SUPREME COURT OF FLORIDA

CASE NO. SC04-1243
Lower Tribunal No. 4D03-1954

THOMAS MCKEAN, ET AL.,

Petitioner,

vs.

PETER WARBURTON,

Respondent.

PETITIONER'S REPLY BRIEF

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FREELY DEVISABLE PROTECTED HOMESTEAD IS NOT PART OF THE DECEDENT'S ESTATE FOR THE PAYMENT OF CREDITORS OR CASH DEVISEES UNLESS IT IS DEVISED TO A NON-HEIR OR THE WILL DIRECTS THAT IT BE SOLD AND THE PROCEEDS DIVIDED.

The issue in this case comes down to this: Do the general rules governing payment of general devises in a will supersede the protection of homestead embodied in Art. X, Sec. 4, Fla. Const., and in the Florida Statutes?

The argument in the Answer Brief focuses entirely upon the premise that the general rules governing payment of cash devises in a will somehow trump or supersede the Florida Constitution and the Florida Statutes, by forcing the Court to divide protected homestead into fractional shares and award those shares to cash devisees, whether such devisees are heirs or not.

Thus, in the present case, the intended beneficiaries of the homestead - - the decedent's brothers - - would take nothing. The two cash devisees - - a friend and a nephew - - would take fractional interests in the homestead. The friend's (non-heir's) interest would be subject to creditor's attacks. Assuming the homestead had not been sold for cash, but had been left intact as a home, the creditor could force partition, resulting in a forced sale of protected homestead to satisfy the claims of creditors, which is expressly prohibited by Art. X, Sec. 4.

The scenario described above is neither speculative nor accidental. It is, in fact, the intended result of Respondent's argument. It flows from a number of false premises upon which the Answer Brief relies, namely: (1) that common law rules of priority supersede the Florida Constitution; (2) that protected homestead is part of the probate estate; and (3) that Testator's intent was that his homestead should be sold, divided, and given in part to an unrelated, non-heir.

Respondent cites Parker's Estate, 110 So. 2d 498 (Fla. 1st DCA 1959) for the proposition that specific devises trump general devises, and general devises trump residuary devises. (Answer Brief, Page 7). That is not exactly what the Court said in Parker's Estate. Rather the Court said:

> A general legacy or devise is one which does not direct the delivery of any particular property; is not limited to any particular asset; and may be satisfied out of the general assets belonging to the estate of the testator and not otherwise disposed of in the will.
> [Emphasis supplied]110 So. 2d at 500.

The Decedent's homestead is not one of the "general assets belonging to the estate of the testator." It is not an asset of the estate at all. Estate of Hamel, 821 So. 2d 1279 (Fla. 2d DCA 2002). Clifton v. Clifton, 553 So. 2d 192 (Fla. 5th DCA 1989); Cavanaugh v. Cavanaugh,542 So. 2d 1345 (Fla. 1st DCA 1989). *See also* Fla. Stat.(2002), Sections 733.607(1) (giving the Personal Representative control of the Decedent's property "except the protected homestead"); 733.608(1) (exempting

protected homestead from the assets to be used for the payment of devises); and 733.805 (1) (limiting the sources available to pay devises to those funds and property "of the estate").

Parker's Estate was not a homestead case, but a shares-of-stock case and Respondent's reliance upon it is misplaced. It stands only for the general proposition that general assets belonging to the estate may be used to pay general devises. It has nothing to do with protected homestead.

To adopt Respondent's position would be a radical departure for this Court. It would be to elevate general rules governing the disposition of assets of an estate to a position of superiority over the Florida Constitution and the Florida Statutes. If Art. X, Sec. 4, means anything, it means that homestead is protected "from forced sale under the process of any Court." Art. X, Sec. 4, Fla. Const. Consequently, the cases and statutes cited above have expressly and specifically exempted protected homestead from the estate of the Decedent. It is not part of the probate estate, it is not under the control or possession of the Personal Representative, and it is not available for the payment of devises. It is certainly not available to satisfy creditor's claims. Yet Respondent would have this Court cast all of that aside; create new law making

homestead part of the estate, and elevate to a position of superiority a general rule which recognizes that general assets of the estate are available to pay general devises.

But how is that to be accomplished? First, the Court would have to find that the protected homestead is an asset of the estate. Respondent argues otherwise, positing instead that the Court could simply divide the homestead into fractional shares, and award the cash devisees a fractional share of the homestead, without ever making it a part of the estate, and without involving the Personal Representative. Apart from novelty, this approach has no merit. There is no precedent for it in Florida law. It would require the reversal of the cases cited above (Hamel, Clifton, and Cavanaugh), and a departure from the Florida Statutes cited above.

More importantly, the Respondent's proposal is prohibited by Art. X, Sec. 4. All general bequests would have to be funded even if it meant dividing protected homestead into fractional shares just because the homestead was devised by a residual clause. Therefore, a home which a decedent intended to leave to his adult children would be held not as tenants in common by siblings with equal shares, but as tenants in common by siblings with equal shares less the share held by the gardener (for example) or the stock broker (another example). Further, Respondent does not suggest how the gardener's or the stock broker's percentage interest is to be determined and instead suggests that such issues routinely arise in probate cases.

(Answer Brief, Page 18). Petitioners respectfully disagree, and suggest that Respondent has not presented a single instance in which a Court has had to determine this issue. If the percentage interest is to be determined based upon an appraisal, what happens if the homestead ultimately sells for more or less than the appraised value? What if it never sells?

Of course the real problem, the constitutional issue, is that by dividing the homestead into fractional interests and awarding some of those interest to non-heirs, the homestead becomes subject to attachment by a creditor, who may then partition the property and force the sale as a creditor, which is specifically prohibited by Art. X, Sec. 4. Respondent argues that partition of homestead is not prohibited by Art. X, Sec. 4, and cites Donly v. Metropolitan Realty Investment Company, 72 So. 178 (1916). However, Donly merely held that Art. X, Sec. 4, was not intended to prevent partition of the homestead property by the beneficiaries. In Donly the Court confirmed that Art. X, Sec. 4, does prevent the forced sale of homestead to satisfy the claims of creditors.

Finally, Respondent continues to misapprehend the testator's intent, by relegating the residuary clause to the status of a "leftovers" clause. In reality, the most important provision in the will is the residuary clause, and every will must have one, without exception. Linda C. Darsey, *The Not-So-Simple Simple Will*, Florida Bar

Journal, June, 1993. Attorneys who have failed to include a residuary clause have been sued for professional negligence. Arnold v. Carmichael, 524 So. 2d 464 (Fla. 1st DCA, 1988); Hamilton v. Needham, 512 Atlantic 2d (DC Ct. App., 1986). Often, probably usually, cash bequests are incidental to the residuary bequest. For example, Snyder v. Davis, 699 So. 2d 999 (Fla. 1997), involved a will which left only two cash bequests **totaling** $5,000.00 to a son and a friend of the Decedent. The rest, and by far the most valuable part of the estate, including the homestead, was devised by the residuary clause to the Decedent's granddaughter. This is very common. Similar wills were presented in many of the cases cited herein. The testator leaves token gifts or no gifts at all to friends or distant relatives, but leaves an all-encompassing residuary devise to his primary intended beneficiary, usually a spouse. The testator says in effect, "Because I cared for these people somewhat, I leave them a limited cash gift; however, all the rest of my bounty, everything else that I may own, in whatever form it may take, whether it is real property or personal, cash, stocks, or whatever, these represent my true estate and these I leave to my wife," (or children, or grandchildren, etc.).

In the present case the testator made no effort to leave his homestead to the Respondent, Warburton, or his friend, Cappelen. Rather, the testator left them limited cash gifts - - cash which we assume the testator had in his possession at the time he

wrote the will. The will did not say, "And if I have insufficient cash in my estate to pay these gifts, then sell my homestead to pay them," as Respondent would have this Court believe. Rather, according to the recognized rules of construction in Florida, in the absence of a specific devise of homestead, the testator's intent must be read in the residuary clause. Estate of Murphy, 347 So. 2d 107 (Fla. 1976); Clifton v. Clifton, supra. In Murphy, the specific issue before the Court was whether a devise of homestead was required by specific devise, rather than by residuary devise. The Court rejected the argument, and squarely held that the general language of the residuary clause constitutes a precise indicator of the testamentary intent with regard to homestead. Murphy, 347 So. 2d at 109. Respondent argues that Murphy does not apply because the alternative was intestacy with respect to homestead; but that is the same situation before this Court: either the residuary clause includes the homestead, or homestead is not covered by the will at all, the intestacy statute applies, and the Decedent's brothers still inherit rather than the nephew or friend. There was certainly no intent expressed in the will to sell the homestead to satisfy the cash devises.

As pointed out in the Brief of the *Amicus Curiae*, the testator had a choice in this matter. He could have mandated in his will that the homestead be sold and the proceeds distributed. Had he done so, then the homestead would not be "protected homestead" under Art. X, Sec. 4, because of the exceptions recognized in the Estate

of Hamel, supra. Homestead loses its protected status if it is left to someone other than an heir or if the will specifically orders the property be sold and the proceeds divided. 821 So. 2d 1279. Petitioners submit the same result - - loss of homestead protection for all of the homestead, not just that devised to the non-heir - - will occur if this Court adopts Respondent's position that the homestead must be sold and the proceeds divided, or that a fractional interest in the homestead must be awarded to someone other than an heir.

Fortunately, the Decedent avoided the issue by choosing correctly to devise his homestead through his residuary clause to his brothers. Murphy and Clifton apply. There is an absence of contrary testamentary intent, so the residuary clause dictates the disposition of the homestead. The Decedent left the Respondent and his friend only limited cash gifts, if such cash remained available at the time of the Decedent's death, but everything else, including his homestead, he intended to leave and did leave to his brothers.

CONCLUSION

For the reasons stated in the Trial Court's original Order; the Brief of the Real Property Probate Trust Law Section of the Florida Bar, as *Amicus Curiae*; the

Petitioner's Initial Brief; and this Reply Brief, the certified question should be answered in the negative, and the Trial Court's Decision reinstated.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was furnished by U.S. Mail this _____ day of November, 2004 to Troy B. Hafner, Esquire and Brian J. Connelly, Esquire, Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A., 979 Beachland Boulevard, Vero Beach, Florida 32963, Attorneys for Respondent; Robert W. Goldman, Esq., The 745 Building, 745 12th Avenue South, Suite 101, Naples, Florida 34102, Counsel for the Real Property Probate & Trust Law Section; and John W. Little III, Esq., Brigham & Moore, LLP, One Clearlake Centre, Suite 1601, 250 South Australian Avenue, West Palm Beach, Florida, 33401, Co-Counsel for Real Property Probate & Trust Law Section.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the font requirements of Fla. R. App. P. 9.210(a).

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