IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO4-1243
L.T. NO. 4D03-1954

THOMAS MCKEAN, ET. AL.,
petitioners,

vs.

PETER WARBURTON
respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF REAL PROPERTY PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR, AS *AMICUS CURIAE*

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INTRODUCTION

The leading cause of cerebral herniation among probate lawyers, real estate lawyers, circuit court judges sitting in probate and appellate judges reviewing their work, is the study of the Alegal chameleon,@ also known as homestead.[i]

We have no interest in the impact this case has on any of the litigants. We are not friends of any one or more of the counsel representing the parties, although we certainly admire their tenacity and professionalism. Our purpose here is to try and untangle the web of constitutional provisions, statutes and cases that make up our homestead jurisprudence. Through this effort, we hope we can assist the Court in its review of the decision below.

SUMMARY OF ARGUMENT

The perplexing homestead question encompassed within the certified question issued to the Court is: If homestead can be freely devised, is it property of the estate subject to abatement in order to pay superior devises in accordance with section 733.805, Florida Statutes?

The answer is: it depends. If the homestead devisee under a will is a person for whom homestead protection was intended, such as Aheirs,@ then the homestead is Aprotected homestead@ and is *not* part of the estate subject to use to pay other, superior devises. If the homestead devisee is not a person for whom the protection was intended or has not waived that protection, then the homestead property has lost its protective status and is simply part of the estate, subject to the payment of superior devises, creditors and other administration expenses.

Section 731.201(29), Florida Statutes, defines Aprotected homestead.@ Section 733.607(1), Florida Statutes, exempts Aprotected homestead@ from the estate and the personal representative=s control. Section 733.608(1) (a), Florida Statutes, also exempts Aprotected homestead@ from the probate estate and expressly from being used to pay other devises. Section 733.805 (1) (b), Florida Statutes, provides the order in which assets abate in order to fund superior devises under a will. Abatement is allowed only with respect to Afunds and property of estate,@ which the previously mentioned statutes indicate does *not* include Aprotected homestead.@

ARGUMENT

I. STANDARD OF REVIEW

The question certified to this Court requires that it construe section

733.805, Florida Statutes, other portions of the Florida Probate Code, and article X, section 4,Florida Constitution. To our knowledge as an *amicus*, there are no issues of fact presented on appeal. Therefore, the Court will apply the *de novo* standard of review to the decision below. *See State v. Glatzmayer*, 789 So. 2d 297, 301-02, n.7 (Fla. 2001) (setting out standards of appellate review); *Gordon v. Regier*, 839 So.2d 715, 718 (Fla. 2d DCA 2003) (AIn reviewing the statutory construction of the Act, we apply the de novo standard.@).

II. THE FUNDAMENTALS OF HOMESTEAD LAW

As this Court noted in *Snyder v. Davis*, 699 So. 2d 999, 1001 (Fla. 1997), there are three kinds of homestead with one purpose, preserving the family home for its owner and Aheirs.@ The purpose of homestead is accomplished through a tax exemption and the protections from certain devises and forced transfer. The homestead protection at issue here is a protection against forced transfer for use by an estate and is a creature of the Florida Constitution, article X, section 4.[ii] To clearly distinguish it in the Florida Probate Code from other forms of homestead, the Legislature now refers to it as Aprotected homestead.@ ' 731.201(29), Fla. Stat.; 2001-226, Laws of Fla. ' 11, eff. Jan. 1, 2002.

Homestead law is to be liberally construed in favor of maintaining the homestead protection. *Snyder v. Davis*, 699 So. 2d at 1002.

Homestead vests on death, even in the absence of a court order confirming homestead status, and is not impacted by a later sale of the property. *In re Estate of Hamel*, 821 So. 2d 1276, 1279-80 (Fla. 2d DCA 2002)

Florida courts have uniformly held that homestead does not become a part of the probate estate regardless of whether it is devised in a will, unless a

testamentary disposition is permitted and is made to someone *other than* a person to whom the benefit of homestead protection could inure. *See Clifton v. Clifton,* 553 So. 2d 192, 194 n. 3 (Fla. 5th DCA 1989) (noting, A[h]omestead whether devised or not, passes outside of the probate estate"); *Cavanaugh v. Cavanaugh,* 542 So. 2d 1345, 1352 (Fla. 1st DCA 1989) (holding transfer of probate jurisdiction to circuit court did not change law that homestead is not asset of probate estate); *Estate of Hamel,* 821 So. 2d at 1279. *See also* ' 733.607(1), Fla. Stat. (requiring a personal representative to take control of all of the decedent's property "except the protected homestead@). AThe test is not how title was devolved, but rather to whom it passed." *Bartelt v. Bartelt*, 579 So. 2d 282, 283 (Fla. 3d DCA 1991). If the transfer is to a member of the protected class, the protection from forced transfer exists. *Id.*

Further, this Court has held that the residuary clause in a will is sufficient to devise homestead even though homestead is not part of the probate estate. *See Estate of Murphy,* 340 So. 2d 107 (Fla. 1976)

Most of these homestead concepts are codified in The Florida Probate Code, sections 731.201(29), 733.607(1), 733.608(1) (a), and 733.805 (1), Florida Statutes.

III. THE LAW OF ABATEMENT

This case is all about the abatement of assets passing in accordance with a will in order to satisfy superior devises. Section 733.805 (1), Florida Statutes, provides the order in which assets abate in order to pay expenses and superior devises under a will:

> 1) Funds or property designated by the will shall be used to pay debts, family allowance, exempt property, elective share charges, expenses of administration, and devises, to the extent the funds or property is sufficient. If no provision is made or the designated fund or property is insufficient, *the funds and property of the estate* shall be used for

these purposes, and to raise the shares of a pretermitted spouse and children, except as otherwise provided in subsections (3) and (4), in the following order:

(a) Property passing by intestacy.

(b) Property devised to the residuary devisee or devisees.

(c) Property not specifically or demonstratively devised.

(d) Property specifically or demonstratively devised.

(2) Demonstrative devises shall be classed as general devises upon the failure or insufficiency of funds or property out of which payment should be made, to the extent of the insufficiency. Devises to the decedent=s surviving spouse, given in satisfaction of, or instead of, the surviving spouse=s statutory rights in the estate, shall not abate until other devises of the same class are exhausted. Devises given for a valuable consideration shall abate with other devises of the same class only to the extent of the excess over the amount of value of the consideration until all others of the same class are exhausted. Except as herein provided, devises shall abate equally and ratably and without preference or priority as between real and personal property. When property that has been specifically devised or charged with a devise is sold or used by the personal representative, other devisees shall contribute according to their respective interests to the devisee whose devise has been sold or used. The amounts of the respective contributions shall be determined by the court and shall be paid or withheld before distribution is made.

(Emphasis added)

As you can see, if a testator wanted to establish his or her own hierarchy of sources of assets from which to pay superior devises, he or she may do so by stating it in his or her will.

If no provision is made then A*funds and property of the estate* shall be used for these purposes,... .@ Section 731.201(12), Florida Statutes, defines Aestate@ as used in the Florida Probate Code and provides: A(12) >Estate=

means the property of a decedent that is the subject of administration.@ So, is Aprotected homestead@ part of the Aestate?@ For the reasons presented below, the answer is Ano.@

Section 731.201(29), Florida Statutes, defines Aprotected homestead:@

> (29) AProtected homestead@ means the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner=s surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code, real property owned as tenants by the entirety is not protected homestead.

Section 733.607(1), Florida Statutes, exempts Aprotected homestead@ from the estate and the personal representative=s control. Section 733.608(1)(a), Florida Statutes, also exempts protected homestead from the probate estate **and expressly from its use to Apay devises:@**

> 1) All real and personal property of the decedent, *except the protected homestead*, within this state and the rents, income, issues, and profits from it shall be assets in the hands of the personal representative:
>
> (a) For *the payment of devises*, family allowance, elective share, estate and inheritance taxes, claims, charges, and expenses of the administration and obligations of the decedent=s estate.

(Emphasis added.)

Further, as previously noted, Florida courts have uniformly held that homestead does not become a part of the probate estate regardless of whether it is devised in a will, unless a testamentary disposition is permitted and is made to someone *other than* a person to whom the benefit of homestead protection could inure. *See Clifton v. Clifton*, 553 So. 2d at 194 n. 3; *Cavanaugh v. Cavanaugh*, 542 So. 2d at 1352; *Estate of Hamel*, 821 So. 2d at 1279.

In the opinion under review, the district court of appeal cited to *City Nat=l Bank of Fla. v. Tescher*, 578 So. 2d 701 (Fla. 1991) and *Estate of Hill*, 552 So. 2d 1133 (Fla. 3d DCA 1989) for the proposition that A[b]ecause homestead could be freely devised, it was property of the estate subject to division in accordance with the established classifications giving some gifts priority over others.@

It appears the Court overlooked or misapprehended the true holding in *Tescher*. In that case, as a result of the surviving spouse=s waiver of homestead protection in an antenuptial agreement, the person receiving the residuary devise of the residence was not protected by article X, section 4, Florida Constitution. As a result, there was no protected homestead and the property passed as an estate asset. 578 So. 2d at 703.

It also appears the court overlooked or misapprehended the true holding in *Bartelt v. Bartelt*, 579 So. 2d 282 (Fla. 3d DCA 1991) and the significance of that court receding from *Estate of Hill*. *Estate of Hill* holds that a devise by will, rather than intestate transfer, of homestead property to a person other than a spouse or minor eliminates the homestead protection. If true, then, without the protection, the property is indeed part of the estate, as in *Tescher*. In *Bartelt*, the court recognized that the holding in *Hill* was erroneous to the extent a devise of homestead is made to a person who falls within the homestead protection, as we have in this case. 579 So. 2d at 284 (AHowever, we expressly recede from *Hill* to the extent it can be read to bar devisees who are also the decedent's heirs under Florida law from seeking the protection of Article X, Section 4, of the Florida Constitution upon inheriting the decedent's homestead property.@)

Based on the statutes and further supported by the case law, including the required liberal interpretation of the law in favor of the homestead protection, it appears that a court cannot properly unravel the homestead

protection in order to satisfy other devises.

IV. THE PARK LAKE PROBLEM

We have tried to develop an understanding of the opinion under review in order to make sense of how the court might have seen fit to obviate the Florida Probate Code=s handling of protected homestead.

We think the court was saying that the homestead never was devised through the residuary. By virtue of abatement it was devised through the general pecuniary devises under the decedent=s will and never made it to the residuary. The concept is tempting and somewhat buoyed by *Park Lake Presbyterian Church v. Estate of Henry*, 106 So. 2d 215 (Fla. 2d DCA 1958). There, the court opined that a Aresiduary legacy is a general legacy wherein fall all the assets of the estate after all other legacies have been satisfied and all charges, debts, and costs have been paid.@ *Id*. at 217. That case was cited with approval by the district court of appeal. AResiduary devise@ is generally defined the same way in the Florida Probate Code with the admonition that the context in which a term is used may alter its meaning. '731.201(31), Fla. Stat. This idea, however, falls apart under closer scrutiny.

Devises, including devises of protected homestead, vest immediately upon the testator=s death. '732.514, Fla. Stat.; *In re Estate of Hamel*, 821 So. 2d at 1279-80. Although legal title vests at that time, the assets, other than protected homestead, are possessed by the personal representative and may be used by that fiduciary in the course of the estate administration. '733.607(1), Fla. Stat. (AExcept as otherwise provided by the decedent=s will, every personal representative has a right to, and shall take possession or control of, the decedent=s property, except the protected homestead,...@); *Jones v. Federal Farm Mortgage Corp.*, 132 Fla. 807, 182 So. 226 (1938). This immediate vesting also applies to remainder interests. *In re Estate of Hamel*, 821 So. 2d at 1280.

After the personal representative has marshaled the assets, which have already vested in devisees, the personal representative goes through various processes by which he, she or it establishes creditors of the decedent and what they are owed, tax liabilities, and other expenses of the estate. AAt that point the personal representative can determine if any assets will remain for distribution or the amount of assets available, taking into account the unavailability of homestead, exempt property and family allowance.@ Trawick, Henry P., *Trawick=s Redfearn Wills And Administration In Florida*, '11-9 (2005 ed.), pg.1.[iii] In the course of developing the Aplan of distribution@ (F.P.R. 5.400(b) (5)), or perhaps earlier when creditors need to be paid, the personal representative will look to sections 733.608 and 733.805 to determine the source of these payments. Assuming no language in the will to the contrary and assuming no property passes by intestacy, the payment of expenses and general devises of money will be paid from the estate Aproperty devised to the residuary devisee or devisees.@' 733.805(1) (b), Fla. Stat. So, a residuary devisee has a vested right in an asset, but it may be taken away at a later point in the estate administration if expenses or other devises have to be paid ahead of his or her devise. And, of course, what interest in property the residuary devisee ultimately receives will be smaller than that in which he or she was originally vested.

Obviously if the Aproperty devised to a residuary devisee@ could not be defined until after the personal representative paid debts and superior devises, as *Park Lake* suggests, then a personal representative could never apply section 733.805. The fiduciary would be frozen in a circular analysis. Estate assets would be harbored in the ether, with no place on the abatement ladder until after abatement.

We believe that what *Park Lake* and the definition of Aresiduary

devise@ in the Florida Probate Code are really defining for us is the net devise to a residuary devisee (what he or she gets to actually take from the probate process at its conclusion)Cnot a shift in how abatement works under Florida law.

In any event, the protected homestead immediately vests in a protected person on the testator=s deathCleaving it out of the abatement calculus.

Given that the court=s possible reasoning will not square with the abatement law under the Florida Probate Code, we considered the possibility of a common law theory. But, sections 733.608(1)(a) and 733.805 cannot be abrogated by some common law rule, if any, that might have a non-probate asset being employed to satisfy a devise in a will (which devises only probate assets). Indeed, in 733.608(1) (a), the Legislature expressly exempted the use of protected homestead to pay devises and, in 733.805, limited abatement to probate assets (which by definition excludes protected homestead). These statutes control over the common law. *See* '2.01, Fla. Stat. And, of course, the common law cannot abrogate the Florida Constitution=s protection of homestead. *See Mathews v. McCain*, 125 Fla. 840, 170 So. 323, 327 (Fla. 1936).

V. THE TESTATOR=S WAY OUT

Testators in Florida are presumed to understand the impact of Florida law on their respective estate plans. *See Efstathion v. Saucer*, 158 Fla. 422, 29 So. 2d 304, 308 (1947) (ASuffice it to say they were each chargeable with knowledge of the [homestead] law.@); *Markham v. Moriarty*, 575 So. 2d 1307, 1310 (Fla. 4th DCA 1991) (A...persons owning property within a state are charged with knowledge of relevant statutory provisions affecting the control or disposition of property.@).

Assuming the testator knew the law or was properly advised, how

might the testator in this case have avoided the homestead protection and the Legislature=s preclusion of abatement of protected homestead? The testator could have changed this result through the preparation of his will. Indeed, if the testator had mandated that the real estate be sold and the proceeds distributed, then we would not be dealing with Aprotected homestead@ and the property would be part of the estate and abatement of the proceeds of the sale would be appropriate. *See Knadle v. Estate of Knadle,* 686 So. 2d 631 (Fla. 1st DCA 1996); *Estate of Price v. W. Fla. Hosp., Inc.*, 513 So. 2d 767 (Fla. 1st DCA 1987).[iv]

So, the homestead issue before the Court is not an inescapable problem for testators and their estate planners. The testator need only weigh the value of the homestead protection against the possibility that a creditor or general devisee may not be paid if the estate has insufficient assets. And, the estate planner need only raise the issue, counsel his or her client, and follow the client=s instructions.

CONCLUSION

For these reasons, the Real Property Probate & Trust Law Section of The Florida Bar believes that section 733.805 and 733.608(a)(1) mandate that protected homestead transferred by devise to the residuary of a will cannot abate to satisfy general pecuniary devises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this response was furnished by U.S. Mail to Bruce D. Barkett, Esquire, Collins, Brown, Caldwell, Barkett & Garavaglia, Chartered, 756 Beachland Blvd., Vero Beach, FL 32963, attorney for petitioners, and Troy B. Hafner, Esquire, Gould, Cooksey, Fennell, et al., 979 Beachland Blvd., Vero Beach, FL 32963, attorney for respondent, this ____ day of August, 2004.

_____
Robert W. Goldman, FBN339180

CERTIFICATE OF FONT COMPLIANCE

I CERTIFY this response complies with the font requirements of rule 9.210(a) (2), Florida Rules of Appellate Procedure.

_____
Robert W. Goldman, FBN 339180

he Alegal chameleon@ moniker appears to stem from a thoughtful study by Harold B. Crosby George John Miller entitled AHomestead exemption, a legal chameleon in Florida,@ which be found beginning at 2 U.Fla.L.Rev. 12 (1949).

n pertinent part, article X, section 4 reads as follows:

There shall be exempt from forced sale under process of any court, and judgment, decree or execution shall be a lien thereon, except for the ment of taxes and assessments thereon, obligations contracted for the chase, improvement or repair thereof, or obligations contracted for house, d or other labor performed on the realty, the following property owned by atural person:

These exemptions shall inure to the surviving spouse or heirs of the ner.

The homestead shall not be subject to devise if the owner is survived by use or minor child, except the homestead may be devised to the owner's use if there be no minor child. The owner of homestead real estate, joined the spouse if married, may alienate the homestead by mortgage, sale or

: and, if married, may by deed transfer the title to an estate by the entirety
h the spouse. If the owner or spouse is incompetent, the method of
:nation or encumbrance shall be as provided by law.
'agination is from West Law and may vary from hardcopy of the book.
f, however, the property is protected homestead at death and not required
will to be sold, but is later sold, as was done here, the proceeds retain the
nestead protection. *See Estate of Hamel*, 821 So. 2d at 1280.