, and upon the facts herein cannot be withdrawn.'" (emphasis supplied). From this language it is clear that the trial court below did not think like the Stein trial judge, and merely look for "magic words". It hardly needs to be observed that the trial court's finding respecting intent is not subject to reversal unless it was an abuse of discretion. The lower court even considered the idea of a withdrawal or receeding from the absolute words, but, again, "upon the facts" decided that could not occur.

Appellant's arguments boil down to these: believe now what I say on appeal was my prior intent; ignore my sworn, chosen words of absolute renunciation; decide without a showing that the trial court abused its discretion; allow me to ignore the guidance of The Florida Bar; allow me to ignore the holdings and precedent of the cases decided by the Second District Court of Appeal; assume that my case is the same as Stein; and assume that this is a case in equity, that "equities" can be first considered in the Supreme Court of Florida on appeal, and that the "equities" are with Appellant.

At page six of her brief Appellant has the temerity to argue in her Summary of Argument that since the Will was upheld, she should inherit by its terms, and goes on to blandly assert that any "alleged settlement" was not a possession and receipt of benefits to change the qualified nature of the renunciation.

There is no further discussion or explanation or argument in her brief of this bald and illogical assertion. Appellant simply takes the position that she can have all of her cake and eat some of the cake (here one-half) given to another if she gets it by a settlement instead of a judgment, and further that everyone affected (and this Honorable Court) should ignore the dramatic dimunition of residue due to attorney's fees of the Personal Representative and Appellees in protecting the Will and the testator's intent.

Appellees respectfully urge that the key words and phrases of the first part of the trial Court's order merit repetition and emphasis. This is something that even the Second District Court of Appeal did not note - the fact that the litigation produced results. The trial judge said Appellant was "not entitled to take"; "upon the facts and events in this matter"; (except as she...has agreed...in settlement...)".

What the trial court knew and saw was that Appellant made a wholesale and total attack upon the Will. She swore that Decedent lacked testamentury capacity and that each of the specific bequests (except her own which she renounced) were the product of conduct sufficient to destroy the entire Will and

every disposition.

Appellees submit Appellant's clear intent was to acquire her brother's entire estate, or as much as she could get, despite his clear contrary provisions, and she played her game of creating inconveniences and nuisances, bluffing and wearing away at the resove and finances of those charged with misconduct until the last possible moment, when having been called out by Appellees and Appellees being ready to commence trial on the merits, she was forced to fold her case and take what one out-of-state and impoverished litigant woud give up to simply end it.

This is not a case in equity. Appellees urge the cases cited therefor and references in argument are misplaced. Indeed, in her argument, Appellant uses "equitable" and "equity" at least seven times and in numerous other ways seeks to persuade that the result is harsh and that the trial court and District Court of Appeal have ruled contrary to the established law, common sense and equity, and that the determinations adverse to her were based on form rather than intent and substance.

Appellant is too clever. She turns the case on its ear and says she lost because the lower courts followed form and missed substance. Substance, she would have us believe, is her intent, a condition of the mind, very likely much different now that she has twice properly lost in her effort to get something beyond what the law allows. Form she urges, is the mere words

she now claims to have chosen from Stein. This is very convenient literary license because she ignored Harby, Gaspelin, and Barnett.

Appellant also makes no mention of the fact that the Stein Court said " but compare Estate of Harby...". Harby was decided in 1972, Stein in 1974, and Gaspelin in 1989. Yet in 1991 Appellant chose clear words, then settled with one litigant, and now says her words should not be held against her. There was no mystery in the precedent; the Florida Bar reached the only conclusion that was possible if a conditional renunciation was desired, and published the words so that any draftsperson could avoid a contrary result. Continuing Legal Education, The Florida Bar, Litigation Under Florida Probate Code, Section 3.33 (2d ed. 1991). And, of course, Gaspelin quotes the language which the Court said was conditional language.

Harby holds that a conditional renunciation is sufficient. It does not hold that an unconditional renunciation should be treated as though it were conditional. Nor does Harby, or any other case, support a withdrawal of a disclaimer or permit both the keeping of a settlement and a taking under the Will.

The language in Barnett, cited in Harby clearly underlines the intent of the rule: that those who are to take under the Will not be adversely or injuriously affected by one who would challenge the will. Appellant made no such showing.

Clearly, from the record no such showing could be made. The fact of settlement appears from: the Order first appealed from (R. 195-197), the answer of Gerthe to Appellee's Petition for Determination of Renunciation of Benefits (R. 167-169), and from Gerthe's Petition to Purchase Automobile (R. 178-180).

Of record, and clearly less than the true total because of the appeals, it was also established that this nominal estate was diminished $ 5,640.00 for the Personal Representative's fees attributable to the purported will contest, (R. 251), plus $ 6,438.00 (R. 212, 213) for all of the Appellees' attorneys.

Appellant's argument resorts to generalities suggesting the lower courts in this case have departed from common sense and equity and expanded the Harby decision to require "magic words". This conclusion is argued to be shown by the words of the Second District Court of Appeal when it said, "confronted with these circumstances we have no alternative but to conclude that the appellant must be bound by her chosen words of 'absolute' renunciation." Appellant again misreads or fails to read what the Second District Court of Appeal has said. Its reference to "circumstances" clearly encompassed all matters discussed under "Renunciation of Benefits", not the least of which, Appellees submit, was the finding by the trial court that the renunciation was unconditioned in its terms and intent (emphasis supplied). At page four of its opinion below the Second District Court of Appeal also quoted the key language of Stein showing the trial judge in that case was in error for

deciding a qualified renunciation had to contain magic words. It is beyond argument here that the trial court in the instant case below had no such limited notions.

Appellees are constrained to point out that not only did the Second District Court of Appeals here below not mention the settlement, it also observed in passing that: "We cannot formulate an example in which a qualified renunciation would have any effect whatsoever." It then postured revocation proceedings as either failing or successful, and concluded that if failing the renunciation is of no effect and the petitioner takes, and if successful, there is nothing to renounce. The Court stated in that context (either - or) the Stein conclusion is a matter of common sense.

Appellees submit that formulation is too limited for at least two reasons. First, as previously noted, in Stein the trial judge required magic words, but the appellate court could see it was clear from reading the pleadings (emphasis supplied) that only a conditional renunciation was intended. Second, and much more important to the pronouncements of the Supreme Court of Florida, revocation proceedings are not necessarily, or even usually, "lose" or "win" scenarios. Just as wills may have complex and varied provisions such as general and specific bequests and devises, conditions precedent to the effectiveness of gifts, layers of residuary depositions, and so forth, so also an attack on a will may be plenary, multifaceted, or focused upon some increments or portions. An attack may seek to

disqualify only some beneficiaries, which, if successful, could increase the bounty of other beneficiaries with or without actually enriching the challenger in a particular case.

Appellant says that there is no argument that she could have had any intent except one that was conditional, and goes further - she argues in effect that all words of renunciation should be considered conditional unless a contrary intent appears. This is simply convenient wishful thinking. Motivations cannot always be inferred with rigor. They do not have to make dollars and cents sense. The law cannot recede to a rule that would allow or require inference from supposition upon unstated intent.

Your Appellees respectfully submit that the instant case does not deserve this Court's attention. The right result was reached in the trial court; on appeal, the appellate court properly affirmed.

However, since it has come this far, Appellees submit that Stein should be seen as not wrong on its particular and limited facts, but should be disapproved to the extent that it suggests unconditional language might be used with, and to express, a conditional intent.

Two additional things might be accomplished. First, language such as that suggested by the Florida Bar and approved in Gaspelin can be specifically approved for conditional renunciations, and other and unconditional language subjected to the test of plain meaning, and, when appropriate, to estoppel by

pleading. Second, it ought to be made clear that there is a price to be paid, not only for fishing with dynamite, as here, but that in every circumstance where something is obtained in derrogation of the will, the taker is absolutely disqualified from any bounty under the will, with the obvious corollary that the prohibited "having one's cake and eating it, too" cannot be avoided by filing an attack, obtaining a settlement, not asking for or needing judicial approval, and dismissing the attack. Adopting Appellant's distinction, such a rule would truly favor substance over form.

As this Court said in Filion, renunciation is more nearly a condition precedent to the remedy than to the cause of action. Had Appellant wanted to take under the Will more than she wanted her settlement, she should have heeded that clear pronouncement. That is not Appellant's orientation. She is concentrated on overreaching greed. She wanted everything, but now what she wants is both to take under the Will and have her settlement of a portion of another beneficiary's bounty. Taking both is what the lower courts have properly forbidden.

CONCLUSION

No reversible error or abuse of discretion occurred and none has been shown. There is no true direct conflict between Stein and the Second District Court of Appeal's decision in Harby and Gaspelin, but if Appellees are wrong and the Supreme Court finds any conflict, then Stein should be disapproved to the extent of such conflict. The lower courts should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to RICHARD C. LANGFORD, ESQ., Post Office Box 3706, St. Petersburg, Florida 33731, J. RICHARD RAHTER, ESQ., 6670 1st Avenue South, St. Petersburg, Florida 33707, JAMES C. RUNYON, ESQ., 5263 Central Avenue, St. Petersburg, Florida 33710, WILLIAM H. BARTLETT, ESQ., Post Office Drawer 41600, St. Petersburg, Florida 33743, and BRUCE MARGER, ESQ., Post Office Drawer 41600, St. Petersburg, Florida 33743, this 21st day of June, 1993.

GEORGE M. OSBORNE
433 4th Street North
St. Petersburg, FL 33701
(813)823-1519
SPN 00001835 FBN 092597
Attorney for SANTANA and CATLE