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 REPLY BRIEF

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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.

Summary of Rebuttal and Response Argument

In his answer brief Respondent restates erroneous positions adopted by the District Court of Appeal in its opinion. These positions presuppose the existence of a

personal representative having a duty to control all available probate assets in order to perform his statutory obligations. Due to Respondent's original choice of summary administration as the method for seeking administration of this estate, considerations involving the powers of a personal representative are absent from this case. Precedents which were decided in the context of formal administration, notably including Snyder v. Davis, are thus of limited use in deciding this case.

Respondent's arguments regarding decedent's intent contradict the plain language of the decedent's will. Respondent's brief is no more persuasive than the opinion of the Second District Court of Appeal as to why a lower-priority devise should prevail over a higher-priority devise devise solely because the only property passing under the decedent's will is protected homestead and thus not capable of being sold through the probate process.

I Important distinctions exist between this case and the case of Snyder v. Davis. Respondent incorrectly argues that Snyder v. Davis is controlling authority in this case.

In his brief Respondent notes the similarity between the facts in this case and certain facts mentioned in this court's opinion in Snyder v. Davis, 699 So. 2d 999 (Fla.

1997). Based on these similarities Respondent asserts that Snyder is controlling and that it compels a decision for Respondent in this case. The cases are similar in that there was no specific devise of the homestead in the will of either testatrix. In each case the will provided at least one pre-residuary general devise to an heir of the decedent (in Snyder this devise was to decedent's son), and then a residuary devise to a single individual. However, in Snyder the existence of the pre-residuary devises was only peripheral to the issue before the court. In this case, on the other hand, the right of the pre-residuary devisee to satisfaction of the testamentary gift made to her is the central issue to be decided.

In Snyder the prevailing litigant was the granddaughter-residuary devisee, who succeeded in her claim that the homestead had passed to her as exempt property. The losing litigant was the personal representative, who unsuccessfully asserted his right under the Probate Code to control and sell the decedent's homestead for general probate purposes. The basis for the personal representative's position was the fact that the granddaughter was not an heir of the decedent under the strict application of the intestate succession laws, and

thus not entitled to claim the benefit of the homestead exemption under Art. X, §4(b), Fla. Constitution. This court rejected the narrow definition of "heir" advanced by the personal representative and found in favor of the granddaughter.

In this case, arising as it does out of a summary administration proceeding, there is no personal representative. The litigants in this case are two devisees under the will, each claiming preference for his or her devise under conflicting legal theories.

In Snyder, 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.; In re Estate of Murphy, 340 So. 2d 107(Fla. 1976); Donly v. Metropolitan Realty & Investment Co., 72 So. 178 (Fla. 1916). The general devisees in Snyder did not become parties or assert any rights; and the case proceeded at the circuit and appellate court levels on the apparently undisputed assumption that, unless the granddaughter was held to be a non-heir, the homestead passed to her.

In Snyder the parties never asked this court to consider whether a general devisee, as distinguished from the personal representative and probate creditors, may receive freely devisable homestead to fulfill an unfunded devise. Instead, the case came before this court upon the Second District's certification of the following question as one of great public importance:

> 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.

While this court is not limited to deciding only the questions certified to it, in rendering its opinion in Snyder this Court confirmed that its ruling had a limited scope, 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, Id. at p. 1000. (Emphasis supplied)

The Snyder holding, being expressly limited in its scope, therefore 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 (Fla. 1936). Thus, as stated in City of Miami v. Stegemann, 158 So. 2d 583 (Fla. 3d DCA 1963), Ano decision is authority on any question not raised and considered although it may have been involved in the facts of the case.@ (Emphasis supplied.) Courts will not rule on matters stipulated by the parties or otherwise not in dispute. State v. DuBose, 99 Fla. 812, 128 So. 4 (Fla. 1930).

Although the result in Snyder may have been that the general devisees received nothing, such result was not compelled by the court's holding, and certainly Snyder does not dictate such a result in this case. The issue before this court in Snyder was who is or is not an "heir" of a decedent for purposes of applying the constitutional protection for inherited homestead. In the present case it undisputed that both petitioner and respondent are heirs entitled to the benefits of Art. X, §4 of the Constitution, even under the narrow definition of the term "heirs" which this court rejected in Snyder. (R33-36)

II Respondent's characterization of the nature of the devise to Petitioner is incorrect. The devise to petitioner is a general devise, capable of satisfaction out of any and all property passing under decedent's will including protected homestead. Satisfaction of a devise with an in-kind interest in protected homestead property does not constitute a sale of the property.

The Respondent refers to the decedent's gift to Petitioner variously as a "cash bequest" (Respondent's Answer Brief, p. 7), or a "devise of cash" (p. 10). According to Respondent's brief, Petitioner was "... only devised money and nothing within the residuary." (p. 8). These references misstate the nature of decedent's gift to Petitioner. Florida law recognizes four classifications of devise in a will: specific, demonstrative, general and residuary. Park Lake Presbyterian Church v. Estate of Henry, 106 So.2d 215 (Fla. 2nd DCA 1958). The devise to Petitioner is within the "general" classification, as it is defined by a sum of Amoney@, but does not depend on the availability of actual cash or currency for its satisfaction. See Park Lake, id, at 218 (AA typical example of a general legacy may be seen in the ordinary pecuniary bequests of specified sums of money...@).

All assets passing under the decedent=s will which are not specifically devised are available to satisfy general

devises before anything can pass to the residue. In re Parker:s Estate, 110 So. 2d 498 (Fla. 1st DCA 1959). Residuary devises, are satisfied, if at all, with all property remaining after satisfaction of all other devises. “Satisfaction” is not synonymous with “sale”. Division of property interests in kind between devisees is both contemplated and encouraged by the Florida Probate Code. See §733.810, Fla. Stat. “Division” is also not synonymous with “sale”, and where the only asset passing under the will is protected homestead, as here, division of interests in kind between Petitioner and Respondent is the only way to give full effect to the decedent’s intent as expressed in her will. The possibility that one devisee or the other might subsequently seek partition of the property does not preclude the division of property between devisees, even when the property comes to the devisees as protected homestead. Donly v. Metropolitan Realty & Investment Co., 72 So. 178 (Fla. 1916)

III There is no clear statement of decedent’s intent regarding her homestead property in her will, only a general statement of intent that all of her property pass under the provisions of the will, consistent with established principals under which wills are construed.

There is no basis in the plain language of decedent’s will for Respondent’s argument that Petitioner’s claims

contravene “the stated intent of decedent’s will” regarding how her homestead property should pass at her death (Respondent’s Brief, p. 7). On the contrary, to the extent that there is any indication at all in the will that the decedent was even aware she was disposing of homestead real property, that indication favors Petitioner. The entire dispositive plan of decedent’s will is contained in Article III of her will, which begins:

> “All the rest, residue and remainder of my estate and property, real, personal and mixed, of whatsoever nature, wherever situated, of which I may died seized and possessed, ..., I devise as follows:...” (R3-6) (emphasis supplied)

The quoted language of the will is consistent with Florida law regarding construction of wills. All property which a testatrix owns at death is presumed to be disposed of by her properly executed last will. §732.6005, Fla. Stat. The decedent obviously intended to dispose of all her property in favor of Petitioner and Respondent and no one else. She made no distinction between the two devisees except insofar as she limited the value of property which should pass to the Petitioner, while not limiting the value that should pass to Respondent. Reasoning from principles which Florida law applies to protect homestead property from claims of creditors, Respondent argues that the

decedent must not have intended any interest in her homestead to pass to Petitioner. Such an argument is not supported by existing law or the plain language of the will, and should be rejected.

Conclusion

Petitioner renews her request for relief as set forth in the Conclusion to her Initial Brief.

Respectfully submitted,
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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 28th day of July, 2005, to Thomas G. Tripp, Attorney for Respondent, 4930 Park Boulevard, Suite 12, Pinellas Park, Florida 33781.

_____
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