SUPREME COURT OF FLORIDA

THERESA H. CARMAN

Petitioner,

vs.

ROY GILBERT, ET AL.,

Respondent.
_____/

Case No. 81,209

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

REPLY BRIEF OF APPELLANT

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

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE

The record does not support Appellees' Statement of the Case nor does he cite the record to support any of his contentions. Initially, their characterization of the renunciations as "unqualified" is improper, since its the central issue of the case.

Secondly, it is inaccurate and insupportable in the record to state that none of the appellees or other beneficiaries had any notice of dismissal before the time for final hearing. Appellant filed the Voluntary Dismissal with the clerk's office first thing in the morning the day of the scheduled hearing.(R 109-110) Copies of the document were provided to each of the appellees prior to the scheduled appearance. It was at the insistence of the appellees that there was even a discussion of the same in open court. No testimony was presented to, nor any decision made by Judge Michael regarding the renunciation or any aspect of the Petition for Revocation because the petition was dismissed before it got to him.

Furthermore, the lower court's Order for Renunciation of Benefits was the result of a Petition For Determination of Renunciation of Benefits filed by appellees. The determination of entitlement and intent was based upon that Petition and the appellant's response thereto. The only testimony presented with regard to appellees' petition was from the attorney for Gerthe, Dick Rahter. Mr. Rahter admitted knowing little of the facts of the case (R 229-230) and testified only as to the fact that his client settled the case with Ms. Carman because of Ms. Gerthe's inability to attend the hearing (R 228-233).

STATEMENT OF THE FACTS

Appellees' remarks concerning the appellants failure to prove the allegations of her initial Petition is misleading in that the opportunity to do so never arose. Prior to any testimony being taken or any evidence being submitted at any hearing or trial, the petition was dismissed voluntarily by Theresa Carman. (R 109-110). Again, Appellee fails to cite the record for any of his contentions.

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. Contrary to the judicial trend toward disregarding the language and conceding petitioner's intent to be satisfaction of a procedural requirement, Appellees and the lower courts herein focus on the words used. The sound and equitable trend toward enforcing a qualified result for renunciations contained in Petitions For Revocation previously established is being reversed in favor of an approach which requires a subjective evaluation of the "qualifying" language contained in the appellant's petition. The qualified language Appellees cite to support their position is either untested, inaccurate or nonexistent. Meanwhile, Appellant relies upon language previously

determined by the case law in Florida to be a conditional renunciation.

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. To preserve the estate, however, a temporary forfeiture of benefits was required of the petitioner, in that they could not be used during the pendency of the suit. The decisions below and to a greater extent the positions advanced by the Appellees promote a return to the "absolute" rule and are unsupported by judicial precedent or intent. There is no reason or basis to find that a petitioner's intention, to temporarily forfeit her rights to the use of property intended for her use by a testator as a condition to seek the court's assistance in determining true tentative intent, is transformed into an absolute forfeiture of benefits because of actions taken during the pendency of that suit.

ARGUMENT

POINT 1

THE APPELLEES FAILED TO PROPERLY INTERPRET JUDICIAL PRECEDENTS AND INTENT WITH REGARD TO THE LANGUAGE REQUIRED TO ESTABLISH A QUALIFIED RENUNCIATION.

Barnett Bank of Jacksonville v. Murray, 49 So. 2d 535 (Fla. 1950), which is the cornerstone of the prevailing renunciation doctrine, does not stand for any of the propositions advanced in the Appellee's brief. Barnett was concerned that the true intent of the testator was produced, and that the means by which one could voice his concerns about that intent was not obstructed by penalties and pitfalls. The court was not concerned with a petitioner taking more through the imposition of the suit than she would have under the will as filed. Nor was it concerned whether the other beneficiaries might lose some or all of their devise through the petitioners action. Appellees did not and could not cite with authority any passages from Barnett, or any of the other cases it relied on, to support its naked assertions. Furthermore, appellees blithely assert as fact items which are not in the record and are not true.

Appellees assert that appellant should have used the language in either the Bar forms or that enunciated in In re Estate of Gaspelin, 542 So. 2d 1023 (Fla. 2d DCA 1989). While the bar forms were available for use, they have never been approved by a court. Furthermore, the Bar provision claims to be "a qualified renunciation under the case law of Florida." As our case suggests,

there is no consensus in the case law of Florida with regard to qualified renunciations. The language in Gaspelin is inappropriate for this case, since it dealt with a spouse's elective share not renunciation of a will. Appellees and the lower Court also cite In re Estate of Harby, 269 So. 2d 433 (Fla. 2nd DCA 1972), but there too no recitation of the "qualified" language approved by the court was contained in the text of the decision. The only renunciation case of record which actually recites some language of the renunciation is In re Estate of Stein, 301 So. 2d 120 (Fla. 3rd DCA 1974). As previously stated, Appellant recited and relied on that exact language for its Petition. The Stein court found that a qualified renunciation does not require "magic words," and that a renunciation made in the course of complying with the filing requirements for a petition to revoke probate, without a showing of further purpose, must be considered qualified. 301 So. 2d at 122.

Appellees assert that the Stein case is distinguishable because it was decided upon a different set of facts. They claim the lower courts herein made intent determinations on other than the language contained in the documents presented and are not subject to review. This court has the record of the only hearing held in this case and can examine any evidence presented. There was no testimony or evidence presented which would enable the intent of the Appellant to be derived from anything other than the language of the Petitions of Revocation filed by Appellant. There was no credibility determination which this court must respect. The District court made its determination based on the same

evidence as in Stein -- the chosen words of the Petition's renunciation.

The Court below found that "the conclusion reached in Stein is a matter of common sense," but still sought to impose the magic words of the Florida Bar form upon the Appellant. Perhaps due to some extent upon the fact that the court could not quite comprehend the intended purpose of terms of revocation in the first place. Stating it "can not formulate an example wherein a qualified renunciation would have any legal effect" the court illustrated its difficulty with the intent of the doctrine. It has no difficulty in grasping the ultimate effects, i.e. the renunciation will be of no effect if the revocation proceeding fails and there would be nothing left to renounce if the trial court revokes the probate of the will. However, it fails to acknowledge that the qualifying nature of the renunciation is not aimed toward the ultimate results, but that the renunciation is part of the process.

The Court and Appellees can find support for the statement that "only a conditional renunciation of benefits under a will is a condition precedent" (page 7), however, their interpretation of that statement can not be supported. A renunciation must be specifically contained in the pleading otherwise the Petition will be summarily dismissed. It is there according to Barnett, Harby, Stein and Gaspelin, exclusively to gain access to the court and to acknowledge the fact that petitioner is not in receipt of any will derived benefits. Regardless of how it is worded, this is the conditional aspect of the renunciation. Since it must be contained

therein, an interpretation or presumption that the intent of this pronouncement in the Petition is "qualified", is a more realistic and reasonable proposition than the harsh principal proposed by the Appellees. Furthermore, this interpretation is consistent with judicial intent and the specific language of Stein.

The harsh realities and effects of an unconditional renunciation should not be forced upon an unwitting or mistaken individual. An unconditional renunciation must be seen as where the person independently, and not in conjunction with another proceeding, determines to forfeit his rights under the will, without recourse. If done not as part of the Petition but as an separate, independent act, there would be no mistake as to the person's intent. There would be no reason for a person to make such a proclamation if not to disclaim any rights of recovery under a will. In this case, no other reasonable purpose can be proposed by the Appellees or the courts below as to why the Petitioner would have announced her intent to forfeit her benefits under the will except to satisfy a judicially imposed requirement to gain access to the court.

POINT II

THE RENUNCIATION IN A PETITION FOR REVOCATION CONCERNS THE USE OF BENEFITS ONLY DURING THE PENDENCY OF THE SUIT AND IS NOT EFFECTED BY DECISIONS MADE BY PETITIONER THEREIN.

As previously stated, the Appellees have failed to properly interpret the cases which set forth the scope and intent of the renunciation requirement. The Appellees would interpret Barnett to

mean that "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" (page 7, Appellee's Brief) and "that those who are to take under the will not be adversely or injuriously affected by one who would challenge the will." (page 11, Appellee's Brief) Further they assert that it would apparently be consistent with that case to declare "that in every circumstance where something is obtained in derogation of the will, the taker is absolutely disqualified from any bounty under the will..." (Page 15, Appellee's Brief). Such interpretations are not reasonable upon a review of Barnett or the cases that follow, and appellees failed to cite with specificity any supporting language from those case.

As was indicated in the Appellants' initial brief and above, the Barnett court sought to promote a legal environment which would advance the true intentions of the testator. In order to encourage the disclosure of bona fide doubts about the legality of a will, courts assured petitioners that their benefits under the will would not be the price exacted for voicing their concerns. All that was required was the petitioner temporarily forfeit his present interest in those assets until final disposition of the case.

This definition of qualified, a pledge of temporary forfeiture rather than absolute forfeiture, is supported in the cases which followed Barnett. In Harby the court noted

> "Qualified renunciation, therefore, would seem to be the existing rule of law and, we believe, the sounder one. Such a renunciation, at once, protects the estate by keeping the property in question in the possession of the estate until its proper disposition is determined; it prevents the attacker of the will from having its cake and eating it

> too, in that if he is successful in invalidating the will he cannot take under the will; and finally, if unsuccessful, the attacker may nevertheless take under the now validated will as intended by the testator, which is in the final analysis the very objective of the entire matter." 269 So. 2d at 434.

In Gaspelin the court noted, "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." 542 So. 2d at 1025 " This qualified renunciation protects the estate, prevents the attacker from having his cake and eating it too, and finally it allows the attacker to take under the will if it is validated." In Re Estate of Wood, 271 So. 2d 42, 43 (Fla. 3rd DCA 1972). In all these cases the court focuses upon the initial retention of benefits not the ultimate entitlement to take.

There is no support for a proposition that subsequent conduct by the Petitioner can transform a qualified renunciation into an absolute one. Appellee's claim that "in every circumstance where something is obtained in derogation of the will, the taker is absolutely disqualified from any bounty under the will" (page 15, Appellee's Brief).

After finding the language of the renunciation to constitute an absolute renunciation, the trial court found that "upon the facts herein [the renunciation] cannot be withdrawn" (R 197), thus indicating that there may be situations where even unconditional renunciations can be withdrawn. Neither the Appellees nor the trial court could cite a precedent for the proposition that

subsequent actions dictate a petitioner's initial intent.

If it is determined, however, that the subsequent taking of benefits could render an otherwise qualified renunciation absolute, it must be determined that Carman is still entitled to take under the will. The Petitioner has yet to actually receive or accept the benefits of the settlement. Petitioner's right to receive a portion of Gerthe's benefits is dependent upon the validity of the will and distribution thereunder. If it is her acceptance of benefits which indicated her true intent to absolutely renounce, then up until the actual receipt of those benefits, she has the right to void the settlement, withdraw the renunciation, and thus take her share of the proceeds of the house as intended by the testator.

The purpose of probate proceedings is to search for and execute upon the true intent of the testator, and any derogation of that search must be prevented. This proposition is supported by Barnett's assurance that by filing this petition, with its requisite renunciation, one is not precluded from taking under the will if the petition is unsuccessful. Thus a position can not be supported which would serve to obstruct the very objective of the process, distribution of the estate in accordance with testamentary intent. If benefits, truly intended for petitioner and temporarily revoked in the petition's renunciation, were subject to absolute forfeiture because she accepted additional property through her pursuit for the proper disposition of the estate, then the court in effect would be endorsing a type of "no contest" punishment sought

to be prevented in F.S. 732.517.

The cases have endorsed the recovery of the renounced assets upon failure of the Petition, there is no basis for concluding that a disposition of the Petition in other than total success or failure would convert the otherwise qualified renunciation into absolute terms. If, during her attempt to show her rights to proceeds are more consistent with the testator's true intent than another, an amicable resolution can be achieved, the court should not condemn her for not pursing the matter to final judicial determination. By denying petitioner the right to take benefits the testator specifically provided for her due to a settlement, would be contrary to the above cases and the long standing policy of law encouraging the compromise and settlement of controversies. National Security Co. v. Willys-Overland, Inc., 138 So. 24 (Fla. 1931); Florida East Coast R. Co. v. Thompson, 111 So. 525 (Fla. 1927).

CONCLUSION

The legal effect the qualified renunciation has, and is meant to have, is to permit the petitioner access to the court. Before being permitted the court's assistance, the petitioner must be divested of her present benefits and acknowledge that fact. It is a declaration that during the time the issue of the validity of the will is before the court, the declarant agrees not to take advantage of the benefits passing to her. Courts have determined that declaration is not to be expanded beyond its required purpose

because its wording is not uniform.

The renunciation is not meant to go to the ultimate benefits, it is meant to preserve the present benefits while the will contest is being fought. It was certainly not meant to serve as punishment for those filing a Petition in good faith who are ultimately unsuccessful before the court or have been fortunate enough to reach an amicable resolution to the matter before a judicial determination. The qualified renunciation rule was created to eliminate the "chilling effect" an absolute renunciation had on encouraging the initiation of Petitions For Revocation of Probate. Its protection must be extended throughout the probate process, otherwise the petitioner would be deterred from settling unless they are willing to exchange the proceeds of settlement for the initial bequest.

Based upon the above it is respectfully requested that the decision of the Second District Court of Appeals be reversed herein as contrary to the intent and purpose of the qualified renunciation rule as established by the Florida Supreme Court and other District Courts of Appeal.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been sent by U.S. mail this 12th day of July, 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

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