SUPREME COURT OF FLORIDA

FILED
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MAR 8 1993
CLERK, SUPREME COURT
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**THERESA H. CARMAN**

Petitioner,

vs.

**ROY GILBERT, ET AL.,**

Respondent.
_____/

Case No. 81,209

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

**INITIAL BRIEF OF PETITIONER**

Appeals from Orders and
Denials of Rehearings
of Second District Court of
Appeal, State of Florida

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## STATEMENT OF THE CASE

The decedent, Charles K. Carman, Jr. died on January 10, 1991 and his will (R-2-5), dated December 21, 1990, was admitted to Probate on January 28, 1991 (R-20-21). The will provided for numerous specific bequests, including the devise of his father's former home to his surviving sister, Theresa H. Carman. In addition the will provided for the residuary of the entire estate to be divided among four beneficiaries, none of whom were related to the decedent.

Appellant, Theresa H. Carman, filed a Petition to Revoke Probate of the will, against the estate (R-46-48). After proper notice, responsive pleadings were filed by the personal representative on behalf of the estate (R-55-56), by Roy Gilbert as a residuary beneficiary (R-53-54), by Gilbert Santana and Nanet Heiser (now known as Nanet Catle) as residuary beneficiaries (R-57-59), and by Gerri Gerthe as a specific devise beneficiary (R-60).

Appellant filed a Motion to Amend Petition for Revocation of Probate, but no Order was entered prior to the matter being voluntarily dismissed. Appellant filed a voluntary dismissal of the revocation proceedings (R-109-110) on July 30, 1991.

On September 17, 1991, Appellees Gilbert, Santana and Heiser filed a Petition for Determination of Renunciation of Benefits (R-136-139) and a Petition of Named Respondents for Attorneys' Fees (R-140-146).

Both petitions were heard on January 13, 1992 (R-222-258) and the Court subsequently entered an Order for Renunciation of

Benefits (R-195-197) and an Order Granting Attorneys' Fees (R-198-199). A Motion for rehearing of the Order for Renunciation of Benefits was filed on February 12, 1992 (R-214-216) and denied February 14, 1992 (R-220). A Motion for rehearing of attorneys' fees was filed (R-217-219) and an Order denying Motion for rehearing entered February 14, 1992 (R-221).

On February 28, 1992 a Notice of Appeal (R-261-262) and Notice of Filing (R-259-260) were filed by the Appellant. A Notice of Filing was filed by Appellant on March 13, 1992 (R-263-264). On November 25, 1992 the District Court of Appeals filed its Opinion upholding the decision of the trial court with regard to appellant's renunciation of benefits. Appellant filed a Motion for Rehearing on December 10, 1992. The District Court of Appeals denied the Motion for Rehearing on January 8, 1993. Notice to Invoke Discretionary Jurisdiction was filed by the Appellant with the Supreme Court of the State of Florida on February 4, 1993. Order Postponing Decision on Jurisdiction and Briefing Schedule was entered by the Supreme Court of Florida on February 10, 1993.

Appellant is appealing the Order for Renunciation of Benefits and Orders denying Motions to rehear these Orders.

## STATEMENT OF THE FACTS

Appellant-Respondent, Theresa H. Carman, is the natural sister of decedent, Charles K. Carman, Jr. By will (R-2-5), decedent left a specific bequest of his one half interest in his Father's former residence to his sister. The will left the residue of the estate to be equally divided between Gerri Gerthe, Basil Santana, Roy

Gilbert and Nanet Catle.

Theresa Carman believed that the will executed by her brother while in the hospital within three weeks prior to death may have been executed while under undue influence of others and included those allegations in her Petition for Revocation of Probate (R-46-48). Each of the residuary beneficiaries filed responsive pleadings. Roy Gilbert in his response (R-53-54) referred to "vulchers" around the decedent at the hospital who disappeared after the will was signed.

Prior to any testimony being taken or any evidence being submitted at any hearing or trial, the petition was dismissed voluntarily by Theresa Carman.

## SUMMARY OF ARGUMENT

The District Court of Appeals erred in concluding that Appellant had absolutely renounced her interest in the will of Charles Carman, Jr. because of the language contained in her petition for revocation.

The evolution and impact of the requirement for a renunciation prior to instituting a will contest, as developed through case law since 1942, has gone from an "absolute" rule to a "qualified" rule. Courts have advanced the notion that it is unreasonable to expect and require an individual to abandon all claims under a will offered for probate in order to contest that will as being contrary to true testative intent. The lower courts herein seek to reverse the sound and equitable trend toward enforcing a qualified result for renunciations contained in petitions for revocation, simply

because of the lack of "qualifying" language in the appellant's petition.

The language of renunciation used by Appellant in her Petition to Revoke Probate of decedent's will was verbatim the language previously determined by the case law in Florida to be a conditional renunciation; since the will was upheld, Appellant should inherit by the terms of the will. Furthermore, any alleged settlement between Appellant and one of four residuary beneficiaries was not a possession and receipt of benefits by Appellant to change the qualified nature of the renunciation.

## ARGUMENT

### THE DECISION OF THE LOWER COURT MUST BE REVERSED AS CONTRARY TO THE JUDICIAL PRECEDENT AND EQUITY, WHEREIN THE PURPOSE FOR AND NOT THE FORM OF THE RENUNCIATION IS THE CONTROLLING FACTOR IN THE ULTIMATE EFFECT THE RENUNCIATION HAS ON THE PETITIONER IN A WILL CONTEST.

The decisions on appeal should be reversed as being contrary to the intent and purpose of the renunciation requirement for will contests. Renunciation is a judicially imposed doctrine deemed necessary to avoid the paradox of a person claiming benefits under a will which he seeks to declare invalid. In Re Estate of Filion, 353 So. 2d 1180, (Fla. 2nd DCA, 1977). The Legislature has been silent as to a renunciation requirement, mandating only that the interested party file a petition which state the interest of the petitioner and the grounds for revocation of the will sought to be admitted to probate. §733.109 Fla. Stat. Ann. (Supp. 1993). Thus, the purpose, requirements and impact of a renunciation contained in

a petition for revocation must be examined through the limited cases dealing with the issue.

Initially, a renunciation was in "absolute" terms; it was absolutely necessary before an action could be brought contesting a will and an absolute abandonment of all benefits under that will by the contestant. In Pournell v. Baxter, 353 So. 2d 162 (Fla. 1942), the Florida Supreme Court held it necessary for contestants to a probated will to first divest themselves of title to any and all property acquired or to be acquired under a will, as a condition of proceeding to attack that will. The renunciation required had to be sufficient to properly divest title in any real estate. Additionally, the court indicated that once the election was made the contestant was no longer able to receive any benefits through the will.

Subsequently, the Florida Supreme Court tempered the effects of the Pournelle renunciation by endorsing a standard more reasonable and consistent with generally accepted probate principals. In Barnett Bank of Jacksonville v. Murray, 49 So. 2d 535 (Fla. 1950), the Court declared an equitable approach to renunciations of this nature was necessary to better advance that purpose of the requirement and ensure an environment in which the sound intentions of the testator are promoted. The Court held that even though a contestant to a will may have initially received benefits under a will, it could subsequently attack that instrument by doing equity.

> "When the contestant has returned the benefits in the same condition as when he received them or has relinquished his

> rights therein in some manner recognized by law, has shown that the rights of claimants under the trust instrument have not been adversely and injuriously affected, and has shown that he has not been guilty of laches, he will be free to contest the validity of the instrument...."Id. at 537-538.

Not only did the Barnett court "qualify" the impact of initially receiving benefits under an instrument, it qualified the impact the renunciation ultimately had on the contestant. The Court actually reversed Pournelle on the issue of an absolute bar for recovery under a contested will.

> "By renouncing his right to property as a condition to contesting the instrument the beneficiary does not thereby forfeit all right or interest regardless of the outcome of the litigation... he will be free to contest the validity of the instrument and thereafter to take under it, if, after all the evidence is in, he finds himself unable to prove that fraud, duress or some other vitiating influence was present in the execution of the instrument or that at the time of its execution the trustor was legally incapable of execution the instrument." Id. at 538

The Supreme Court was focusing on the circumstances surrounding the renunciation's existence and the result it was meant to obtain. The Court recognized the fact that the only reason for the statement of renunciation was to be able to contest a will of questionable nature. Since the renunciation was included in the actual petition for revocation, it must be examined in that context and not as a separate and distinct act of the contestant. Since the purpose of its execution was to achieve a specific goal, i.e. qualifying to contest a will, the Barnett Bank court found that its resultant effect must therefore be limited. The Barnett Bank approach, which was followed by numerous other cases including those relied on by the District court below, mandated a focus on

the result rather than the existence or language of the renunciation.

This position was a recognition by the Court that unless individuals, who had serious and legitimate concerns about the making or execution of a will, were free to voice their concerns, then the primary objective for probate may be quashed. The most basic and important principal in the construction or probate of wills is that the ascertainment and effectuation of the testator's intention in disposing of his property upon death is controlling. See, Pancoast v. Pancoast, 97 So. 2d 875 (Fla. 2nd DCA 1957) and In re Roulston's Estate,142 So. 2d 107 (Fla. 2nd DCA 1962). If, however, the court imposed upon an individual the harsh consequence that unless he was successful in proving undue influence, fraud or the like, he would lose all that was provided to him in that document, then he may be forced economically to accept something which is morally and legally improper. The "absolute" theory was turning innocent, legitimate beneficiaries into "silent partners" of those who would take advantage of testators through fraud, duress or undue influence. Thus the goal of obtaining and enforcing a testator's true intentions was being thwarted.

The advancement for the "qualified" renunciation was echoed in In re Estate of Harby, 269 So. 2d 433 (Fla. 2nd DCA 1972), as cause for justice and equity.

> "Beneficiaries under two will who stand to get less under the later one, or heirs at law standing to gain under laws of intestacy, may bona fide have prima facie sufficient grounds to invalidate the questioned will, but be loathe to attack it lest they lose all if unsuccessful. Not only would the truth finding process thus go unavailed but, more

importantly, true and probable testative intent may remain unfulfilled." Id. at 434

The Harby court, after endorsing the Barnett Bank rationale, therein found a "qualified" renunciation was all that was necessary for a petition for revocation of probate of a will.

The lower courts in this case have taken the Harby ruling and fashioned a result which is contrary to the intent of that earlier decision, common sense, and equity. Since the Harby court found a qualified renunciation was all that was necessary, the lower courts in this case interpreted that to mean that any renunciation contained in a petition to revoke which was not specifically and unequivocally made qualified through its language was deemed to be absolute and resulted in the contestant's forfeiture of all benefits thereunder. The lower courts' interpretation is thus contrary not only to Harby, but to Barnett Bank and every other case thereafter which endorsed a movement away from the unreasonable harshness of interpreting both language and results as absolute.

In In re Estate of Wood v. Chowning, 271 So. 2d 42 (Fla.3rd DCA 1972), the court affirmed the need for a qualified renunciation in the petition for revocation.

> "This qualified renunciation protects the estate, prevents the attacker of the will from "having his cake and eating it too', and finally it allows the attacker to take under the will if it is validated. It is felt that the qualified renunciation rule works to satisfy the ultimate goal of testative intent...." Id. at 43.

Likewise, the court in In re Estate of Gaspelin, 542 So. 2d 1023 (Fla. 2d DCA 1989), reiterated the soundness of the Harby, holding

that a beneficiary is permitted to make a qualified renunciation of a will in order to contest it.

> "It is reasoned that a qualified renunciation by a beneficiary leaves the disputed property in the possession of the estate and does not unreasonably disrupt the orderly and timely distribution of the estate assets."Id. at 1025.

In no case was there a mandate that the language of the renunciation be expressly set forth or restrictive. The term "qualified" was meant to refer to the impact of the language and not the language itself.

The more rational and consistent approach to the qualified language issue is contained in In re Estate of Stein, 301 So. 2d 120 (Fla 3rd DCA 1974), and is the interpretation this court should endorse. In Stein, a petition for revocation contained the following language "The Petitioners disclaim any and all interest which they have under the Last Will and Testament instrument dated September 8, 1972." This language, which is identical to that used by the Appellant herein, was found to evoke a "qualified" result despite the absence of additional limiting language. The Stein court properly concentrated on the circumstances of the renunciations' existence rather than the particular words. Recognizing that the purpose for the qualified rule was to avoid an inequitable result for including a renunciation in a petition for revocation, the court found that the words used are not as important as the fact that the words were contained in the petition itself.

> "Even though the law allows a qualified renunciation, it is clear that the language of renunciation may be absolute." Id. at 122.

The court below dismissed both the rationale and holding in Stein; relying instead on a mistaken interpretation of Harby and the forms contained in the Florida Continuing Legal Education volume on "Litigation Under the Florida Probate Code." The lower court interpreted Harby as mandating the position that if the language of a renunciation does not contain qualified language it does not achieve a qualified result. The court in Harby, however, could not have been endorsing such a proposition, since it acknowledged and endorsed extensively the Supreme Court's holding in Barnett Bank. The Harby decision must stand for the proposition that since a renunciation contained in a petition for revocation will be deemed to solicit a qualified result, language in the petition which merely acknowledges that intent does not render the action insufficient to allow that contest to commence. If the Harby court sought to limit in any means the qualified result of a renunciation contained in a petition it would have done so expressly and not relied upon Barnett Bank so heavily.

The lower court herein also focused on the language contained in the form for a petition for revocation contained in the CLE volume which expressly qualified the nature of the renunciation. That court then improperly concluded that with such language in existence, any language in a petition which was not as restrictive must be found to be absolute in substance and affect. "Confronted with these circumstances we have no alternative but to conclude that the appellant must be bound by her chosen words of"absolute" renunciation."

In focusing on the language rather than the circumstances surrounding the renunciation's existence, the lower court herein has advanced a restrictive, unreasonable approach; more consistent with Pournelle than Barnett Bank's qualified approach. The lower court herein, just like the trial court in Stein which was eventually reversed, seeks to require "magic words" in order for a revocation to result in an effective qualified result. This approach is contrary to the Supreme Court's holding in Barnett Bank, that it is the circumstances surrounding the renunciation's existence which is the focus of concern not the renunciation itself. If the renunciation is made a part of the petition for revocation, then the language itself is immaterial, beyond its need to divest the contestant of ownership during the pendency of the will contest. The purpose for its existence and the results sought to be obtained through its existence are the important factors, and thus qualified results are to be dictated when the renunciation is contained as part of the will contest.

The limited approach endorsed by the District Court herein fails to recognize the inherent danger in placing weight on interpretive words and form over substance. By requiring an investigation into the form and content of each renunciation, the court below is opening up itself and other jurisdictions to the type of result sought to be avoided by establishing qualified renunciations in the first place. If one jurisdiction relies upon a certain authors interpretation of qualifying language while another jurisdiction mandates the form of another, contestants will

be chilled into not filing petitions for revocation for fear that a court may interpret the language of their renunciation as absolute rather than qualified.

It must be universally recognized that if the purpose for the renunciation is to qualify for contesting the will, then the effect that renunciation will have should be qualified. Since the renunciation is a condition precedent to the filing of the petition for revocation, the clause contained therein must be treated as such in order to advance the search for uncoerced testative intent. If a presumption as to the language contained in a petition for revocation is to be made, then, in terms of equity and consistency with judicial precedent, the presumption must be in favor of a qualified effect. Thus, unless the language contained in the petition is clearly, expressly and unambiguously made absolute. it must be considered qualified.

The contestant herein should not be penalized and the intent of the testator to convey to his sister his half interest in their father's house dismissed, simply because the language contained in the petition was not in conformity with a form espoused by the author of continuing legal education literature, but not approved by any case law or statute. The contestant herein relied instead on the express language found by a neighboring district court of appeals to be sufficient, as well as the judicial precedents heretofore announced, to connote the intent of this contestant. See also, 18 Fla Jur 2d.,Decedent's Property, § 227. (Echoing the rule against "magic words") it is interesting to note that in

order for a formal renunciation or disclaimer of property to be effective, it must meet requirements as to specifically stating its extent and scope. The court below is making it easier for an individual to mistakenly forfeit his property than it is for a person to purposely waive his rights to property.

The courts have consistently sought to protect the rights of individuals and promote measures which insure proper and just disposition of property. Generally, a forfeiture clause contained in a will won't be enforced against a legatee who in good faith and upon probable cause files a petition for the purpose of contesting the validity of a will. See, In re Pellicer's Estate, 118 So. 2d 59 (Fla. 1st DCA 1960). Furthermore, qualified elections have been adopted to ensure a spouse's claim as pretermitted spouse will not be forfeited should a petition to determine beneficiaries be decided against her. See, In re Estate of Gaspelin, 542 So. 2d 1023 (Fla. 2d DCA 1989).

Equity also dictates that the lower court be reversed in order to promote a fair and just result herein.

> "Equity regards substance rather than form, looks to substance and not to shadow, to spirit and not to letter, and seeks justice rather than technicality, truth rather than debate, common sense rather than quibbling." Coleman v. Coleman, 191 So. 2d 410 (Fla. 1st DCA 1966) .

Neither the appellees nor the court below are able to present a reasonable argument as to why the appellant would have included a renunciation in her petition for revocation other than to comply with the judicially imposed condition precedent. The appellees' right to receive their share of the residuary estate has not

diminished through any of appellant's actions. The facts are clear that the sole purpose and intent for the renunciation was to properly contest the will and the appellees knew the renunciation was made for that sole purpose. To permit these individuals to unjustly benefit from the appellant's good faith reliance on the language in Stein in formulating her renunciation, will be unequitable. "Equity will look beyond form to the true intent of parties in applying equitable remedies." Cooper v. Wolkowitz, 375 So. 2d 1099 (Fla. 3rd DCA 1979).

## CONCLUSION

Based upon the above it is respectfully requested that the decision of the District Court of Appeals be reversed herein as contrary to the intent and purpose of the qualified renunciation rule. There are two basic rules which apply to renunciations contained in petitions of revocation, as adopted by the courts. Rule number one is that a renunciation, which divests the petitioner of the title and use of property during the pendency of the suit, is necessary, i.e. a condition precedent, before an action can be instituted. Rule number two is that the effect given to the renunciation must recognize rule number one. The Supreme Court has determined, and lower courts have endorsed, the proposition that it is inequitable and counterproductive to the search for true testative intent, to penalize a petitioner for having the inclination to, in good faith, contest an instrument, which is of some value to them. The judiciary has found that since

the existence of this renunciation is to serve a specific purpose, its existence must not be a means by which the results sought to be obtained are foiled. The lower courts herein are endorsing a position which will result in petitioners losing their "qualified" protection simply because the language used in the petition was not of a particular form. This concentration on form rather than intent is contrary to the mandate for qualified and equitable results as pronounced by the Supreme Court in Barnett Bank and all the cases which followed.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been sent by U.S. mail this 5th day of March, 1993 to Richard Rahter, 6670 First Avenue South, St. Petersburg, FL 33707; James C. Runyon, 5263 Central Avenue, St. Petersburg, FL 33710; George M. Osborne, 433 Fourth Street North, St. Petersburg, FL 33701; William H. Bartlett, Esquire, Post Office Drawer 41600, St. Petersburg, FL 33743-1600 and Bruce Marger, Post Office Drawer 41600, St. Petersburg, FL 33743.

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