IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC04-1243
L.T. NO. 4D03-1954

THOMAS McKEAN and JOHN McKEAN,
as Co-Personal Representatives of the
ESTATE OF HENRY PRATT McKEAN, II

Petitioners,

v.

PETER WARBURTON,

Respondent.

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

ANSWER BRIEF OF RESPONDENT

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Preliminary Statement

In this brief, the petitioners will be referred to as "Petitioners" or as "Personal Representatives." Respondent will be referred to as "Respondent." The author of the Amicus Curiae Brief will be referred to as "Amicus." The following symbols will be adopted for reference:

"ACB" for "Amicus Curiae Brief"

"R" for "Original Record on Appeal"

"Resp. App" for "Respondent's Appendix"

REQUEST FOR RESTATEMENT OF CERTIFIED QUESTION

Respondent respectfully suggests that the question certified by the District Court should be restated because it is drawn too broadly in one aspect and too narrowly in another to properly frame the disputed issue. The issue arises only when general, pre-residuary devises remain unfunded **after** all probate assets are properly exhausted according to the priority of devises and the applicable probate abatement statute. The question certified may be inappropriate to the extent it suggests that general devisees may receive homestead property while ordinary probate assets still remain available for allocation.

The question as drawn further implies that the analysis of the issue is confined to Florida's probate abatement statute. §733.805(1), Fla. Stat. However, the statute governing abatement of probate assets is quite arguably irrelevant to the priority of devise rules governing freely devisable, but **non-probate, homestead**.

Therefore, Respondent respectfully requests this Court to restate the certified question as follows:

> WHERE A DECEDENT IS NOT SURVIVED BY A SPOUSE OR ANY MINOR CHILDREN, IS DECEDENT'S HOMESTEAD PROPERTY, WHEN NOT SPECIFICALLY DEVISED, DEVISED TO PRE-RESIDUARY, GENERAL DEVISEES AHEAD OF RESIDUARY DEVISEES TO THE EXTENT THE GENERAL DEVISES WOULD OTHERWISE REMAIN UNSATISFIED?

SUMMARY OF ARGUMENT

When a testator is not survived by a spouse or minor child, his homestead property is freely devisable and is devised according to the will's entire dispositive plan with the same priorities that govern all other devisable assets. The logistics are slightly different only because protected homestead is not part of the probate estate nor subject to possession, control or conveyance by the personal representative. §733.608(1), Fla. Stat. However, once the probate assets are exhausted, the testator's complete directions in the will and the established rules of will construction still govern the homestead's devise. No asset is ever devised to the will's residuary devisees (even tentatively) until the superior, pre-residuary, general devises are fulfilled. Contrary to Petitioners' assertion, no homestead protection is impaired by this proper result. The forced sale/creditor exemption remains in place for any actual devisee who is within the class of the testator's "heirs."

In the instant case, the decedent devised the first $170,000 of his wealth among his nephew (Respondent) and a friend in the amounts of $150,000 and $20,000, respectively (R-6). He named Petitioners and two other half brothers as residuary beneficiaries and expressly limited their entitlement to **only the "rest, residue, and remainder"** (if any) that remained after fulfilling the superior, general devises (R-7). Since the total value of this testator's devisable wealth, including homestead, was less

than $170,000, he, in fact, devised his homestead to the general devisees in proportion to their bequeathed amounts. None of it was devised or vested under the failed residuary clause, even for an instant.

The actual devisee(s) of homestead who are within the protected class of "heirs" enjoy the constitutional exemption from the decedent's creditors and estate administration expenses. As the decedent's nephew, Respondent enjoys this protection over the homestead share devised to him. The other general devisee is not an "heir" so his receipt of a proportionate share of the homestead is subject to forfeiture, if necessary, to satisfy creditors and pay expenses.

Petitioners' position would render homestead uniquely subject to complete reversal of a testator's stated intent and all ordinary rules governing priority of devises. Their argument confuses the homestead devise restriction (applicable only when a spouse or minor child survives) with the creditor/forced sale protection (always applicable to shield the receipt of any "heir" devisee who properly receives a share of the homestead). Their argument further depends on a peculiar and imprudent interpretation of Florida's probate abatement statute.

The District Court correctly ruled that the will devised the homestead to the general devisees since there were insufficient other assets to fulfill those superior devises. However, Respondent respectfully submits that the District Court's Opinion lacks thorough and proper analysis and contains troublesome wording that invites

further confusion.

Because the disputed issue is the subject of much debate even among Board Certified estate planning and probate specialists, Respondent respectfully urges this Court to grant review of the District Court's ruling and render a more explicit analysis of the competing arguments to clarify this important aspect of Florida law.

On Motions for Clarification, Rehearing and Certification previously before the District Court, Respondent offered extensive proposed language for the Court's consideration to clarify its initial holding in this case. (The District Court's subsequent clarification was far more limited.) That proposed language is substantially reproduced following the Argument section of this brief in hopes that it may benefit this Honorable Court.

ARGUMENT

I. Standard of Review.

Respondent concurs with Petitioners and Amicus that the de novo standard of review applies to the decisions below since there are no disputed issues of fact.

II. Bypassing Unfunded General Bequests and Distributing Homestead to the Last Priority Residuary Devisees Is Contrary to Established Law.

In the absence of a surviving spouse or minor child, a decedent's homestead is freely devisable under his will. City National Bank of Florida v. Tescher, 578 So. 2d 701 (Fla. 1991). The homestead is, therefore, treated like every other devisable asset

in fulfilling the priority of devises reflected in **all** dispositive provisions of the will. This Court has stated that "the restraint on the right of an individual to devise property should not extend beyond that expressly allowed by the constitution." Id. at 703. The testator is entitled to have his priority, pre-residuary bequests satisfied with the homestead, when necessary, just as any other devisable asset (real or personal) would be so utilized. See Estate of Murphy, 340 So. 2d 107 (Fla. 1976) ("While it is true that homestead property is not chargeable with the decedent's debts or with costs of administration, the Constitution specifically provides that the homestead may be devised..."). Thus, the only relevant distinction between homestead and the other devisable assets lies in the secondary question of whether such homestead remains shielded in its devisees' hands from the reach of the personal representative and the decedent's creditors. "Heir" devisees enjoy that protection, but non-heirs do not. Estate of Hamel, 821 So. 2d 1276 (Fla. 2d DCA 2002).

The Circuit Court erroneously deemed Respondent's monetary bequest a "specific bequest" (R-63, 68), rather than a general bequest as it is properly characterized by well-established law. In re McDougald's Estate, 149 Fla. 648, 6 So. 2d 274 (Fla. 1942); Park Lake Presbyterian Church v. Estate of Henry, 106 So. 2d 215 (Fla. 2d DCA 1958). A specific devise refers to a specific, identifiable item of property and is generally deemed to lapse if that particular asset is not owned at the decedent's death. In re Parker's Estate, 110 So. 2d 498 (Fla. 1st DCA 1959). Bequests defined by

a sum of "money" are "general devises" and do not depend on actual cash or currency for their satisfaction. See Park Lake, 106 So. 2d at 218 ("A typical example of a general legacy may be seen in the ordinary pecuniary bequests of specified sums of money..."). Therefore, all assets passing under the decedent's will (other than those that may have been specifically devised) are available to satisfy general bequests before anything can pass to the residue. Parker's Estate, 110 So. 2d at 500. If the law were otherwise, the frequently used pecuniary devise of "the amount of money equal to my available estate tax exemption" could never be fully funded as directed unless the testator died possessed of at least $1.5 million in physical cash or cash deposits.

Florida Statutes and the common law permit satisfaction of general cash gifts either with cash or any other property (real or personal) having equivalent value. Section 733.810(2), Florida Statutes, provides:

> 733.810 **Distribution in kind; valuation. -**
>
> (2) **Any pecuniary devise**, family allowance, or other pecuniary share of the estate or trust **may be satisfied in kind if:**
>
> (a) **The person entitled to payment has not demanded cash;**
>
> (b) The property is distributed at fair market value as of its distribution date; and
>
> (c) No residuary devisee has requested that the asset remain a part of the residuary estate. (Emphasis added.)

Thus, the general devisees were entitled to receive in kind shares of the homestead up to the amount of the deficiency in their priority bequests after exhaustion of the other

(probate) assets.

Under the rules governing the priority and funding of bequests, specific devises trump general devises; and general devises trump residuary devises. Parker's Estate, 110 So. 2d 498 (Fla. 1st DCA 1959). These rules apply to **all assets** freely devisable under the will as stated in Section 732.6005, Florida Statutes.

> 732.6005 **Rules of construction and intention.--**
> (1) The **intention** of the testator as **expressed in the will controls the legal effect of the testator's dispositions.** The rules of construction expressed in this part shall apply unless a contrary intention is indicated by the will.
> (2) Subject to the foregoing, **a will is construed to pass all property which the testator owns at death**, including property acquired after the execution of the will. (Emphasis added.)

The term "will" in this statute must mean all of the will, not an arbitrarily selected, last priority devise lifted from the context imposed by the testator. See Parker's Estate, 110 So. 2d at 501, stating:

> It is uniformly held in this jurisdiction that in construing last wills and testaments the polar star by which the court is guided is the intent of the testator as ascertained by a consideration of the **entire instrument, and not some isolated segment thereof**. (Emphasis added.)

Testators frequently use general devises to ensure first priority funding to certain beneficiaries, as is the case here. The Circuit Court's ruling, properly rejected on appeal, defeats a testator's intent, misconstrues applicable statutes and ignores established rules of will construction and the owner's right to freely alienate his or her

property. In Snyder v. Davis, 699 So. 2d 999, 1005 (Fla. 1997), this Court stated:

> In many instances where there is no surviving spouse or minor children, the homestead property is **the most significant part of a testator's estate**. If a testator loses control over the disposition of his or her homestead property, the need for a will is effectively eliminated. (Emphasis added.)

In support of their assertion that the testator actually devised the homestead under the residuary article to the exclusion of the unfunded priority devises, Petitioners cite Estate of Murphy, 348 So. 2d 107 (Fla. 1976), which found that in the absence of a specific devise of homestead, "the general language of the residuary clause is a sufficiently precise indicator of intent [to avoid intestacy]." Id. at 109. A thorough reading of Murphy reveals that the disputed issue was whether the typically general language of the residuary clause was effective to pass title to the homestead and save it from application of the intestate succession statutes. Id. The Murphy court concluded that general residuary language is sufficient to prevent intestate succession; but that holding was clearly not addressing a question of priorities or testamentary intent as between two competing clauses within a will. There were no unfunded pre-residuary devises in Murphy to compete against the residue. Id.

Clifton v. Clifton, 552 So. 2d 192 (Fla 5th DCA 1989), cited by Petitioners for the same proposition, is similarly distinguished. Clifton was also a residuary clause versus intestate descent case. Id. at 194. Neither Murphy nor Clifton involved the existence of an unfunded general devise. Therefore, the statement in both decisions

that the general language of a residuary clause of a will is a sufficiently precise indicator of intent [to avoid intestacy] must not be transported into the very different context of this case and viewed as an indicator of the testator's intent [to disinherit his own priority devisees].

Confining the testator to either a residuary or a specific devise of the homestead impairs his control over the intended disposition of his total wealth. It might require one testator to accurately predict the date of death value of the home when drafting the priority, pre-residuary bequests. It might force another to specifically devise the homestead to a pre-residuary devisee even thought its value may now or upon death exceed or fall short of the testator's intended gift to that devisee. For many Florida testators, will-making would indeed become "an act of prophecy" as this Court was anxious to avoid in Snyder, 699 So. 2d at 1005.

III. The Testator's Will Expressed No Intent That the Homestead Pass to the Residuary Beneficiaries.

The residuary clause (Article VII) of the decedent's will provides:

> All the **rest, residue and remainder** of my property which I may own at the time of my death, real, personal or mixed, tangible or intangible, of whatsoever nature and wheresoever situate, including all property which I may acquire or be given title to after the execution of this Will, including all lapsed legacies and devises or gifts made by this Will which fail for any reason, including all insurance(s) on my life payable to my estate or receivable by my Personal Representative, and including any property over or concerning which I may have any power of appointment, I give, devise and bequeath to my half-brothers, THOMAS McKEAN, JOHN

> W. McKEAN, ROBERT McKEAN and DAVID McKEAN, in equal shares, share and share alike, per stirpes. (R-7) (Emphasis added.)

The probate court ruled that this language "expressed his intent in the residuary clause of his will as to who should receive the homestead." (R-68). Yet, no such intention appears in this clause or any other provision of his will. (R-6-9).

Presumably, the probate court was swayed by Petitioners' mention that the residuary clause referenced "real" property and that general, pecuniary devises do not. Obviously, however, these observations are true of virtually every residuary devise and every general devise ever encountered. There is <u>no type</u> of property omitted from this residuary clause as it includes "[a]ll the rest, residue and remainder of my property which I may own at the time of my death, real, personal or mixed, tangible or intangible, of whatsoever nature and wheresoever situate...." The comprehensive litany does not change the fact that it means to dispose only of the <u>rest</u>, <u>residue</u> and <u>remainder</u> of such property after first satisfying the pre-residuary bequests.

Petitioners concede that any other (non-homestead) real property would have to first satisfy the pre-residuary, general bequests under this will. (R-56). However, where homestead real property is involved, Petitioners wish to apply an entirely unique approach, which would limit a pecuniary devisee to the receipt of currency and nothing more. This contradicts section 733.810, Florida Statutes, and the common law rules permitting the funding of such devises in-kind. It is impossible to properly conclude

that the testator expressed a separate intention as to the homestead under this residuary clause which bears no separate mention of "homestead" or "residence" or any other words suggesting an intent to distinguish the homestead from all other real and personal property passing under the will.

IV. Sections 733.607(1) and 733.608(1) Are Irrelevant to the Issue Before this Court and Their Purpose Is Misapplied by Petitioners.

Sections 733.607(1) and 733.608(1), Florida Statutes, affirm the Personal Representative's possession and comprehensive authority over the probate estate, which, of course, excludes protected homestead. Section 733.608(1) provides:

> 733.608 **General power of the personal representative.**--
>
> (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.
>
> (b) To enforce contribution and equalize advancement.
>
> (c) For distribution. (Emphasis Added)

Petitioners and Amicus presume that because homestead lies outside of the **personal representative's** grasp, the **testator** himself is prohibited from fulfilling his priority devises with freely devisable homestead. Petitioners' account of the issue ignores the fact that a personal representative's possession and control of the protected homestead are unnecessary for the testator's will to apply it to satisfy the

ordered priority of gifts he directed, or for the probate court to affirm such vesting in its Order Determining Homestead. See (Resp. App. 22-23). All parties agree that the personal representative has no role in any devise of protected homestead regardless of which clause may effectively devise it. The will is the muniment of title in all devises of protected homestead (including this one) and the personal representative has no role in effecting such devises. §§733.6005, 733.608(1), Fla. Stat.

Section 733.608(1), Florida Statutes, is merely the broad empowerment statute affirming that the personal representative has **all** those enumerated powers (including payment of devises) over **all** that enumerated **probate** property. It was absolutely necessary and appropriate for the legislature to carve out the protected homestead from that enumerated property, otherwise the statute would contradict established homestead law which excludes protected homestead from the personal representative's possession and control and from the reach of creditors.

This Court should not take that necessary exclusion relating solely to the **"[g]eneral power of the personal representative"** and flip it around to stand for the legislature's affirmative intent to limit a **testator's** ability to use all freely devisable assets to satisfy all devises under his will according to the priorities he established. That unconnected interpretation is not within the scope or contemplation of the statute. A statute affirming the personal representative's obvious power to pay devises with

probate assets cannot be contorted into a declaration that will-governed, non-probate assets (outside the personal representative's domain) cannot fund devises.

That devise restraint, imposed beyond the constitutionally limited context of a surviving spouse or minor child, would contradict directly this Court's declaration in City National Bank of Florida v. Tescher, 578 So. 2d 701, 703 (Fla. 1991), that "the restraint on the right of an individual to devise [homestead] property at death should not be extended beyond that expressly allowed by the constitution." Petitioners' interpretation of this "General Power of the Personal Representative" statute could render the statute unconstitutional.

V. Protected Homestead Is Excluded from the Probate Estate, the Claims of Creditors and the Control of the Personal Representative; But Not from the Dispositive Provisions of the Will or Its Intended Devisees.

Florida caselaw confirms that the homestead, whether passed by testamentary disposition, constitutional mandate or intestate succession, remains protected from the decedent's creditors to the extent that the actual recipients of such property, or its proceeds, lie within the broad class of "heirs" as described in Florida's Intestate Succession statutes. See Bartelt v. Bartelt, 579 So. 2d 282 (Fla. 3d DCA 1991). A devisee's classification as "heir" or "non-heir" affects only the secondary determination of whether the homestead remains protected from decedent's creditors in the hands of that devisee. It has no impact on the prior determination of whom the

devisees are to be. See Clifton v. Clifton, 552 So. 2d 192 (Fla. 5th DCA 1989).

A testator may have many surviving heirs, but in the absence of a surviving spouse or minor child, he is free to devise his homestead to any one or more persons inside or outside of that class. Estate of Hamel, 821 So. 2d 1276 (Fla. 2d DCA 2002). The consequence of devising homestead to a non-heir is the forfeiture of the creditor protection as to that portion of the homestead. Department of Health & Rehabilitative Services v. Trammell, 508 So. 2d 422 (Fla. 1st DCA 1987).

In the instant case, where the homestead was properly devised to the general devisees, the secondary question of whether creditors' claims can be satisfied from such property (or its proceeds) is analyzed based on the relationship between such devisees and the decedent. Estate of Hamel, 821 So. 2d 1276 (Fla. 2d DCA 2002). Respondent is decedent's nephew and is, therefore, within the protected class of "heirs" under the holding in Snyder v. Davis, 699 So. 2d 999 (Fla. 1997). As such, the homestead share devised to Respondent remains fully exempt from the claims of the decedent's creditors and the expenses of administering his estate. As Bartelt states:

> Article X, Section 4 of the Florida Constitution defines the class of persons to whom the decedent's exemption from forced sale of homestead property inures; it does not mandate the technique by which the qualified person must receive title. To hold otherwise would discourage Florida residents from making wills...Bartelt v. Bartelt, 579 So. 2d 282, 284 (Fla. 3d DCA 1991).

A thorough study of the many homestead cases reveals that the exclusion of

protected homestead from probate is not an exclusion from the otherwise applicable dispositive terms of the will. See Clifton v. Clifton, 553 So. 2d 192, 194 n. 3 (Fla. 5th DCA 1989) ("Homestead property, whether devised or not, passes outside the probate estate"). It is, instead, an exclusion of any heir-received (and therefore "protected") homestead interest from the reach of the personal representative and decedent's creditors. "[H]omestead does not become a part of the probate estate unless a testamentary disposition is permitted and is made to someone other than an heir, i.e., a person to whom the benefit of homestead protection could not inure." Estate of Hamel, 821 So. 2d 1276, 1279 (Fla. 2d DCA 2002).

The homestead laws do not exist to protect wishful residuary devisees from the unfunded entitlements of higher priority, pre-residuary devisees. In Donly v. Metropolitan Realty & Investment Co., 71 Fla. 644, 72 So. 178 (1916), this Court ruled:

> The purpose of the law is to exempt the homestead property from forced sale for the **debts** of the owner who is entitled to the exemptions, and **not to deny to the beneficiaries** of homestead exemptions, who may be adults with families of their own living away from the homestead, **the right to a partition of the property where their interests demand it.**...The provisions that the homestead property "shall be exempt from forced sale under process of any court" was not intended to prevent a partition of the homestead property among the beneficiaries thereof, **even if a judicial sale thereof be necessary to effect partition.** Id. (Emphasis added.)

This testator's homestead was freely devisable and his will reflects no intent to

pass his homestead differently than any other asset passing under his will. He is entitled to have it treated the same. See §733.6005, Fla. Stat.

VI. A General Devisee's Receipt of a Share of the Homestead Does Not Require It to Become First an Asset of the Estate in the Hands of the Personal Representative and Subject to Administration as a Probate Asset.

A Personal Representative is no more involved in the custody, control or conveyancing of the homestead when passing to a pre-residuary, general devisee than when it passes by specific or residuary devise. §733.608(1), Fla. Stat. When a will devises the homestead by specific devise or through the residuary clause, the probate court must still confirm the will's validity and the new ownership of the property for record title purposes by its order affirming that title has so passed. This is done with the Personal Representative's **Petition to Determine Homestead Status of Real Property**, Bar Form No. P-4.0421, New Jan. 1, 2002, (Resp. App. 18-21) and a corresponding **Order Determining Homestead Status of Real Property**, Bar Form No. P-4.0466, Rev. Jan. 1, 2002, (Resp. App. 22-23) which confirms vesting in the appropriate devisee or devisees under the will. See (R-31-40, 46-48, showing Petitioners' use of these very forms for their Petition and initial proposed Order).

No more is required when the homestead, or an undivided share of it, properly passes to a general devisee whose priority bequest is otherwise unsatisfied. If a deficiency remains for the priority general devisees after applying all assets subject to

probate administration, and if the decedent owned a homestead free from the devise restrictions applicable only with a surviving spouse or minor child, then the probate court confirms the actual vesting of homestead in the priority devisees to the extent of the value of their unfunded bequests. It does not skip ahead to the residuary article of the will. If the value of the homestead exceeds the deficiency of the priority devises, then only a fractional interest in the home equal to the unfunded deficiency vests in the priority devisees, thereby satisfying the testator's directions. No such actions require or permit a Personal Representative to take control of the homestead asset or to make it "subject to administration."

VII. Fulfilling Respondent's General Devise Does Not Erode the Creditor/Forced Sale Exemption and a Pecuniary Devise of "Money" Is Not a Devise Fundable Only by Available Currency.

Amicus argues on Petitioners' behalf that this Court's ruling upholding the testator's stated or implied intent would necessitate a "forced transfer for use by an estate" in violation of the homestead exemption from "forced sale." See Art. X, Sec. 4(a), Fla. Const. However, to the extent that fulfilling the testator's true and actual devise of homestead among the superior devisees is a "forced transfer," it is forced only by the testator himself, just as it is with a specific devise of homestead. There is no "use by the estate" in this situation as Amicus contends. Furthermore, the exemption in question prevents only **"forced sales" to satisfy creditors' claims and**

expenses. It has nothing to do with the proper division among beneficiaries. See quoted portion of Donly v. Metropolitan Realty & Investment Co., 71 Fla. 644, 72 So. 178 (1916), at page 15 above.

Fulfilling the will's order of devises requires, **no sale** (forced or otherwise) as long as the in-kind shares of the homestead reflect appropriate value. Section 733.810, Florida Statutes, allows any pecuniary devisee to receive his devised amount with unliquidated, in-kind shares of the decedent's property. There is no "use by the estate" in this case as Amicus wrongly asserts. Protected homestead remains outside of the probate estate throughout.

Petitioners suggest that questions or uncertainty regarding valuation of the homestead are too bothersome to allow in-kind satisfaction of the priority devises. However, such issues arise constantly in connection with distribution of all non-cash assets. These are not issues unique to homestead or newly presented by this case.

Petitioners' position would have this Court disregard the testator's express intent to pass to the residue only those assets **remaining** after first fulfilling his priority devises. (R-7) Instead, they urge this Court to anoint one clause, the lowest priority residuary clause, lift it from its context in the will, resurrect it from its failed condition precedent, and apply it as some type of peculiar, stand-alone beneficiary designation pertaining only to homestead property. Such an interpretation not only ignores, but

actually **reverses**, what every testator or revocable trust settlor almost certainly intends in this scenario. See Park Lake, 106 So. 2d 215 (Fla. 2d DCA 1958). This would be an absurd result and a very difficult one to justify even if the law seemed to compel it. Fortunately, it does not.

VIII. Petitioners and Amicus Confuse the Constitution's Homestead Devise Restrictions with Its Homestead Creditor Exemptions.

Petitioners' position is founded on the untenable conclusion that the homestead was, in fact, devised under a failed residuary clause and, from there, was cloaked with a new protection (not only from creditors' claims and forced sale under article X, section 4 (a) and (b), but now from even the unfulfilled entitlements of the testator's higher priority devisees). There are no cases and no statutes in all of the Florida Probate Code or Chapter 222, Florida Statutes (which details the homestead creditor exemptions), even hinting that those creditor exemptions exist to disinherit a testator's own chosen devisees. Rather these are protections from creditors and forced sales which inure to the actual inheritors of homestead property so long as they are within the class of "heirs"; and all agree that Respondent, the testator's nephew, is within that class. Art. X, §4(b), Fla. Const. Therefore, no "unraveling of the homestead protection in order to satisfy other devises" is involved, as Amicus claims.

The Amicus Brief contains critical misstatements of the law. Amicus states that the Districit Court's Opinion "overlooked or misapprehended the true holding in

Tescher," and that the "true holding" in City National Bank of Fla. v. Tescher, 578 So. 2d 701 (Fla. 1991), was that "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." (ACB-12) This is a complete misinterpretation of Tescher's holding.

In Tescher, the surviving husband had not waived the homestead protections from creditor claims as provided in article X, section 4, (a) and (b); but rather he waived the devise restrictions of article X, section 4(c)[1] that would have otherwise prevented the testator from making any devise of the homestead other than an outright devise to him. Id. As a result of the waiver, the testator was free to devise that property to any person or persons she saw fit; but that fact did not undermine the homestead creditor/forced sale protections of article x, section 4 (a) and (b). Id.

The devise restrictions applicable when a surviving spouse is present are

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[1]Article X, section 4, Florida Constitution, states:

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead,...,upon which the exemption shall be limited to the residence of the owner or the owner's family;...

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child...

considerations completely separate from the forced sale/creditor exemption which always applies if the testator devises homestead property to one or more "heirs", later defined by Snyder v. Davis, 699 So. 2d 999 (Fla. 1997), to include all persons described in Florida's intestate descent statute. Therefore, the testator in Tescher was free to devise her homestead to anyone and such property would remain "protected homestead" to the extent its resulting devisees were "heirs." Amicus confuses the Constitution's article X, section 4 (a) and (b) creditor exemptions with the article X, section 4(c) devise restrictions and, therefore, misconstrues both the holding and consequence of Tescher.

Had the surviving spouse not waived the devise restriction, the testator would have been prohibited by section 4(c) from making any devise of the homestead other than a complete, fee-simple devise to her spouse. Absent such a waiver, section 732.401(1), Florida Statutes, invalidates any other attempted devise and vests a life estate in the spouse and the remainder in the decedent's lineal descendants. The Tescher dispute concerned only whether the spouse's waiver allowed the unrestricted **devise** by will or whether the physical existence of the surviving spouse (even though waiving his descent entitlement) still preserved for the lineal descendants the interest they would receive by the **descent** statute absent the spousal waiver. The decision had nothing to do with the forced sale protections of sections 4(a) and (b).

To the extent Amicus' misinterpretation of Tescher is not immediately apparent, a review of the Tescher contestants' briefs illuminates it very clearly. The prevailing Respondents' Brief, at 6-7 (Resp. App. 34-35), states:

> The [Hartwell v. Blasingame] court found that the 1985 amendment that expands the class of persons entitled to protect their homes from creditors does not expand the class of persons entitled to receive the homestead beyond the surviving spouse and minor children....
>
> The Petitioners rely upon the Public Health Trust of Dade County v. Lopez, 531 So. 2d 946 (Fla. 1988) (PB 8-9). That decision is clearly unrelated to this issue. Lopez only addresses the effect of the 1985 amendment **from forced sale provided in article X, section 4(a)**. Lopez does not address the **devise of homestead**, before or after the 1985 amendment, which is **provided in article X, section 4(c).**

Amicus' improper view of Tescher illustrates the fundamental flaw in his analysis of the instant case. Amicus and Petitioners continue to assume that the protections of article X, section 4 (a) and (b) drive the determination of **to whom the homestead property is actually devised**. However, those protections play no role in answering that question. Estate of Hamel, 521 So. 2d 1276 (Fla. 2d DCA 2002). The will is the exclusive source of that determination, except in the specifically limited context of a surviving spouse or minor child as expressed in article X, section 4(c). The creditor/forced sale protections of section 4 (a) and (b) apply merely to protect the will's actual devisees (as ordinarily determined) from the testator's creditors and probate expenses if those resulting devisees are also "heirs." Department of Health and

Rehabilitative Services v. Trammell, 508 So. 2d 422 (Fla. 1st DCA 1987).

Amicus further challenges the District Court's reliance on Estate of Hill, 552 So. 2d 1133 (Fla. 3d DCA 1989), because Bartelt v. Bartelt, 579 So. 2d 282 (Fla. 3d DCA 1991), later receded from a portion of the Hill decision. However, that portion was not relied on by the District Court. Bartelt receded only from Hill's determination that no will devisees (as opposed to intestate heirs) could be regarded as "heirs" to enjoy the creditor protections inuring to heir recipients of the homestead. Id. at 284.

Finally, Amicus makes the irreconcilable statement that "non-probate assets (homestead) cannot be employed to satisfy a devise in a will (which devises only probate assets)." Numerous cases confirm the obvious fact that protected homesteads (which are not probate assets) are devisable and are, of course, devised under various clauses in wills, when not prohibited by the surviving spouse or minor child devise restrictions. Indeed, a residuary devise of homestead is still a "devise."

Amicus offers testators a "way out" from the unintended disinheritance his theory imposes by suggesting that a testator can avoid disinheriting intended devisees by ordering the sale of the homestead in the will. However, Knadle v. Estate of Knadle, 686 So. 2d 631 (Fla. 1st DCA 1996), holds that if the testator **mandates the sale** of the homestead, then all creditor protections otherwise inuring to the testator's heir devisees are lost. Amicus would have this Court force testators into the position of forfeiting the homestead protection just to effect the intended disposition of their

wealth. Amicus' solution also presumes that our testators would even become aware of the previously unpublished devise restraint he urges this Court to enact.

Fortunately, this Court's holdings in Snyder, 699 So. 2d 999 (Fla. 1997), and Tescher, 578 So. 2d 701 (Fla. 1991), abhor rule interpretations forcing testators into "act[s] of prophecy," Snyder, at 1005, or imposing "restraint on the right of an individual to devise [homestead] property at death...beyond that expressly allowed by the constitution." Tescher, at 703. Indeed, the contrary result rejects a testator's intent and contravenes common law and statutory rules governing this and every other devisable asset. That result would send testators and their planners scurrying to address the many fixed sum bequests and countless pecuniary tax planning devises that could no longer be fulfilled as intended.

IX. The True Meaning of Abatement.

Amicus' argument stands on the fundamental misconception that "abatement" is the means by which the various devises of a will are established, vested and funded. However, abatement provides only the order in which **existing** devises, once established, are **eroded** or **forfeited** to pay creditors' claims and expenses (and other devises only in the narrow exception discussed below). The affirmative establishment of devises occurs first according to the will's ordered priorities and the long-standing rules governing those priorities before any issues of abatement are considered. See

Park Lake, 106 So. 2d 215 (Fla. 2d DCA 1958); In re Parker's Estate,110 So. 2d 498 (Fla. 1st DCA 1959). Abatement **then follows** from that point **by taking away** from the devises so established in reverse of their order of creation. §733.805, Fla. Stat.

The statutory definition of "residuary devise" confirms this distinction:

> "Residuary devise" means a devise of the assets of the estate which remain **after the provisions for any devise** which is to be satisfied by reference to a specific property or type of property, fund, **sum** or statutory amount. §731.201(31), Fla. Stat. (Emphasis added.)

Thus, when the value of the pre-residuary devises consume all assets, the residuary devise is defined as non-existent well before any abatement may yet be applicable for claims and expenses to erode the **existing** devises. Under these facts, there is no residuary devise, no vesting of any property in the residuary devisees and, consequently, no event of abatement affecting any residuary devise.

The abatement statute properly compels erosion of existing devises to pay obligations in reverse order of the priorities upon which those devises were established. §733.805(1), Fla. Stat. Consequently, the lowest priority devises will always be established last, if at all. Therefore, abatement is never necessary or applicable to move assets backwards in the will from lower to higher priority devisees, with one specific exception. See §733.805(2), Fla. Stat., providing:

> 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.

Thus, the only time "abatement" ever applies to enable a devise is when a probate asset devised to a high priority devisee (e.g., specific devise of my IBM stock to X) is liquidated by the personal representative (perhaps because the other assets are unmarketable or tied up in litigation, etc.). It is only in this limited instance, when an asset specifically or demonstratively devised is taken out of order by the personal representative, that a lower priority devise actually abates to repay a superior devise, thereby restoring the value of that superior devisee's entitlement which was temporarily deprived. Id. In such a case, the superior devisee is really just advancing payment for an expense properly borne by the lowest priority devisee so that reimbursement via abatement of the lower priority devise is required. This is the only scenario where the funding of one devise depends on the abatement of another. §§733.805, 731.201(31), Fla. Stat.

Thus, it is not an abatement which establishes the entitlements of specific, demonstrative and general devises. Under the instant facts, the devise of the homestead property to the two general devisees has no dependence on any applicable rule of abatement. See Park Lake, 106 So. 2d 215 (Fla. 2d DCA 1958).

Once it is understood that establishment of devises occurs first without regard to any subsequent abatement that may follow, the problem Amicus had reconciling Park Lake evaporates; and the circular application of 733.805(1) he perceived proves

perfectly linear, with no assets “harbored in the ether.”

Amicus’ misconception of the abatement issue breeds a resulting misconception about the vesting of devises. Although Amicus correctly asserts that Florida law deems devises to vest at the instant of death, those assets vest only in the actual, ultimate takers under the will. Admittedly, the identity of the actual devisees of various assets is often not ascertained for quite some time after death, even though the law regards vesting of the ultimate shares as relating back to the death. §732.514, Fla. Stat; U.S. v. 936.71 Acres of Land, More or Less, in Brevard County, State of Fla., 418 F. 2d 551 (5th Cir. 1969). This “relation-back” is not a new issue presented by the instant case. Consider this example:

> $100,000 general devise to son G
> Residue to son R
> Decedent’s assets are a $70,000 bond and a $150,000 citrus grove which G and R both wish to preserve in-kind.

G is, by necessity, a devisee of some portion, but not all, of the grove, as is son R. Vesting is deemed to occur at the instant of death, even though it is not known immediately what share each son is to receive.

Under this example, Amicus’ theory would state that the entire grove and the entire bond vest initially in R, followed by subsequent, partial unvesting from R and revesting in G. This is a false interpretation of the rules governing funding of devises and a tortured interpretation of the statute governing the subsequent abatement of

those devises. Indeed, under this theory, existing judgment creditors of R would now have attached liens over 100% of the grove, even that portion finally vesting in G, because R's existing judgment liens attach at the instant of R's original vesting. Allison on the Ocean, Inc., v. Paul's Carpet, 479 So. 2d 188, 190 (Fla. 3d DCA 1985).

Finally, 733.805(1) addresses only abatement of **will devises** and has no application in the context of **revocable living trust devises**. Because Petitioners' position is entirely dependent upon their interpretation of this abatement statute, that position, even if adopted, could not be transported into the context of revocable living trust devises. Therefore, recipients of homestead under will devises would be entirely different than the recipients of homestead devised in revocable trusts with identical dispositive provisions. That interpretation is flawed and untenable.

X. Four Theories Differ on the Role of the Abatement Statute in the Devise of Homestead.

The role that section 733.805(1), Florida Statutes, plays, or does not play, in the devise of homestead is the key technical debate in this case. See (ACB-9). The four different theories or interpretations are summarized as follows:

Theory 1. All devises are established and funded by application of the abatement statute which vests them initially in the lowest priority beneficiaries and then (as necessary to fulfill higher priority devises) moves them subsequently upstream (reading the will back to front) with temporary vesting and unvesting at each intermittent step. The homestead, however, must stay in the lowest priority starting position (if occupied by "heirs") because (i) moving it backwards in the will to higher priority devisees is a prohibited "forced sale"

violating the restriction of Article X, Section 4(a), and (ii) 733.805 directs only the abatement of "estate" assets and homestead is excluded from the word "estate" in this context.

This is the theory advanced by Petitioners and Amicus. It lacks viability for the many reasons discussed above and below. In fact, consistent application of their theory (that 733.805(1) is what creates the entitlements) requires the four abatement tiers under 733.805(1)(a)-(d) to vest assets first in the would-be intestate takers (tier a), then unvest in favor of residuary devisees (tier b), then general devisees (tier c), and finally demonstrative and specific devisees (tier d). This theory, if consistently applied, would leave the homestead "vested" and "protected" in the intestate heirs without the ability to move even into the residuary clause of the will.

Theory 2. The devise of homestead to general devisees requires an event of abatement under 733.805(1), but the statute's reference to "funds and property of the estate" should not be deemed to exclude the homestead in fulfilling superior devises (as opposed to forfeiture for creditors' claims and expenses, as prohibited by Article X, Section 4(a)).

This is the position apparently adopted by the District Court, as gleaned by the language of its holding and its phrasing of the certified question. Although it is not the theory most favored by Respondent, it is, still far more viable than Theory 1, because the introductory language of the definitional section of the Probate Code (§731.201, Fla. Stat.) would permit homestead to be included in the term "estate" where "the context otherwise requires." §731.201(12), Fla. Stat. Certainly other statutorily defined

terms read the "estate" to include homestead.

> "Residuary devise" means a devise of the assets of the **estate** which remain after the provision for any devise which is to be satisfied by reference to a specific property or type of property, fund, sum, or statutory amount. §731.201(31), Fla. Stat.

If homestead were excluded from the word "estate" in this context, then homestead could not even pass by way of residuary devise, which we all know to be incorrect.

The District Court's interpretation also finds greater support in the numerous policy considerations obliterated by Theory 1, such as the testator's intent being paramount and the restraint on free alienation of devisable assets being abhorred. See Snyder v. Davis, 699 So. 2d 999 (Fla. 1997).

Theory 3. Fulfillment of pre-residuary devises occurs affirmatively from the testator's stated priorities and long-standing rules of construction, not from any subsequent abatement of an unintended residuary devise. The only role for 733.805(1) is in its ordinary application to erode non-exempt devises as needed for the payment of debts and expenses. Homestead, like all devisable assets, vests only in the actual resulting devisees and is deemed to so vest at the instant of death. The statute's reference to "funds or property of the estate" may or may not be interpreted by this Court to include protected homestead, but because there is no abatement event involved or needed to fulfill Respondent's general devise under these facts, it receives its proportionate share of the homestead either way.

Theory 3 is the one Respondent contends is the most appropriate and most easily reconciled with all other aspects of Florida law (and sensible policy).

The residuary devise in the instant case has no more significance than a devise of assets "to my son if he is married when I die," if the son is not married at the

testator's death. Such a devise does not abate. It simply does not exist because it was subject to a factual condition precedent which did not develop. Compare that conditional devise to the residuary devise in the instant case and in virtually all wills which say, in effect: "**If** there are assets remaining under the governance of my will after satisfying my prior bequests, **then** I give such residuary assets to R." This testator lacked sufficient assets to fully satisfy even his pre-residuary bequests. (R-62, 63) Thus, his residuary devise was predefined not to exist because the condition precedent was not met. (R-7) The residuary devise in the instant case does not exist subject to possible abatement. It simply never exists...not tentatively, not conditionally, not permanently, not ever. The terms of the will have already declared the intended result under these facts. (R-7)

Although it is clear that homestead can be devised by the residuary clause, it can only be so devised if the application of the entire will yields that result. Park Lake Presbyterian Church v. Estate of Henry, 106 So. 2d 215 (Fla. 2d DCA 1958), affirms that residuary devisees receive only the "rest and remainder" **after** fully funding all prior devises. The residuary devisees in the instant case are not allowed to presume that the homestead disposition begins in the residuary clause. See §733.201(31), Fla. Stat. The analysis does not start there; it has only the **possibility** of finishing there. Under the instant facts, that possibility simply did not develop. (R-63)

Theory 4. The devise of homestead to general devisees requires an abatement from the residuary devise, but 733.805 only addresses the abatement of "estate" assets, leaving the common law rules to govern funding and abatement of non-probate assets, such as protected homestead devised by a will and all living trust devises.

Theory 4, like Theories 2 and 3, is far more viable than Theory 1, and, therefore, warrants consideration.

In the instant case, the decedent's assets were insufficient to fully satisfy even his pre-residuary devises. Despite this deficiency, Petitioners conclude that the testator actually devised the homestead with his residuary clause. They next assert that because the abatement statute refers only to "funds and property of the estate," the non-probate homestead is subject to **no rules** governing the funding and priorities of devises. Even if one accepts Amicus' general view of abatement, this latter assertion presumes that the legislature affirmatively intended, **by its silence** on non-estate assets in 733.805(1), to eradicate centuries' worth of common law governing devises when applied to **non-probate** assets.

However, abundant caselaw declares that the common law persists everywhere not specifically abrogated by statute. In re Levy's Estate, 141 So. 2d 803 (Fla. 2d DCA 1962), states:

> A statute will not be held to have changed well settled common law principles by implication, unless the implication of change is clear or necessary to give full force to express provisions of the statute and the public policy thus established. Dudley v. Harrison, McCready & Co.,

> 1937, 127 Fla. 687, 173 So. 820, reh. den., 128 Fla. 338, 174 So. 729. A statute will not be construed as taking away common law rights unless the pre-existing right is repugnant to the statute. Cullen v. Seaboard Airline Ry., Co., 1912, 63 Fla. 122, 58 So. 182. Id at 805.

Applying Levy's Estate, if Section 733.805(1), Florida Statutes, addresses only the abatement of "property of the estate," it has its "full force" without interpreting its silence as eradicating the common law order of devise rules for other devisable "non-estate" assets. Surely, Florida law is not devoid of **any** rules governing the disposition of devisable, non-probate property (such as homestead property passing by will and all types of property passing under living trusts). The "public policy" prong of the Levy's Estate test supports this conclusion since one cannot conclude that public policy desires a complete reversal of the ordinary disposition rules that would apply to every other asset (real or personal) in the same scenario.

Respondent submits that Theory 3 is the only one which can be fully reconciled with all other aspects of Florida law and appropriate policy considerations as expressed in Snyder and Tescher. Theory 1 is the only one that yields the Petitioners' desired result, but it is the least viable and breeds the most anomalous results.

XI. Petitioners' Position Leads to Anomalous Results.

It is highly unlikely that Florida testators and their advisors have prepared their wills with full appreciation and awareness that portions of their wills may not be able

to speak to the disposition of one of their most significant assets. The resulting reversal of priorities unique to that one significant asset would be an abomination. Even assuming that such a rule could become well known to Florida testators, or their attorneys, countless scenarios exist in which thorough awareness and planning still cannot solve the resulting problems. Two examples follow:

Example 1. Assume a husband and wife have a combined net worth that will likely result in estate taxes being payable upon the second spouse's death. As is typical for spouses in this situation, their wills provide for a general devise of $1,500,000 (the current estate tax exemption) to pass to a trust for the surviving spouse's life-time benefit. Such a "by-pass trust" or "credit shelter trust" will capture and utilize the first spouse's tax exemption to avoid estate tax at the surviving spouse's death. In many cases, the value of the home is such a significant portion of the couple's net worth that part or all of the homestead must be used to fund that general devise and not waste the first spouse's estate tax exemption. In such cases, the spouses may, as part of their planning, formally waive the homestead spousal devise restriction so it can be devised to the trust.

Under Petitioners' theory, the decedent's homestead would be unavailable to satisfy that $1,500,000 general bequest to the "by-pass trust." Instead, it must skip this intended bequest and fall into the residuary clause, causing the valuable tax exemption to be needlessly wasted. This result could ultimately cost the couple's heirs several

hundred thousand dollars in unnecessary estate taxes.

This problem cannot be solved merely by making a specific devise of part or all of the homestead into the by-pass trust because the date of death values of the home and other assets cannot be known in advance. Even changes in a testator's mortgage balance would require tedious and frequent attention in the will. Severe estate tax consequences could result from under-funding or over-funding the by-pass trust amount.

Example 2. Assume a simpler scenario where a testator dies survived by no spouse or minor children and wishing to leave the first $500,000 of her wealth to her adult daughter, and the residue of her estate, if any, to her sister. If she dies with a net worth of $550,000, including a home valued at $350,000 and other probate assets valued at $200,000, then, under the lower court's ruling, her daughter can only receive $200,000 of the intended $500,000. Her more valuable asset, the home, is forced to pass to her sister under the residuary clause. Her daughter consequently receives only 40% of what she intended ($200,000 instead of $500,000); and her sister receives 700% of what she intended ($350,000 instead of $50,000). If, in trying to plan around this problem, she specifically devises the homestead to her daughter, then she can at least be assured her daughter will receive the value of that asset, if still owned. She cannot, however, know that its value will be sufficient to meet her intended total or that it will not exceed it. This new restriction on the freedom to devise homestead like any

other devisable asset would present an unfair obstacle course to Florida residents planning for the disposition of their property.

These situations, and countless others, would, at best, force Florida testators into tortured exercises of hypothetical valuations, contingent formula provisions and other manipulations just to dodge homestead restrictions that were never intended to exist outside the context of a surviving spouse or minor child.

XII. Land Title Concerns Loom Large.

No doubt, numerous Orders Determining Homestead Status of Real Property have already been issued by probate courts throughout Florida affirming the vesting of title in homestead property to general, pre-residuary devisees. Since there is no statutory, constitutional or caselaw devise restriction (in the absence of a spouse or minor child), a new decision holding that a testator cannot pass homestead property by general devise would undermine title for such properties which have already been so transferred, and even re-transferred to subsequent bona fide purchasers.

Fortunately, regardless of the Court's resolution of the instant issue, Florida Forest and Park Service v. Strickland, 18 So. 2d 251 (Fla. 1944), affirms this Court's ability to provide that its decision shall apply only **prospectively**. See also Department of Revenue v. Anderson, 389 So. 2d 1034, 1037 (Fla. 1st DCA 1980). Respondent urges this Court to expressly limit its decision to apply only prospectively so as not

to unravel or impair those titles already confirmed under previous court orders which may have assumed a contrary position. There will, no doubt, be many such instances whichever way the Court rules here.

XIII. Snyder V. Davis Is Not Dispositive Because Its Holding Is Expressly Limited to the Issue of Whether Creditors Can Reach the Homestead Property When Devised to an "Heir" Other Than the Would-Be Intestate Heir.

The facts in Snyder v. Davis, 699 So. 2d 999 (Fla. 1997), are similar to the instant case as there are two general devises (although very nominal) of $2,000 and $3,000, respectively, followed by the residue. In Snyder, the personal representative argued that, because the residuary devisee was not the particular individual who would take under intestacy, she was not an "heir" and the homestead should be thus fully subject to probate and available to satisfy both the claims of the creditors and the bequests of the pre-residuary devisees. Id at 1001. Neither party made any distinction between the rights of the general devisees and the estate's creditors, although the law clearly makes this distinction. Art. X, §4(a), Fla. Const.; Estate of Murphy, 340 So. 2d 107,109 (Fla. 1976); Donly v. Metropolitan Realty & Investment Co., 71 Fla. 644, 72 So. 178 (1916). The general devisees in Snyder, for $2,000 and $3,000, respectively, did not become parties or assert any rights; and the case proceeded at the circuit and appellate court levels on the undisputed assumption that, unless the residuary devisee was held to be a non-heir, the homestead passed to that residuary

devisee. See Petition to Determine Homestead Property from the Snyder case, noting particularly items 8, 12 and the prayer for relief, as well as the omission of any mention of the pre-residuary devises in the Petition. (R-81-83).

The Opinions of the Second District and of this Court in Snyder never considered whether a general devisee, **as distinguished from the personal representative and probate creditors**, may receive freely devisable homestead to fulfill an unfunded devise. In fact, the Second District had ruled in error that the residuary beneficiary was not even an "heir" and that the property should be sold to satisfy even the creditors. Davis v. Snyder, 681 So. 2d 1191 (Fla. 2d DCA 1996), reversed, 699 So. 2d 999 (Fla. 1997). The Second District then certified to this Court the following succinct question:

> WHETHER ARTICLE X, SECTION 4, OF THE FLORIDA CONSTITUTION EXEMPTS FROM FORCED SALE A DEVISE OF HOMESTEAD BY A DECEDENT NOT SURVIVED BY A SPOUSE OR MINOR CHILD TO A LINEAL DESCENDANT WHO IS NOT AN HEIR UNDER THE DEFINITION IN SECTION 731.201(18), FLORIDA STATUTES (1993). Id.

This Court then further confirmed the limited scope of its ruling in Snyder, stating:

> There is **no dispute** in this case that Betty Snyder's home was homestead property for the purpose of distribution or **that said property was properly devised in the residuary clause** of her will. The **sole issue is whether** Kelli Snyder, as **the granddaughter**, **may be properly considered an heir** under the homestead provision, qualifying her for protection from the forced sale. Snyder v. Davis, 699 So. 2d 999, 1000 (Fla. 1997). (Emphasis added.)

The Snyder holding is therefore limited to the certified question and cannot stand as an endorsement of the stipulations and assumptions upon which the litigants arrived before the Court. For a prior decision to control a subsequent case, the issues presented by the latter case must have been raised, considered, and determined in the former one. Twyman v. Roell, 123 Fla. 2, 166 So. 215 (1936). Thus, as stated in City of Miami v. Stegemann, 158 So. 2d 583 (Fla. 3d DCA 1963), "no decision is authority on any question not raised and considered **although it may have been involved in the facts of the case**." (Emphasis added.) Courts will not rule on matters stipulated by the parties or otherwise not in dispute. State v. DuBose, 99 Fla. 812, 128 So. 4 (1930).

The mere mention of these two nominal, unfunded, general devisees does not expand the scope of the Snyder decision. The losing party in Snyder was the personal representative who was seeking statutorily prohibited custody and control of the homestead for all general probate purposes. Snyder, 699 So. 2d at 1000. He was not a champion for the separate entitlements of the unfunded general devisees.

Clarification Suggestion Made to District Court

On Motions for rehearing and clarification following issuance of the District Court's initial Opinion, Respondent proposed extensive language for the Court's

consideration to clarify its original holding. That proposal is substantially reproduced below in hopes it will benefit this Honorable Court:

> Although protected homestead is not an asset in the hands of the personal representative or an asset of the probate estate subject to creditors' claims or expenses, it remains an asset whose disposition among the testator's beneficiaries is fully governed by all dispositive provisions of the will (in the absence of a surviving spouse or minor child). §§733.608(1), 732.6005, Fla. Stat.; Art. X, §4, Fla. Const. It is not until the recipients of that homestead are so determined, after application of the well-established rules of priority, that we analyze whether and to what extent the homestead or proceeds will remain "protected" in the hands of its would-be recipients. If a recipient is within the class of persons regarded as "heirs" under Snyder v. Davis, 699 So. 2d 999 (Fla. 1997), then such devisee's share remains free from claims for debts and expenses and the probate process in general. Conversely, if a recipient is not an heir, such devisee's receipt of any homestead interest or its proceeds becomes unprotected and is at risk of forfeiture for debts and expenses to the same extent it would be if it were not homestead property. See Bartelt v. Bartelt, 579 So. 2d 282, 283 (Fla. 3d DCA 1991) (noting, "[t]he test [for inurement of protection from creditors] is not how title was devolved, but rather to whom it was passed"). As stated in Estate of Hamel, 821 So. 2d 1276, 1279 (Fla. 2d DCA 2002), "Florida Courts have continued to hold that homestead does not become a part of the probate estate unless a testamentary disposition is permitted and is made to someone other than an heir, i.e., a person to whom the benefit of homestead protection could not inure."
>
> Where a testator's devisable assets include homestead, the probate (non-homestead) assets are applied first by the personal representative per the terms of the will and section 733.805(1), Florida Statutes. After exhausting the probate assets he controls, the personal representative has no more assets subject to his possession or control and is now a mere provider of information to the probate court regarding the probate distributions made and the resulting deficiencies in the funding of pre-residuary devises. If any deficiencies remain, then the probate court must still apply the whole of the will to the freely devisable, non-probate homestead, and affirm the resulting dispositions that are, in fact, made of

that homestead by the full and proper application of the will.

Bequests that define themselves by a sum of "money" are regarded by the law as "general devises" which do not depend on the existence of actual cash or currency for their satisfaction and can be funded in-kind with any devisable asset. In re Parker's Estate, 110 So. 2d 498 (Fla. 1st DCA 1959); §733.810, Fla. Stat.

In support of their assertion that the testator actually devised the homestead under the residuary article to the exclusion of the unfunded priority devises, Petitioners cite Estate of Murphy, 348 So. 2d 107 (Fla. 1976), which found that in the absence of a specific devise of homestead, "the general language of the residuary clause is a sufficiently precise indicator of intent [to avoid intestacy]." Id. at 109. A thorough reading of Murphy reveals that the disputed issue was whether the typically general language of the residuary clause was effective to pass title to the homestead and save it from application of the intestate succession statutes. Id. The Murphy court concluded that general residuary language is sufficient to prevent intestate succession; but that holding was clearly not addressing a question of priorities or testamentary intent as between two competing clauses within a will. There were no unfunded pre-residuary devises in Murphy to compete against the residue. Id.

Clifton v. Clifton, 552 So. 2d 192 (Fla 5th DCA 1989), is cited by Petitioners for the same reason. However, the distinction is the same. Clifton was also a residuary clause versus intestate succession case. Id. at 194. Neither Murphy nor Clifton involved the existence of an unfunded general devise. Therefore, the statement in both decisions that the general language of a residuary clause of a will is a sufficiently precise indicator of intent [to avoid intestacy] must not be transported into the very different context of this case and viewed as an indicator of the testator's intent [to disinherit his own priority devisees].

Petitioners contend that section 733.608(1), Florida Statutes, bars allocation of any homestead interest to a general devise. While 733.608(1) bars the **personal representative** from taking any such action, the personal representative's participation is unnecessary for the testator's will to accomplish that allocation, or for the probate court to affirm the resulting devise(s) in its order regarding the homestead property.

Petitioners argue that fulfilling a general devise with the homestead requires a "forced sale of that property" and that such a sale violates article X, section 4(a) and (b) of the Florida Constitution exempting the homestead from forced sales. However, since pecuniary devises may be satisfied in-kind under section 733.810, Florida Statutes, and the common law rules, no sale, forced or otherwise, is needed to effect those devises. Furthermore, this Court has clearly distinguished creditors' claims from beneficiaries' entitlements in applying the Constitution's exemption from forced sales. Donly v. Metropolitan Realty & Investment Co., 71 Fla. 644, 72 So. 178 (1916), held:

> The purpose of the law is to exempt the homestead property from forced sale for the **debts** of the owner who is entitled to the exemptions, and **not to deny to the beneficiaries** of homestead exemptions, who may be adults with families of their own living away from the homestead, **the right to a partition of the property where their interests demand it.**...The provisions that the homestead property "shall be exempt from forced sale under process of any court" was not intended to prevent a partition of the homestead property among the beneficiaries thereof, **even if a judicial sale thereof be necessary to effect partition**. Id. (Emphasis added.)

Therefore, even if a judicial partition sale of the homestead were needed to fulfill the pecuniary devisees' entitlements, the "forced sale" exemption still would not apply to prevent that because no creditor protections would be impaired. The sales proceeds would still enjoy the protection from the decedent's creditors except for that portion actually devised to non-heirs. Estate of Hamel, 821 So. 2d 1276 (Fla. 2d DCA 2002). The proceeds from the sale of the protected homestead retain their exemption from creditors except in the limited instance in which the testator's will explicitly mandates the sale of that property. Knadle v. Estate of Knadle, 686 So. 2d 631 (Fla. 1st DCA 1996).

Petitioners view the probate abatement statute, section 733.805(1), Florida Statutes, as the means by which pre-residuary devises are enabled rather than the order in which they are eroded, if necessary, after first

being established by the will's priorities. We reject Petitioners' assertion that the abatement statute governing necessary erosion of devised "estate" assets was meant to eradicate the affirmative funding of devise rules for any non-probate assets. Such a conclusion is unsupported and imprudent. It is also contradicted by well-settled principles sustaining the common law in all respects except where a statute by clear expression or necessary implication means to revoke it. See In re Levy's Estate, 141 So. 2d 803 (Fla. 2d DCA 1962).

Imputing the legislature with this extraordinary intent would leave us devoid of **any** rules governing priority of devises for homestead devised by will (and, perhaps, all assets devised by living trust agreements). Amidst that anarchy, how would a court resolve to anoint one isolated clause of the will, particularly the lowest priority residuary clause, to pass the homestead? **"It is uniformly held in this jurisdiction that in construing last wills and testaments the polar star by which the court is guided is the intent of the testator as ascertained by a consideration of the entire instrument, and not some isolated segment thereof."** In re Parker's Estate, 110 So. 2d 498, 501 (Fla. 1st DCA 1959).

Section 731.201(31), Florida Statutes, defines a "[r]esiduary devise" as "a devise of the **assets of the estate** which remain **after** the provision for any devise which is to be satisfied by reference to a specific property or type of property, fund, **sum**, or statutory amount." Consistently applying Petitioners' approach of excluding homestead from all traditional rules now expressed in the Florida Probate Code by reference to "assets of the estate," would seemingly necessitate a finding that protected homestead cannot even pass per the "residuary devise." At the very least, this approach would exclude residuary homestead devises from all statutory provisions referencing "residuary devises." See, e.g. §732.604, Fla. Stat.

Petitioners' position is also contrary to section 732.6005, Florida Statutes, which states that "the intention of the testator as expressed in the will controls the legal effect of the testator's dispositions" and further provides that "a will is construed to pass all property which the testator owns at death...." The "will" in this context must refer to the entire will,

not the arbitrarily selected, lowest priority residuary clause predefined by this testator to fail due to lack of sufficient devisable assets owned at death.

The array of anomalies that follow from Petitioners' position is unacceptable. A hypothetical example, which includes creditors' claims, illustrates the impact of the opposing positions. Assume T's will leaves a $200,000 cash bequest to his adult son, and the residue to his church. T dies owning $200,000 in cash and a $300,000 homestead. T is subject to a $1,000,000 tort claim. Under Petitioners' position, the protected homestead cannot pass under the pecuniary devise and must be devised by the residuary article. Since the residuary devisee is not an heir, the forced sale/creditor protection is lost and the homestead becomes available to T's creditor. The $200,000 cash lies within the probate estate with the potential to fund the general devise to Son (an heir), but the creditor, of course, stands in first position, and because the cash account is not an exempt asset, it is also fully consumed by the creditor. Decedent's homestead is completely lost to the creditor along with all of the cash; and neither beneficiary, heir or non-heir, receives a nickel.

Under Respondent's position, however, both assets are potentially subject to all of the dispositive provisions of the will, even though only the cash is a "probate" asset. As the probate asset, the cash would be the first asset applied; but, again, the creditor stands in priority position to Son's bequest of non-exempt probate assets, so the creditor receives the probate cash ahead of any beneficiary. However, because Son's priority bequest still remains unfunded, the will **compels** the passage of the homestead (or, more accurately, a $200,000 share of it) to Son before anything can pass to the residuary beneficiary. As a result, Son ends up with an interest in the home, in-kind, valued at $200,000 (the amount of his intended bequest), which remains fully protected from the creditor's claim because it is protected homestead devised to an heir. This is true whether or not the property is sold by agreement or partition with the creditor who received the remaining share of the homestead, or its proceeds, which lost protection for lack of an heir recipient. See Estate of Hamel, 821 So. 2d 1276 (Fla. 2d DCA 2002).

Respondent's position is the proper one. "[T]he Florida Constitution defines the class of persons to whom the decedent's exemption from

forced sale of property inures; it does not mandate the technique by which the qualified person must receive title." Bartelt v. Bartelt, 579 So. 2d 282, 284 (Fla. 3d DCA 1991).

One can imagine many fixed sum bequests tied to various tax exemption amounts which would go largely or completely unfunded under Petitioners' interpretation. These situations, and countless others, would force testators into tortured exercises of hypothetical valuations, contingent formula provisions and other manipulations to avoid homestead restrictions never intended to exist outside the context of a surviving spouse or minor children. See City National Bank of Florida v. Tescher, 578 So. 2d 701, 703 (Fla. 1991).

Petitioners offer testators an escape from these unintended consequences by suggesting that they can avoid disinheriting their intended devisees by ordering the sale of the homestead in their wills. However, Knadle v. Estate of Knadle, 686 So. 2d 631 (Fla. 1st DCA 1996) holds that if the testator **mandates** the sale of the homestead in the will, then all creditor protections otherwise inuring to heir devisees are thereby lost. Petitioners would, therefore, have us impute testators with crystal ball foresight regarding their date of death holdings and force them into the position of forfeiting their creditor protections just to ensure the intended disposition of their wealth. This further presumes that testators would even become aware of these new devise restraints. However, the holdings in Snyder v. Davis, 699 So. 2d 999 (Fla. 1997), and Tescher, 578 So. 2d 701 (Fla. 1991), are replete with language abhorring rule interpretations that force testators into "act[s] of prophecy", Snyder, at 1005, or that impose a "restraint on the right of an individual to devise [homestead] property at death...beyond that expressly allowed by the constitution." Tescher, at 703.

Even if we were inclined to adopt Petitioners' position in this case, we can imagine an immediate and widespread effort by the estate planning bar to draft and include in almost all wills (and living trusts) new boilerplate "pecuniary devise savings clauses" in order to avoid the traps laid by such a ruling. Such clauses might state (in paraphrase):

> *If Florida law does not itself compel application of all or a portion of my homestead to satisfy any deficiency in the*

> *probate funding of my pecuniary devises, then I hereby affirm my direction in this regard. If Florida law regards my intent as irrelevant, then I hereby specifically devise to my general devisees those shares of my homestead necessary to leave them with the total value of assets passing under my will [or trust] equal to the amount I specified for them under [the general devise article]. If Florida law still regards this as ineffective, then I compel my personal representative [trustee] to sell my homestead, even under pain of forfeiting the creditor protections (per Knadle) that would have otherwise inured to my heirs.*

Therefore, Florida's testators (who retain specialized estate planners) would be careful to draft themselves right back into that logical result which they likely expected the law to achieve on its own.

Absent a clear rule of law compelling us to do so, we decline to adopt that result which reverses the disposition of property that would occur for every other imaginable asset in this scenario, and even **this** asset if the homestead status were to terminate a week before the testator's death (e.g. permanent admission to a nursing home or change of legal residence). That ruling would (1) create ridiculous anomalies (such as will devises getting entirely different recipients than the identical counterparts in living trusts); (2) impose unreasonable and unconstitutional restraints on our testators' means of alienating perhaps their most valuable assets; (3) trap unwary testators; and (4) hamstring even those who may become aware of such new restraint, but without crystal ball foresight revealing the exact nature, value, and status of all their date of death holdings, must still struggle mightily to draft wills that actually achieve their intended results.

Finally, we acknowledge that the issue presented by this case was well debated among real property, probate and trust practitioners. Numerous land titles will have been affirmed and established assuming the correctness of either side of this debate. As such, any ruling on this issue of first impression may create chaos for land titles throughout the state. So as not to undermine any such existing titles, we declare the application of our ruling to be prospective only as contemplated by Florida Forest and Park Service v. Strickland, 18 So. 2d 251 (Fla. 1944). See also

Department of Revenue v. Anderson, 389 So. 2d 1034, 1037 (Fla. 1st DCA 1980).

CONCLUSION

A decision reinstating the Circuit Court's ruling would constitute new and dangerous law, frustrating legitimate intentions of testators, contradicting established rules of will construction and creating malpractice traps for attorneys.

The District Court of Appeals achieved the right result, but its Opinion arguably lacked the proper basis and thorough analysis required for this issue.

Respondent respectfully asks this Court to restate the Certified Question and issue a detailed Opinion consistent with Respondent's analysis.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was furnished by U.S. Mail this __________ day October, 2004, to Bruce D. Barkett, Esq., Collins, Brown, Caldwell, Barkett & Garavaglia, Chartered, 756 Beachland Blvd., Vero Beach, FL 32963, Attorney for Petitioners; Robert W. Goldman, Esq., The 745 Building, 745 12th Avenue South, Suite 101, Naples, Florida 34102, Counsel for RPP&TL Section; and

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2).

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