IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-905

In Re: Estate of
Rachael Duffy MAHANEY
Deceased

MARY ELLEN MCENDERFER,

Petitioner,

2nd DCA CASE NO.: 2D03-5358
Circuit Case No.: 03-4278 ES 0004

v.

JOHN C. KEEFE,

Respondent

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

Former Statutes

Preliminary Statement

In this brief, the Petitioner will be referred to by name or as Petitioner and the Respondent will be referred to by name or as Respondent. The term "probate court" is intended to refer to the Circuit Court in and for Pinellas County, Florida, in which this case arose, unless a more general meaning is indicated by context. The term "District Court" is intended to refer to the District Court of Appeal for the Second District.

The notation "(R [page number])" shall indicate a reference to the Original Record on Appeal.

Unless otherwise indicated, references to Florida Statutes in this brief are references to the 2002 version of the Statutes, those being the statutes which were in effect at the date of death of the decedent.

Statement of the Case

The Petitioner seeks review of the decision of the District Court of Appeal for the Second District, which upheld final orders in probate proceedings of the Circuit Court in Pinellas County. (R 39-42) The orders of the probate court which were appealed were entered in a summary administration proceeding under Chapter 735, Fla. Stat., so there is no personal representative appointed to administer the decedent's estate. The only parties to this case are the two devisees whose rights were at issue before the probate court. The Respondent in this proceeding for review was the original petitioner in the probate court, and was the Appellee before the District Court. The Petitioner in this proceeding filed objections to the original petitions in the probate court, and was the Appellant before the District Court.

In this case, this court is asked to rule on the rights, if any, which a general devisee has in the decedent's homestead, where the homestead is freely devisable but is not specifically devised by the testatrix, and where there is no other property passing under decedent's will out of which the general devise can be

satisfied. At the time the probate court ruled in this case there was no published Florida appellate decision on this question. While the appeal in this case was pending before the Second District Court of Appeal, the Fourth District Court of Appeal announced its decision in the case of Warburton v. McKean, 877 So. 2d 50 (Fla. 4th DCA 2004). The Warburton decision was cited in the briefs and discussed in the arguments of counsel before the Second District Court of Appeal. In upholding the probate court in this case, the District Court recognized and certified conflict between its decision and the decision of the Fourth District Court of Appeal in Warburton. The District Court also certified the following as a question of great public importance:

> **WHERE A DECEDENT IS NOT SURVIVED BY A SPOUSE OR ANY MINOR CHILD, DOES DECEDENT'S HOMESTEAD PROPERTY, WHEN NOT SPECIFICALLY DEVISED, PASS TO GENERAL DEVISEES BEFORE RESIDUARY DEVISEES IN ACCORDANCE WITH SECTION 733.805, FLORIDA STATUTES.**

The certified question is identical to the question certified by the Fourth District Court. This Court has accepted the decision of the Fourth District Court for review and has heard oral arguments in that case (McKean vs. Warburton, Supreme Court Case No. SC04-1243).

Statement of Facts

The decedent Rachael Duffy Mahaney died testate on 21 April 2003. She was not survived by a spouse or minor child. The parties to this appeal are the only two devisees named in decedent?s last will dated 19 April 1990, which was admitted to probate without objection (R 3). Both Petitioner and Respondent are collateral kin of the decedent: Petitioner is the decedent?s grandniece; Respondent is the decedent’s nephew.

Except for provisions regarding possible disposition of tangible personal property by separate writing, the entire dispositive plan of the decedent?s will (R 3-6) is set forth in Article III of that instrument, which reads as follows:

ARTICLE III

> ?All the rest, residue and remainder of my estate and property, real, personal and mixed, of whatsoever nature, wherever situated, of which I may die seized and possessed, and to which I may be or become in any way entitled or have any interest, and over which I may have any power of appointment, I devise as follows:
>
> A. The sum of Thirty Thousand Dollars ($30,000)

to my grandniece, MARY ELLEN SHEA McENDERFER, absolutely and in fee.

B. My remaining residual estate to my nephew, JOHN CHRISTOPHER KEEFE, absolutely and in fee.?

At her death the decedent owned her single-family residence in her sole name. The decedent owned no other property of value which passed under her will.

On 27 May 2003 the Respondent filed a combined Petition for Summary Administration and Petition to Determine Homestead Status of Real Property (R 7), seeking (1) to have the decedent?s will admitted to probate, (2) to have the decedent?s residence determined to be exempt homestead under Florida law and (3) to have it determined that the residence passed to Respondent as exempt property under the residuary clause of the will. The Petitioner objected to the granting of any of the relief requested by Respondent beyond admission of the will to probate (R 19), and filed a memorandum in support of her objections (R 33). On 4 September 2003 the Circuit Court heard arguments on the Respondent?s petition and Petitioner?s objections thereto. On 9 October 2003 the Circuit Court entered the orders appealed from, overruling Petitioner?s objections and granting all relief sought by Respondent (R 39-42).

Standard of Review

All points of error asserted by the Petitioner relate to the District Court?s determination of the legal effect of undisputed evidence and are, therefore, questions of law. Bradley v. Waldrop, 611 So. 2d 31 (Fla. 1st DCA 1992). All points of error asserted by the Petitioner relate to the District Court's interpretation of the actual text of the will, which speaks for itself, and the application of the law to that document. Consequently, all asserted points of error are subject to review by this Court under the "clearly erroneous" standard. Bradley, Id., Furthermore, since this Court can review the exact same evidence as reviewed by the District Court, there is ?no presumption, or, at best, only a slight presumption, in favor of the correctness? of its decision. Julian v Julian 188 So.2d 896, 898 (Fla. 2nd DCA 1966); Terrace Bank of Florida v Brady 598 So.2d 225 (Fla 2nd DCA 1992). The District Court?s Order resulted from misconceptions of the rules of law and their application to the decedent?s will. In the absence of such misconceptions a different decision would have been rendered.

Summary of Argument

The decision of the District Court of Appeal for which Petitioner seeks review purports to resolve apparent conflicts between the preferences given under Florida statutes and case law to pre-residuary devises and the privileges attaching to homestead property when devised to persons entitled to claim the benefits of the homestead exemption from forced sale under Florida's Constitution. That such conflicts appear to exist is undisputed, and is evidenced by the fact that another case with similar facts has already been accepted for review by this Court.

Unfortunately, the District Court's decision was premised on fundamental errors concerning (1) proper classification of the devises in this case; (2) the differences in priority given to these devises under Florida law and (3) the particular nature of the case under review and the consequent implications regarding the applicability of law relating to the powers of a personal representative. These errors prevented the District Court from effectively analyzing and resolving the apparent conflict, and the resulting holding cannot be viewed as reflecting current Florida law.

Raising a question of law on which the parties did not disagree, the District Court erroneously characterized the devise to Petitioner in this case as a "quasi-general" residuary devise, a classification unknown to Florida law. Proceeding from this premise, the District Court found no persuasive expression of decedent's intent to give priority to her devise to Petitioner, despite the fact that the devises are phrased and structured in a classical fashion designed to establish the priority of one over the other.

It is a fact that most of the decisions which set forth Florida law regarding a decedent's homestead involved cases where an appointed personal representative was either a party to the litigation or an interested by-stander, often where creditor claims were an issue. It is thus not surprising that the District Court's opinion is interspersed with statements and conclusions about what the personal representative may and may not do when homestead is involved. This case arises in the context of a summary administration proceeding, where no personal representative is appointed but where the probate court is called on nonetheless to exercise its jurisdiction to construe wills and determine how property has passed under the terms of wills. Thus in this case the District Court had the

opportunity to affirm the principle of Florida law that places primacy on the determination of who receives protected homestead, not how it passes. Instead, the District Court erred by ignoring the procedural origins of this case, and by basing its decision about the Petitioner's claim on cases which deal solely with the powers of the personal representative and the rights of creditors.

The question certified to this Court by the District Court included a reference to the application of the probate abatement statute, §733.805, Fla. Stat.. Petitioner's argument will admit that the abatement statute is relevant to this case because it illustrates how the Florida Probate Code reflects pre-existing general principles about the preferences to be given to different kinds of devises. However, the statute is not dispositive of this case, and indeed could not be dispositive as to any case involving protected homestead.

The decision of the District Court, if upheld by this Court, would stand for the creation of a new restraint, not previously recognized in Florida law, on the freedom of individuals who are not survived by spouse or minor child

to devise their homesteads to anyone they wish, in that it eliminates the pre-residuary general devise as a method by which a testatrix can give an interest in what may well be the only asset passing under her will.

Inasmuch as this Court may be reviewing this case in conjunction with the decision of the Fourth District Court in Warburton, Petitioner argues in this brief that the Warburton opinion, although raising an unnecessary issue through some unfortunate choice of terms, is based on sound reasoning from valid precedents set by this Court, and should be viewed as a correct decision on a case of first impression in Florida.

I The District Court improperly classified the devises to both Petitioner and Respondent as residuary devises, which is inconsistent with settled Florida law and constitutes reversible error.

The District Court's opinion states, with respect to the devises to both Petitioner and Respondent, that

> ". . . both devises in this case were in the residuary clause, a fact we believe weighs against McEnderfer's contention that the decedent intended to favor her."

In a footnote following this statement, the court states:

> "Both are residuary devises as both are in the residuary clause of the will. This raises the question of whether the devise to McEnderfer is, in fact, a general devise or whether it is a residuary devise that functions as a "quasi-general" devise for the purpose of abatement."

McEnderfer, Slip opinion, p.5. The classification of the devises to Petitioner and Respondent as general and residuary devises, respectively, was never an issue disputed by the parties in this litigation, in the probate court or before the District Court. The principles governing classification of devises are well-established in Florida law. There are four principal classifications under which devises may be grouped: specific, general, demonstrative and residuary. Park Lake Presbyterian Church v. Estate of Henry, 106 So.2d 215 (Fla. 2nd DCA 1958). In classifying devises, a court must give effect to the total will and determine the testatrix's intent as gathered from the complete instrument. Id. at p. 217. The unique identifying characteristic of a general devise is that it has as a prerequisite of designation by quantity or amount. Id., at p. 217. Of the two devises in the will before the court in this case, only one (the devise to Petitioner) specifies a quantity or amount. The devise to Petitioner is clearly a general devise, regardless of the fact that it is contained within an Article of the will which begins

with the words “All the rest, residue and remainder of my estate..”.

The District Court opinion correctly states that neither of the parties raised the possibility that the devise to Petitioner was “... a residuary devise that functions as a “quasi-general” devise...”. McEnderfer, Slip Opinion, p. 5, footnote 1. A WestLaw ® search on the term “quasi-general devise” does not produce a reference to that term in any published Florida appellate decision other than the District Court’s opinion under review. Petitioner argues that no such classification of devise exists under Florida law. Park Lake Presbyterian Church, Id. However, if such a concept exists in Florida law (perhaps referred to by some other term), then the District Court misstates the application of such a classification to this case. If Florida law would in fact treat the devise to Petitioner as a “quasi-general” residuary devise, then the District Court’s conclusion that “...(it does not) appear that the answer would make a difference in this case...” is wrong. Treatment of Petitioner as a residuary devisee would place her on the same level of priority as the Respondent, entitled thereby to share in the protected homestead property. Petitioner makes clear that this is not her

argument, but points out the District Court's error in the matter as indicative of the District Court's misapplication of settled law.

The District Court's erroneous classification of the devise to Petitioner led the court to conclude that the devise to Petitioner enjoys no priority or preference under Florida law. To the extent this reasoning and conclusion supports the District Court's ultimate decision based on Florida homestead law applicable to the case, it constitutes reversible error.

II The District Court erred by disregarding the decedent's plainly expressed intent and ruling that in the absence of a specific devise of the homestead, the homestead passed exclusively to the residuary devisee, with the result that the pre-residuary general devise was left unfulfilled.

The District Court's decision disregards and contravenes the intentions of the decedent as expressed in the plain language of her will. In Article III of her will, the decedent clearly expresses her intent as well as her understanding of the differing qualities of the two gifts she is making (R 3&4). After defining the extent of the gift she wishes to make to Petitioner in monetary terms (?The sum of Thirty Thousand Dollars...?), the decedent then

uses that gift as a referent to define the extent of her gift to Respondent (?My remaining residual estate...?) (emphasis supplied). The probate court erred in disregarding this unambiguous language of the decedent?s will which classified and prioritized the two gifts she wished to make.

As a preface to that portion of the Florida Probate Code which contains rules for will construction, ?732.6005, Fla. Stat. , provides as follows:

> (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 execution of the will.

In its analysis of the decedent's intent based on the terms of her will, the District Court correctly describes the Petitioner's position as being based on "...the assumption that in preparing the will, the decedent relied only on the general rules governing the priority of devises." McEnderfer, slip opinion, p. 4. The District Court opinion advances another theory – that the decedent "...relied on the protection afforded to homestead property

when she prepared her will". The fundamental error of the District Court decision (and of the probate court orders which it upheld) is the assumption that these two theories must inevitably be in conflict when the only property passing under the will is protected homestead. Petitioner argues, and this Court should find, that in this case where both she and Respondent are "heirs" of the decedent entitled to the benefits of protected homestead, these two assumptions may both be true.

The correct interpretation of decedent's intent can be reached through analysis of some very simple statements: Decedent was obviously aware of her close family relationship to both devisees. Decedent may be presumed to have been aware that her homestead property would be protected for the benefit of these "heirs", and that it was not necessary for her to specifically give the homestead to anyone in order for this protection to inure. What is certainly true is that decedent was aware that if she wanted to make a gift to one devisee in a way calculated to maximize the chances that it would satisfied first, the way to do that would be to describe and limit the value of the gift, and to require that only property "remaining" after its satisfaction pass to other devisee. The District

Court's failure to give primacy to the decedent's intent as it appears from these simple propositions was fundamental error, and its decision should be reversed.

III The District Court disregarded the fact that the probate Court order appealed from was rendered in a summary administration proceeding, which does not involve the appointment of a personal representative. To the extent the District Court's based its decision on statutes and case law regarding the powers of the personal representative, the court misapprehended the law applicable to this case, which is reversible error.

The probate proceeding in this case was commenced with the filing of a petition for summary administration under Chapter 735 of the Florida Probate Code (see §735.201, Fla. Stat., et seq.) combined with a petition to determine protected homestead real property, under Rule 5.405, Fla. Prob. R. Summary administration is a procedure whereby ownership of a decedent's property is determined directly by the probate court, without the appointment of a personal representative. The District Court opinion initially mentions that the Respondent "...filed a combined Petition for Summary Administration and Petition to Determine Homestead Status of Real Property...", but then ignores that important fact in the balance of the opinion. Indeed, the District Court's discussion and its conclusions are

clearly grounded in the premise that the intervention of, and sale of the homestead by, a personal representative is essential if the devise to the Petitioner is to be honored. In concluding its analysis of relevant constitutional provisions and case law, the court states:

> "...that title vested in Keefe at the time of decedent's death, and that because Keefe was an "heir", the property maintained its exempt status and never became property of the estate subject to the control of the personal representative."

McEnderfer, slip opinion at p.3. (emphasis supplied). In the same vein, in stating its holding in the case, the District Court pronounces:

> "Because homestead property does not become an asset in the hands of the personal representative, it cannot be used by the personal representative in this case to satisfy the devise to McEnderfer."

McEnderfer, slip opinion at p.5. (emphasis supplied). These are certainly correct statements of an established legal principle (that protected homestead is beyond the control of the personal representative), but that is a principle which is applied in error to this case. Its misapplication indicates the District Court's failure to understand the relevance of the type of probate proceeding under review by it.

Summary administration is a procedure in which the probate court may deal with a wide range of the tasks and problems that also occur in the more familiar "formal administration" under Chapter 733, Fla. Stat. These include determining the validity of wills and construction of the terms of wills, determination of intestate heirs, and determination of the rights of heirs or devisees to particular interests or property. §735.206, Fla. Stat., Rule 5.530, Fla. Prob. R. The proceeding is provided by the Probate Code to allow interested persons to settle estates where creditor claims are time-barred, or where the value of assets which are not exempt from creditor claims is relatively small. §735.201, Fla. Stat. Summary administration is fully a "probate proceeding", sufficiently so to afford the probate court the jurisdiction necessary to provide complete relief to the petitioners which resort to it. This includes the jurisdiction to enter orders determining protected homestead property. In re Noble's Estate, 73 So.2d 873 (Fla. 1954), Rule 5.405, Fla. Prob. R., §19.46 Practice Under Florida Probate Code, 3rd Edition (Florida Bar Continuing Legal Education, 2003). As noted in the previous paragraph, there is no provision for appointment

of a personal representative in a summary administration proceeding, and concepts which assume the existence of a personal representative driving the probate process have no relevance.

The Petitioner admits that before the probate court she argued against the granting of any relief on the Respondent's petition beyond admitting the will to probate. Petitioner specifically argued against granting summary administration on the grounds that the conflicting devises to Petitioner and Respondent might be construed as an implied direction to sell the decedent's homestead, thus requiring appointment of a personal representative. (see Knadle v. Estate of Knadle, 686 So.2d 631 (Fla. 1st DCA 1997) At the time, and because Respondent chose to combine his petitions before the court, such arguments were considered necessary to support Petitioner's primary arguments, which were (and are) that Respondent, simply by virtue of his status as residuary devisee, cannot thereby stand as the sole devisee of decedent's homestead.

If this Court reverses the District Court and finds that Petitioner as well as Respondent enjoys the status as devisee of the protected homestead, it will be necessary to

remand the case for further proceedings to establish the respective interests of the parties. Petitioner argues that such determination can take place within the context of a summary administration proceeding, since that is no more than the exercise of the probate court's jurisdiction to determine the entitlement to protected homestead as well as all other property of the decedent. In re Noble's Estate, Id. The probate court will, of course, be bound by this court's ruling that Petitioner and Respondent, although their devises are different in character, are both "heirs" of the decedent, and as such both are entitled to assert the exempt status of the property as protected homestead. Snyder v. Davis, 699 So. 2d 999 (Fla. 1997). It is well within the competence of the probate court to interpret the provisions of wills so as allocate interests in the decedent's property. In the instant case, the devise to Petitioner is defined in terms of a dollar value, and that of Respondent is necessarily defined as what remains after Petitioner's interest is determined. In making such allocation the probate court may and should require the parties to produce evidence as to the fair market value of the property, so that the court may properly fix the undivided fraction of the property devised to Petitioner under the will.

IV A discussion of §733.805, Fla. Stat. is relevant to the proper analysis of this case, but the statute is not dispositive of the case as suggested by the certified question framed by the District Court.

The certified question at the conclusion of the District Court's opinion asks this Court to decide if decedent's freely devisable homestead property passes "...to general devisees before residuary devisees in accordance with Section 733.805, Florida Statutes." The certified question thus refers to a statute which is not otherwise discussed or even mentioned in the District Court's decision. It is possible that the District Court included the statutory reference in its certified question solely to make the question identical to the question certified by the Fourth District Court in Warburton v. McKean with which decision the District Court certified conflict. However, the effect of this statute was briefed and argued by the parties before the District Court, and a discussion of it is certainly relevant to Petitioner's request for review by this Court.

The statute in question prescribes the order in which devises abate in a testate estate in order to pay debts, family allowance, exempt property, elective share charges,

expenses of administration, and devises. In pertinent part, the statute provides that:

> "...the funds and property of the estate shall be used ..., in the following order:
>
> (a) Property passing by intestacy.
> (b) Property devised to the residuary devisee or devisees.
> (c) Property not specifically or demonstratively devised.
> (d) Property specifically or demonstratively devised.

§733.805(1), Fla. Stat. The terms used to classify devises for purposes of this statute are not defined by the Florida Probate Code, with the exception of the term "residuary devise" (defined in §731.201(31), Fla. Stat.). The meaning of these terms is supplied by the generally understood system of classifying devises such as is described in Park Lake Presbyterian Church, Id. Petitioner thus argues that, in addition to prescribing the process by which a personal representative performs his duties in the context of a formal administration, §733.805 Fla.Stat. has independent significance in that it codifies the substantive law of Florida regarding the different classes of devise recognized under the law, and the relative rights and preferences of each. A case decided on the basis of the direct predecessor to the current statute is the case of Central Christian Church of Bradenton v. School Board of

Manatee County, 314 So.2d 598 (Fla. 2nd DCA 1975). In that case, this court found in favor of a church which claimed a right of reverter in certain real property under the will of a decedent who died 45 years earlier. Reviewing the facts concerning the estate of that decedent, the court noted that the estate had been determined to be insolvent and the church never received any of the $3,000 devised to it by the decedent's will. While it was unclear as to whether the right of reverter held by the decedent was even known to the executor of the estate, or whether it was deemed to have no value, no disposition of this right was ever made by the executor, and the estate was closed in 1931. This court applied the analysis of Park Lake Presbyterian Church and determined that the interest of the church was that of a general legatee whose devise had never been funded. Applying §734.06, Fla. Stat. (1973), the predecessor to the current §733.805, the court held that the church was entitled to assert the right of reverter because it had passed to the church as general legatee under that statute, regardless of the inaction of the long-since-discharged executor. The court concluded its opinion with the following statement:

> The fact that these legal representatives are now nonexistent or uninterested should not preclude the appellant from making its claim as a real party in interest." Central Christian Church of Bradenton, Id. at 599. (emphasis supplied)

In ruling for Respondent in this case, the District Court appears to have assumed that the operation of the principles discussed above, otherwise universally applicable in determining the relative interests of devisees, is somehow suspended when the property which is the subject of dispute is protected homestead. Petitioner cites the case of In re Estate of Potter, 469 So.2d 957 (Fla. 4th DCA 1985), as authority for her argument that the same rules and concepts that classify and prioritize devises of all other property are just as vital and applicable when the subject is homestead property. In In re Potter, the litigants were a son and daughter of the decedent. In her will their mother described her homestead quite specifically and devised it to the daughter. To her son she devised a sum in cash equivalent to the value of the residence received by the daughter, to be determined by appraisal of the residence at the time of her death. Unfortunately there were insufficient probate assets to pay the son this equivalent sum. The Circuit Court found that the decedent?s intent was to treat her children equally, and

accordingly ordered the sale of the residence and aggregation of the proceeds with the other assets which remained after payment of taxes and administration expenses. The amount which remained, ruled the Circuit Court, should be divided equally between the son and daughter. The daughter appealed and the District Court of Appeal reversed and remanded. The appellate court classified the devise to the son as a general devise, incorporating and quoting the definition of that term as set forth in Park Lake Presbyterian Church. The court went on to hold that the Florida abatement statute then in effect was applicable in the situation and that the general devise to the son must necessarily yield to the right of the daughter, as a specific devisee, to receive the property left to her. §733.805, Fla. Stat. (1983).

The decision in In re Potter clearly affirms that, with homestead property as with all other property, the specific devise takes priority over the general devise as a matter of law. To hold, as did the District Court, that in the case of protected homestead but nowhere else the residuary devise also takes priority over the general devise, was error.

The abatement statute, §733.805 F.S., may thus be seen as having a dual purpose: First, where there is a role for a personal representative to play, it describes the process by which a personal representative carries out its duties in executing the various devises of a will. Second, and outside of any particular probate process, it also codifies the substantive law of Florida by classifying the types of devises which will be recognized and prescribing the relative rights and preferences of each. Petitioner argues that it is through this independent, substantive aspect of the abatement statute that her interest in the property passing under the decedent's will (in this case, protected homestead property) is recognized. The ruling of the District Court that no property interest passes to Petitioner under the will is thus erroneous, and should be reversed.

V Petitioner and Respondent are both "heirs" of the decedent within the meaning of Snyder v. Davis. By finding that Respondent was an heir of the decedent entitled to protected homestead but that the Petitioner was not, the District Court erred to properly apply the law to the undisputed facts.

An undisputed fact of the instant case is that both the Petitioner and Respondent are collateral kin of the decedent. Petitioner is a grandniece of the decedent,

Respondent is a nephew. Either or both of them could potentially be decedent's heirs by intestate succession. §732.103, Fla. Stat. As such, each of them is entitled to claim the status of "heir" under this court's decision in Snyder v. Davis, entitled to receive decedent's freely-devisable homestead exempt from the claims of creditors and charges for expenses of administration.

In its opinion the District Court acknowledges the family relationships of both Petitioner and Respondent to decedent. McEnderfer, slip opinion, p. 2. It is unclear, however, that the District Court kept those facts in mind as it applied the law. The Court evidently found the decision of the Second District Court of Appeal in In re Estate of Hamel relevant to the instant case, because it cited that decision (correctly) as authority for the proposition that homestead property becomes part of the probate estate only when a testamentary disposition is made to someone other than an heir. In re Estate of Hamel, 821 So.2d 1276 (Fla. 2nd DCA 2002), McEnderfer, slip opinion, p. 3. The inclusion of this authority seems to be relevant only if the District Court was making a distinction between Respondent (whom it expressly acknowledged to be an "heir") and Petitioner, as to whose "heirship" status the District

Court appears uncertain. The undisputed facts of this case are that there was no devise to anyone who is not an "heir" within the meaning of Snyder v. Davis. To the extent the District Court misunderstood the legal effect of Petitioner's family relationship to the decedent, the Court failed to apply the law to the facts as clearly established in the probate court. Such a misapplication is reversible error.

VI Florida homestead law does not bar a devisee who is not a specific or residuary devisee from sharing in the decedent's protected homestead, if such devisee is an "heir" of the decedent under applicable law. The District Court erroneously applied this court's decision in *In re Murphy* to find otherwise

The two sources of Florida homestead law relevant to this case appear in Article X, §4 of the Florida Constitution. Both work to protect the family through preservation of the family residence, but in significantly different ways. Petitioner argues that the probate court erroneously interpreted the central holding of an important case construing one of the constitutional provisions, and then improperly applied that construction so as to deprive Petitioner of her right to share the benefits flowing from the other constitutional provision. The decision of the

District Court was in error to the extent that it did not correct the probate court's misapplication of the law.

The first principle is the limitation on the ability of a Florida decedent to devise her homestead if she is survived by a spouse or minor child. Art. X, §4(c), Fla. Const. This long-standing restriction was liberalized in a 1972 constitutional revision to permit a devise to the surviving spouse if there is no minor child. If not survived by a spouse or minor child, a decedent is free to devise her homestead in any manner she wishes. Art. X, §4(c), Fla. Const., City National Bank of Florida v. Tescher, 578 So.2d 701 (Fla. 1991). If a decedent survived by a spouse but not by a minor child makes a will naming the surviving spouse as sole residuary devisee, that residuary clause in and of itself is sufficient as a devise to pass the decedent's homestead to the surviving spouse. In re Estate of Murphy, 340 So. 2d 7 (Fla. 1976).

The second principle arising in §4 of Article X of the Florida Constitution is the exemption of the homestead from forced sale to pay the creditors of the owner. Art. X, §4(a), Fla. Const. This exemption continues after the death of the owners in that its benefits ". . . inure to

the surviving spouse or heirs of the owner." Art. X, §4(b), Fla. Const. The term "heirs" as used in §4(b) of Article X has been given a much more expansive definition by the courts than the same term as used in the Florida Probate Code in determining those who are entitled to the property of a particular decedent under the laws of intestate succession. See §731.201(18), Fla. Stat. and §732.103, Fla. Stat. . Takers of homestead are considered to be "heirs" benefiting from the inurement provision of Art. X, §4(b) whether their interests pass to them by traditional intestacy or by testamentary devise. Public Health Trust of Dade County v. Lopez, 531 So.2d 946 (Fla. 1988). If devisees, such persons are not required to be persons who would take by actual intestacy; it is sufficient that they be persons whose relation to the decedent falls within any of the categories of related persons described in the intestacy statutes. Snyder v. Davis, 699 So. 2d 999 (Fla. 1997) Thus, to the extent that homestead property is devised to persons who are "heirs" of the decedent, the constitutional exemption of the homestead from forced sale to pay claims of creditors inures to those devisees. Art. X, §4, Fla. Const., City National Bank v. Tescher, Id., Public Health Trust v. Lopez, Id. The constitutional exemption is not lost if the testatrix

exercises the right, inherent in making her will, to favor some heirs over others related in the same degree, or even skip over some heirs to favor others more distantly related. Bartelt v. Bartelt, 579 So. 2d 282 (Fla. 3d DCA 1991), Snyder v. Davis,.

Because homestead passing to persons defined as "heirs" is exempt from forced sale to pay the claims of the deceased owner's creditors, Florida probate law sets it apart for probate purposes from all other property of the decedent. §731.201, Fla. Stat., the definitional section of the Florida Probate Code, contains a special definition of "protected homestead" which refers to Art. X, §4(b), of the Florida Constitution and thus incorporates the case law describing the extent of the homestead exemption. §731.201(29) Fla. Stat. §733.608 Fla. Stat., which sets forth the general powers of the personal representative, begins with a declaration that "All real and personal property of the decedent, except the protected homestead, . . . shall be assets in the hands of the personal representative: (for all purposes connected with the administration and distribution of the estate)" §733.608(1) Fla. Stat.

It should be plain from the foregoing survey that concepts and precedents relevant to one of the constitutional sources of homestead law influence the development of concepts and precedents relevant to the other. It is basic to the further development of Petitioner's argument, for example, to point out that the enjoyment by various "heirs" of the decedent's homestead property, free from claims of her creditors under Art X., §4(b) depends on the decedent not having been subject to the restrictions on devise contained in Art. X, §4(c). The homestead must be "freely devisable" under subsec. 4(c) before an analysis under Art. X, §4(b) is relevant, or even possible. It is unfortunately quite easy to reason backwards and thus construe a precedent developed to deal with one aspect of homestead law in a manner which appears to control quite another aspect. Such backward reasoning is a major flaw of Respondent's argument before the probate court and the District Court in this case, and in the probate court's ruling which was affirmed by the District Court. The precedent in question is the decision of this court in In re Murphy, Id. It is important to understand why, contrary to arguments made by the Respondent and adopted by the probate court and (as evidenced by its

silence on the issue) by the District Court, that case is not controlling here.

As in this case, the decedent?s homestead in In re Murphy was not specifically devised or otherwise mentioned in his will. Unlike this case, where the litigants are both collateral kin of the decedent, the litigants in In re Murphy were the decedent?s surviving spouse and his adult son from a prior marriage. The case arose only a few years after the 1972 revision to the Florida Constitution which added to Art. X, §4(c) the specific provision authorizing a devise of the homestead to a surviving spouse in the absence of minor children. Art. X, §4, Fla. Const. The spouse was the sole residuary devisee under her husband's will. Invoking the recently-adopted constitutional provision, the spouse claimed that the homestead was thus validly devised to her. The son cited well-established law to the effect that homestead property does not constitute part of the probate estate of a decedent and argued that the homestead would therefore not pass under a clause in a will directing disposition of the decedent?s "...entire remaining estate, both real and personal??. In re Murphy, Id., 109. Because there was no valid devise of the homestead, argued the son, the property would pass as

specifically provided by statute in such cases, with the wife receiving a life estate in the homestead and the son (as heir of his father under the intestacy rules) receiving a vested remainder. §731.27, Fla. Stat. (1973).[1] The Supreme Court, holding for the surviving spouse, summarized and rejected the son?s argument at the conclusion of its opinion:

> ?Appellant...argues that we should lay down judicially a requirement that any devise of homestead be a specific devise and rule that a residuary clause is ineffective to pass homestead property. Unquestionably a specific devise is to be preferred, but in the absence of a specific devise, we conclude that the general language of a residuary clause is a sufficiently precise indicator of testamentary intent?

In re Murphy, Id. at 109. This court?s holding in In re Murphy gave effect to the decedent?s testamentary intent by permitting a residuary devise, when the alternative would have been descent by intestacy. In the instant case, the beneficial holding of In re Murphy has been turned upside down -- that in the absence of a specific devise of the homestead, this court’s decision compels a probate court to award the decedent’s homestead entirely to the residuary beneficiary, even when to do so is to ignore the decedent’s

[1] §731.27, Fla. Stat. was the predecessor to the current statute regulating descent of homestead and was the statute in effect at the time; at the time In re Murphy arose it had not been amended to take into account the possibility of a devise to the surviving spouse authorized by the 1972 constitutional amendment. It was otherwise very similar to the present-day §732.401, Fla. Stat. .

clear expression of her intent that a certain portion of her property pass to others.

In its opinion, the District Court correctly stated the holding of In re Murphy to the effect that homestead property may be devised through the residuary clause of a will. The District Court then stated, again correctly, that freely devisable homestead

> "... does not become part of the probate estate ... unless a testamentary disposition is made to someone other than an heir."

However, with no further analysis of how these principles apply to the dispute at hand, and with no acknowledgement of the fact that Petitioner is also an "heir" of the decedent, the District Court then concluded that "...(the homestead) passed to Keefe through the residuary clause of the decedent's will."

The contrast between In re Murphy and this case is evident -- in the relationship of the parties to the decedent and to each other, the nature of their claims and the language of the governing instrument. In re Murphy, while clearly a correct decision and an important element in Florida?s homestead caselaw, did not arise in the context of conflicting claims by different classes of devisee under

a will, such as exist in the instant case. Accordingly, its application should be limited and it should not be viewed as controlling in this case.

VII The decision of the probate court is contrary to established rules and public policies which guide Florida residents and their legal advisors in estate planning and will drafting

No public policy goals are served by a rule which states that unless specifically devised, protected homestead can only pass under the residuary clause of a decedent's will. Such a rule would not make it more likely that the "heirs" of the decedent would be the takers of the homestead; it is equally possible that the reverse could occur. To the extent that testators recognize general devises as higher in priority than residuary devises it is reasonable to expect that the they will more often than not favor those most closely related to them with devises conceived to increase the chances that at least a certain, defined quantum of property having a given value reaches these natural objects of their bounty.

If the ruling of the District Court survives and becomes part of Florida decisional law, it will be at odds with several well-established policies and doctrines which

guide Florida residents in managing their affairs. Established principles of will construction are cast aside allowing the lowest priority, residuary devisee to receive a windfall at the expense of the pre-residuary beneficiary. That this should occur in any circumstance is unfortunate enough; that it should occur because of the strained interpretation of supposedly protective constitutional homestead principles would be truly abhorrent to the supposed liberality of those principles.

If allowed to stand, the District Court's ruling would stand as a marked exception to public policies against restraints on alienation of one's property and against impediments to the free exercise of one's right to make a will. The right to dispose of property by will, as well as the right to inherit property, are fundamental property rights of Florida residents and are recognized as such in the Florida Constitution. Art. I, §2, Fla. Const.; Shriners Hospitals for Crippled Children v. Zrillic, 563 So.2d 64 (Fla. 1990). Restrictions on such constitutionally protected rights are permissible if they are necessary to the "fair exercise of the power inherent in the State to promote the . . . health, safety, good

order and general welfare" of the people. Shriners Hospitals v. Zrillic, Id., 68.

Petitioner admits the existence of valid restrictions on the freedom of a Florida resident to devise her homestead property, but would show that they have nothing to do with the result in this case. Clearly a testatrix may not devise her homestead if she is survived by a spouse or minor child. Art. X, §4(c), Fla. Const. Such is not the situation in the case before the court. The restriction sought to be asserted by Respondent, and embodied in the District Court's opinion, prevents a testatrix from devising any interest in her protected homestead property unless she does so by a specific devise or a residuary devise. No basis or precedent for such a restriction exists. To the contrary, this court has affirmed the right of a testatrix who is not survived by a spouse or minor child to devise property as she wishes, and has ruled against attempts to extend restrictions beyond those expressly allowed by the Constitution. City National Bank v. Tescher, Id.

VIII The result of the decision of the Fourth District Court of Appeal in *Warburton v. McKean* is correct, but an essential part of the holding in that case was incorrectly

stated, and should be harmonized with existing and well-established constitutional homestead case law.

The case of Warburton v. McKean was decided by the Fourth District Court of Appeal while the appeal of the instant case was pending before the Second District Court of Appeal. Warburton v. McKean, 877 So.2d 50 (Fla. 4th DCA 2004) The Fourth District Court's decision has been accepted for review by this Court and the case has been heard on oral argument. McKean vs. Warburton, Supreme Court Case No. SC04-1243. Petitioner contends that the Fourth District Court reached the correct result in Warburton v. McKean, although certain language used by the court in its opinion was imprecise and incorrect.

The interests of the parties in Warburton v. McKean were very similar to the interests of the parties in this case. The appellant/general devisee in Warburton was a nephew of the decedent, and the appellants/residuary devisees were the decedent's four half-brothers. The decedent was not survived by a spouse or minor child, so the property was freely devisable under Art. X, §4(c), Fla. Const. (1968). Thus as in the instant case the parties on both sides of the case were thus considered "heirs" of the decedent under the holding of this court in Snyder v.

Davis, Id. The probate court order appealed by Warburton held that the devise to him was a "specific devise" of cash and that he therefore took nothing under the decedent's will because there was no cash. The probate court also ruled that the decedent's condominium was protected homestead under applicable law, and that it was effectively devised to the decedent's half-brothers under the residuary clause of the will.

The Fourth District Court reversed the probate court on both of these points. On the issue of the nature of the $150,000 devise to Warburton, the court applied the classification and analysis of devises summarized in Park Lake Presbyterian Church, Id., and found that the devise to Warburton was a general devise. Warburton v. McKean, Id. p. 53. As such, the court held, it was entitled to be satisfied out of property passing under the will before any property would be deemed to have passed to the residuary devisees.

On the issue of entitlement to the protected homestead as between the general devisee and the residuary devisees, the Fourth District Court also held for the general devisee. Citing City National Bank v. Tescher, Id.,Bartelt

v. Bartelt, Id. and In re Estate of Hill, 552 So.2d 1133 (Fla 3rd DCA 1989), the court found that because the homestead property was freely devisable, it should not be excluded from the application of the principles governing classification of devises. Unfortunately, what the court actually wrote was that the homestead was ". . . property of the estate subject to division in accordance with the established classifications giving some gifts priority over others." Warburton v. McKean, Id. (emphasis supplied) The use of the phrase "property of the estate" in the court's holding was clearly an unfortunate choice of words. The Florida Probate Code defines "estate" as meaning ". . . property of a decedent that is the subject of administration." §731.201(12), Fla. Stat. The holding of Warburton has been viewed as problematic by practitioners ever since the decision was announced – even prompting the filing of an amicus brief by the Real Property, Probate and Trust Law Section of The Florida Bar. It is not unreasonable to speculate that in the instant case the Second District Court declined to follow Warburton v. McKean precisely because of this obviously anomalous language in an otherwise well-reasoned opinion. Petitioner would show that it is clear from the authorities cited by the Fourth District Court in its Warburton opinion that the

court did not intend to depart from the established principle that freely-devisable homestead which passes to "heirs" is not part of the probate estate. Warburton v. McKean, p. 53, footnote 1. Had the Fourth District Court used the phrase "property passing under the will" instead of "property of the estate", the court's opinion would still have reached the correct result, and would be viewed as much more authoritative than appears to be the case. Petitioner argues that the Warburton v. McKean should be understood as a decision which reached a correct result on an important issue in a case of first impression in Florida, and should be harmonized with existing case law to give the case its proper precedential value.

IX A decision that a general devise is effective to pass a interest in freely-devisable, protected homestead will create fractional shares which may be subject to future partition, but that will NOT be tantamount to ordering a forced sale of the homestead.

Petitioner does not seek to deny Respondent the share of decedent's homestead property to which he is entitled, nor does petitioner assert that Respondent's interest in the property should not be considered protected homestead. §731.201(29), Fla. Stat. The value of decedent's devise to Petitioner is only a fraction of the value of decedent's

homestead, meaning that Petitioner and Respondent are both entitled to fractional undivided interests in the property, as determined by the probate court.[2] In this respect the facts of the instant case are unlike those which apparently confronted the parties in Warburton v. McKean, where the amount of the gift to the general devisees exceeded the value of the homestead. Warburton v. McKean, Id.

The creation of fractional interests in the protected homestead brings with it the potential for a future partition of the property if the parties cannot both enjoy the use of the property and are otherwise unable to agree on its disposition. A forcible partition of the homestead between owners is not the equivalent of a forced sale that would violate the protected status of the homestead under the Florida Constitution. Art.X, §4(a), Fla. Const.; Donly v. Metropolitan Realty & Investment Co., 72 So. 178 (Fla. 1916) In Donly, the homestead property of a decedent descended to his adult family members, one of whom alienated his interest in the property to Metropolitan Realty, which brought suit for partition. The remaining family members defended on the basis of the constitutional

[2] According to the unrefuted facts contained in Petitioner's objections to the relief sought by Respondent in the probate court, the fair market value of the decedent's homestead property as assessed by the Pinellas County Property Appraiser for 2002 was $79,200. The record does not reflect whether the property was encumbered by any mortgages.

protection against forced sale of the homestead. This Court ruled against them, stating:

> "Considering the terms and purpose of the homestead provisions of the Constitution, it is manifest that a judicial sale, if necessary for the purposes of partition among the beneficiaries of a homestead, is not included in the exemption from forced sale under process of any court. There is nothing in the Constitution indicating a purpose that homestead property may not be partitioned even by judicial process if that be necessary to a complete enjoyment of the property by those upon whom it is cast..."

Donly v. Metropolitan Realty, Id. (emphasis supplied). It is important for Petitioner to make clear that by finding in favor of her entitlement to a share in the decedent's protected homestead, this Court will not thereby be ordering a "forced sale" of the homestead to satisfy a $30,000 cash gift to Petitioner. Instead, the effect of the Court's decision in favor of Petitioner will be to give Petitioner the same fractional interest she would have received had the decedent's will contained a fractional-formula devise, the numerator of the fraction being 30,000 and the denominator being whatever the probate court determined (or the parties agreed) the fair market value of the property to be at the date of death. Fractional-formula devises are a well-known and accepted estate planning technique, allowing flexibility in dealing with unforeseen fluctuations in asset values for tax purposes.

The application of the analogous concept to this area of the law will thus not cause great difficulty or concern to practitioners and judges who are accustomed to working with such tools.

Conclusion

Petitioner requests that this Court reverse the decision of the Second District Court of Appeal which upheld the orders of the probate court and that this Court remand this case to the District Court for further remand to the probate court. Upon remand the probate court should be directed to enter its Order Determining Homestead Status to find that Petitioner as well as Respondent are persons entitled to the decedent's homestead real property under decedent's will, determining their respective interests in the property, and determining that as "heirs" of the decedent within the meaning of Snyder v. Davis they take their interests as protected homestead.

Respectfully submitted,
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By:

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via regular United States Mail this 17th day of June, 2005, to Thomas G. Tripp, Attorney for Respondent, 4930 Park Boulevard, Suite 12, Pinellas Park, Florida 33781.

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Cord C. Mellor

Certificate of Compliance

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

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Cord C. Mellor