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SUPREME COURT OF FLORIDA

VIRGINIA WALKER

Petitioner,

CASE NO. 89,992

vs.

Launa G. MICKLER,
Personal Representative
IN RE: THE ESTATE OF
CAROLYN B. MANSFIELD,

Respondent.
_____/

On Appeal from the District Court of Appeal
First District of Florida

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The petitioner, VIRGINIA WALKER, will be referred to herein as petitioner/creditor. The Respondent, LAUNA G. MICKLER, personal representative of the Estate of Carolyn B. Mansfield, will be referred to herein as the respondent/decedent. Appellant in the court below was VIRGINIA WALKER. Appellee in the court below was LAUNA G. MICKLER as personal representative of the Estate of Carolyn B. Mansfield. Portions of the transcript of Court Proceedings held before Honorable L. Haldane Taylor on December 11, **1995**, will be referred to as (T-). Portions of the Record will be referred to as (R-). The District Court of Florida, First District will be referred to as the First District, **The** opinion of the First District herein shall be referred to as (0-).

STATEMENT OF THE FACTS AND OF THE CASE

This is an appeal from an Opinion filed January 31, 1997 and Mandate signed February 18, 1997 by the District Court of Appeal of Florida, First District. Notice of Appeal was filed February 26, 1997.

This action was begun by the filing of Petition for Administration (testate Florida Resident- single petitioner) in the Probate Division in the Circuit Court, Fourth Judicial Circuit, In and For Duval County, Florida. An Order Admitting Will to Probate and Appointing Launa G. Mickler as Personal Representative was filed on February 28, 1995. (R 1-2) The Last Will and Testament of Carolyn B. Mansfield, dated March 22, 1991, was filed on February 28, 1995. (R-3-5)

Appellant, VIRGINIA WALKER, timely filed her statement of Claim in the probate proceeding on April 26, 1995. (R-6-7). Her claim was based on a Deficiency Judgement against the decedent dated January 11, 1991, case number 89-21-CA Circuit Court Alachua County, Florida. (R-6-7)

The personal representative, LAUNA G. MICKLER, and her son, DAVID BAVLE filed on June 7, 1995, a Petition to Determine Homestead Real Property. (R-10-12) The petitioners, LAUNA G.

MICKLER and DAVID BAVLE allege the following:

1. The decedent died on January 26, 1995, and was domiciled in Duval County, Florida.

2. At the time of decedent's death she owned the following described real property:

> Lot 11, Block TWO, SURF PARK, UNIT NO. 1, REPLAT; according to Plat thereof recorded in Plat Book 20, page 27 of the current Public Records of Duval County, Florida.

3. The decedent was not survived by a spouse, and specifically devised the above described property to her daughter, LAUNA G. MICKLER, as to a Life Estate, and to her Grandson, DAVID BAVLE, as to the remainder interest.

4. The above described real property and all improvements thereon constituted the homestead of the decedent within the meaning of Section 4 of Article X of the Constitution of the State of Florida. (R-10-12)

DAVID BAVLE filed on June 7, 1995, a Petition to Determine Exempt Property. (R-8-9) The petitioner, DAVID BAVLE alleged the following:

1. The decedent died on January 26, 1995, domiciled in Duval County, Florida.

2. That Petitioner pursuant to Section 732.402 of the Florida Probate Code is entitled, subject to any perfected security interest up to a net value of $10,000 of decedents personal property and pursuant to Section 4 of Article X of the Florida Constitution is entitled to personal property of the decedent to the value of $1,000.00. (R-8-9)

Petitioner/creditor filed on June 23, 1995 a Response to Petition to Determine Exempt Property. (R-13-14)

A court proceeding was held before Honorable L. Haldane Taylor on December 11, 1995, to consider the Petition to Determine Exempt

Property and Petition to Determine Homestead Real Property. (**R-1-19**)

The decedent, Carolyn B. Mansfield devised to her daughter, LAUNA G. MICKLER, a life estate in her homestead real property and a remainder interest in the homestead to LAUNA G. MICKLER'S son, DAVID BAVLE. (R-3), (T-2) Decedent devised all the rest residue and remainder of her estate to her grandson, DAVID BAVLE. (R-4).

As to the Petition to Determine Homestead Real Property the trial court entered January 4, 1996, an ORDER DETERMINING HOMESTEAD **EXEMPTION** and it was filed on January 5, 1996. The court found, inter alia, that

> 1. The "duplex, owned by the decedent as her residence, was homestead property pursuant to Article X Section 4 of the Florida Constitution and was exempt from the claims of her creditors. The benefit of the exemption inures to the heirs of the owner. FLA. CONST. Art, X, section **4(b)." (R-17-18)**
>
> 2. "That Petitioners, LAUNA G. MICKLER and DAVID BAVLE, the decedent's daughter and grandson, respectively, are lineal descendants of the decedent. Thus, they are heirs within the meaning of Article X, Section 4 (b) of the Florida Constitution." **(R-17-19)**

As to the Petition to Determine Exempt Property the trial court entered January 4, 1996, an **ORDER** RULING ON EXEMPT PROPERTY and it was filed on January 5, 1996. The court found, inter alia, that

> 1. "The Petitioner, DAVID BAVLE, was devised of the residue of the estate of CAROLYN B. MANSFIELD. Petitioner is the grandson of the deceased."

2. "The residue of the decedent's estate consists of furniture, furnishings, and appliance valued at approximately $2,000.00."

3. "Under the Florida Constitution personal property owned by a natural person to the value of $1,000.00 is exempt from creditor's claims. FLA. CONST. art. X, section 4(a)(2). This exemption inures to the heirs of the owner. FLA. CONST, art, X, section 4 (b)."

4. "It has been determined by this Court that Petitioner, DAVID BAVLE, as grandson and Lineal descendant of the decedent, is an heir within the meaning of article X, section 4 (2)(b). "

5. DAVID BAVLE can not avail himself of the exemption under Section, 732.402, Florida Statutes.

6. The court Ordered that Petitioner, DAVID BAVLE, is entitled exempt personal property of the decedent to a value of $1,000.00. **(R-15-16)**

Petitioner/Creditor mailed a Motion for Rehearing on January 11, 1996 which was filed on January 20, 1996. **(R-20-23)** The trial court filed an Order Denying Motion for Rehearing an March 26, 1996. **(R-24)**

Appellant filed a Notice of Appeal on April 18, 1996 to the District Court of Appeal of Florida First District. **(R-25-32)** The District Court of Appeal of Florida First District upheld the order of the trial court in its Opinion filed on January 31, 1997.

SUMMARY OF ARGUMENT

The trial court and First District court erred in its determination that the grandson of the decedent, DAVID BAVLE, was an heir entitled to the exemption protection provided by ARTICLE X, SECTION 4 (b) Florida Constitution. The pivotal question for this court is the interpretation and definition of the word "heir" contained in ARTICLE X, SECTION 4 (b) of the Florida Constitution. Florida Statute section 731.201 (18) defines heirs as "those persons, including the surviving spouse who are entitled under the statutes of intestate succession to the property of the decedent." The facts of this matter are that the grandson would not be entitled to inherit under the laws of intestacy from his grandmother at the time of her death because at that time his mother, LAUNA G. MICKLER, was living. LAUNA G. MICKLER as well as her brothers would be the persons entitled under the statutes of intestate succession to the property of the decedent.

ARGUMENT

The Trial Court's and First District's finding that DAVID BAVLE is an heir entitled to take the decedent's homestead real property free from decedent's creditors within the meaning of Article X, Section 4(b) of the Florida Constitution is in error. The opinion of the First District herein is in conflict with the District Court of Appeal, Second District, case of Davis v. Snyder, presently on appeal to this court. 681 So.2d 1191 (Fla. 2nd DCA 1996), cited as Snyder v. Davis, Supreme Court Case Number 89,410.

The trial Court in paragraph 4 of the Order Determining Homestead Exemption and First District quoted the Florida First District Court opinion in Department of Health and Rehabilitative Services v. Trammell to interpret Article X, Section 4(b) of the Florida Constitution to mean "those who may under the laws of the State inherit from the owner of the homestead." (R-18). The court concluded that all lineal descendants including the grandson herein were entitled to the homestead protection afforded by the constitution (0-2). It is assumed in this case from the opinion of the First District that "may" redefines heir to include all lineal descendants.

However, the First District Court in Trammell went on to properly define heirs. "Heirs are defined in Section 731.201(18) Florida Statutes, as those persons, including the surviving spouse

who are entitled under the statutes of intestate succession to the property of the decedent. 508 So. 2d 422, 424 (Fla. 1st DCA 1987). In the instant case DAVID BAVLE, the decedent's grandson, would not be entitled to inherit under the statutes of intestate succession because at the time of his grandmothers death, his mother was living and she would have been entitled under the statutes of intestate succession to the property of decedent along with her two brothers.

The clear and unequivocable language of the definitional statute says "'heirs' or 'heirs at law' means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of the decedent." Public Health Trust of Dade vs. Lopez, 531 So 2d 946, 951 ftn.6 (Fla. 1988). The Fourth District Court of Appeal in Hubert vs. Hubert, defined "heirs for purposes of homestead are those persons who would inherit under our statutes providing for intestate succession." 622 So. 2d 1049, 1050 (Fla. 4th DCA 1993). All of the cases and statutes clearly define heirs or heirs-at-law as those "entitled" to or who would inherit. None of these cases indicate that the word "heirs" are synonymous with "lineal descendants". Lineal descendants may, but for being survived by a lineal descendent closer in consanguinity, inherit under the laws of intestacy.

The trial court and the First District are correct in

emphasizing that lineal descendants, are fathers and mothers, brothers and sisters, and grandmothers and grandfathers. That is the correct definition of lineal descendants. Further, the Trammel Court does not indicate that they are all at the same time eligible under the statute of intestate succession to the property of a decedent. In fact, Florida Statute 732.103 (1) merely provides the priority upon which the particular lineal descendant entitled to inherit is determined. That person who inherits under the laws of intestate succession is the heir.

In the instant case, the decedent was not survived by a spouse and was survived by three children. Florida Statute section 732.103(1) provides that the part of the intestate estate not passing to the surviving spouse under 732.102 Florida Statute descends as follows: " (1) To the lineal descendants of the decedent." Under the statute, the person or class of persons named in each division or subdivision take to the exclusion of the person or class of persons named in subsequent divisions or subdivision created by the statute.

It has been held that only one provision of the statute can apply to any one particular estate. The Florida Supreme Court stated:

> "The legitimacy of the children is raised by the collateral heirs of the deceased with the knowledge that they cannot inherit the estate if children of the deceased survive." In re: Ruff's Estate, 159 Fla 777, 32 So.2d 840, 842 (1947)

The lineal descendants entitled to take are those who are in direct line of descent from the decedent. In Florida, descent is per stirpes whether to lineal descendants or to collateral heirs. Florida Statute section 732.104. Per stirpes is a method based on the doctrine of representation. Thus the children of a predeceased parent would share in that portion of the estate to which their parent would be entitled had he survived.

This Court In Ruff's Estate clarified this point with the statement "The right of a child to inherit property through its father does not commence until after the death of the father and consequently all such rights will be governed by the statutes then existing." Id, 843. In the instant case, the right of DAVID BAVLE to inherit property through his mother, LAUNA G. MICKLER, does not commence until after the death of the mother, LAUNA G. MICKLER.

The definition of heir is not to be equated with lineal descendent. The definition of heir is not to be equated with "adult heir" or "minor heir" or "independent heir" or "dependant heir". Health Trust of Dade County, v. Lopez, 531 So. 2nd 946, 947 (Fla. 1988). This Court in Lopez explained that the constitutional provision at issue is clear, reasonable and logical in its operation. id. at 949 The court had no trouble in defining heir in the Lopez case. Certainly the definition of the term "heir" has not changed since the Lopez opinion was entered and this aspect of the constitutional provision has not been changed.

Where the language is clear and unambiguous and conveys a clear and definite meaning it is inappropriate for the court "to graft onto to it something that is not there." id. The court should not graft "lineal descendants" onto the constitutional provision in place of "heir". The Respondent would edit the case law to change "heir" to "lineal descendants" in order to conform this case to Respondent/decedent's desired result.

The interest of the State of Florida is quite evident, since persons who become destitute would become a charge upon the public. The exemption is calculated to benefit the public and is liberally construed in favor of those persons entitled to its protection. For example, the 1985 Amendment changed the persons who qualified under Article X Section 4 from "head of a family" to a "natural person". id. at 948. That change did not affect or broaden scope of the protection provision from "heir" to "lineal descendants" during that vote of the people of Florida.

Even though liberally construed, this does not mean that the exemption laws are to be applied to those who are not entitled to be benefitted. For example in Hubert v. Hubert, 622 So.2d 1049 (Fla. 4th DCA 1993), the devise of a conditional life estate to the decendent's friend was not a protected interest. Likewise, a devise to a "good friend" was held to not be an heir entitled to protection under homestead provisions with respect to the creditor's lien. Department of Health and Rehabilitative Services

v. Trammell, 508 So. 2nd. 422 (1st DCA 1987). Similarly, the provision in a will to sell the homestead and distribute the proceeds to the decedent's children was held by the District Court of Appeal of Florida, First District, to subject the proceeds to the claims of decedent's creditors. Estate of Price v. West Florida Hospital, 513 So.2d 767 (Fla. 1st DCA 1987). (Query, why would a homestead property which is outside the probate as of the date of death of the decedent and passes to the children loss its homestead protection merely because it is directed to be sold by the decedent's will? Does such a provision in a will subject the homestead to the loss af protection and to probate proceedings? Is the property interest herein still a homestead interest despite not being protected from decedent's creditors?)

The Trammel1 court, contrary to its holding in the instant case, refused to uphold the trial court's finding that the good friend was a testamentary heir. The trial court in Trammel1 confused heir with devisee. The good friend was a testamentary devisee, never an heir at law. The very definition of the word heir as the one entitled to inherit under the laws of intestacy was clear in Trammell. In the instant case the trial court and the First District, confused a testamentary devisee (who is also a lineal descendent) with the definition of heir. A testamentary devisee may be the heir at law of a decedent, such as the devise herein of a life estate to the decedent's daughter. The

testamentary devisee, DAVID BAVLE, is a lineal descendent but he is not the heir at law of the decedent as he is survived by his mother.

The definition of heirs at the time of the constitutional enactment of the homestead provision has remained clear and precise. The definition of lineal descendants has also remained clear and precise during the constitutional enactments of the homestead provision.

The First District in its opinion herein indicated creditors are aware that the homestead is protected, but this court should not conclude that the protection is absolute or without exceptions. The devise of homestead property to a friend is not protected. A direction in a will to sell the homestead and split the proceeds among the decedent's children is not protected. Consequently, it is logical that a devise to a distant relative, not next in consanguinity, is not without risk of losing the homestead protection.

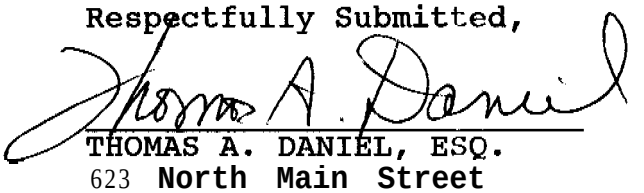
There is no public policy being violated as the clear, unambiguous, and reasonable meaning of the constitution limits the protection afforded to a decedent's heirs. Further, there is no public policy being violated as there is no requirement of indigency or dependency in order to quality for the exemption. The real public policy is that property owned by a natural person which a creditor can not take during her life cannot be taken from her

heirs after her death. In this case the policy is being followed as DAVID BAVLE is not an heir of the decedent. He is a testamentary devisee. The definition of heir has been plainly said to homesteaders and creditors alike. Miller v. Finegan, 26 Fla. 29, 7 So. 140 (1890).

CONCLUSION

DAVID BAVLE as grandson of a decedent survived by her children is not an heir entitled to the protections of Article X, section 4(2)(b) and Article X, Section 4 of the Florida Constitution as to the remainder interest and residuary interest he received pursuant to the will of the decedent. For the reasons expressed herein this court should reverse the Opinion of the District Court of Appeal of Florida, First District.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by US Mail to:

WILLIAM G. NOE, JR., ESQ.
Attorney for the Personal Representative
for the estate of Carolyn B. Mansfield
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Atlantic Beach, FL 32233

this 1st day of April, 1997.

Thomas A. Daniel

THOMAS A. DANIEL, ESQ.