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.: 2DO3-5358
Circuit Case No.: 03-4278-ES4

JOHN C. KEEFE,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Before the Court is a petition seeking review of the decision of the Second District Court of Appeal decision that was an appeal from a final order admitting will to probate, granting summary administration, and determining homestead status of real property, specifically finding that Ms. Mahaney's property was protected homestead within the meaning of Section 4 of Article X of the Constitution of the State of Florida and that title to the property descended and the constitutional exemption from claims of decedent's creditors inured to the decedent's nephew, John C. Keefe, the Respondent in this matter. (R 39-41)

The facts of the case are not in dispute. The decedent's homestead was the only asset subject to devise of the decedent at the time of her death. The decedent died testate in Pinellas County, Florida on April 21, 2003 and her will, in Article III., provided for:

> "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."

No dispute exists as to the homestead status of the property, nor the fact that it was freely devisable and that Mr. Keefe is an heir under Sec. 731.201 (18) Fla. Stat.

While agreeing with the Probate Court below, the Second District Court of Appeal recognized the conflict between its decision in this cause and the Fourth District Court of Appeal decision in Warburton vs. McKean, 877 So. 2d 50 (Fla. 4th DCA 2004). The Warburton case has been certified and is currently before this Court with the same certified question we have pending:

> WHERE A DECEDENT IS NOT SURVIVED BY A SPOUSE OR ANY MINOR CHILD, DOES THE DECEDENT'S HOMESTEAD PROPERTY, WHEN NOT SPECIFICALLY DEVISED, PASS TO GENERAL DEVISEES OR RESIDUARY DEVISEES IN ACCORDANCE WITH SEC. 733.805 FLA. STAT.

SUMMARY OF ARGUMENT

Both the Trial Court and the Second District Court of Appeal were correct in their decisions and the Second District Court of Appeal's decision should be affirmed and the certified question answered in the negative. Both the Petitioner and the Respondent agree that abatement under Fla. Stat.

733.805 does not apply to protected homestead property, since homestead property is not part of the estate and that statute is only meant to establish a hierarchy of assets amongst estate assets.

Respondent, as the residual devisee of the decedent's homestead property is entitled to the protection under Article X, Section 4 of the Florida Constitution which would prohibit any forced sale or division of the decedent's homestead in order to satisfy a specific cash bequest to the Petitioner. The Respondent is both an heir at law and a devisee of the decedent's homestead under the decedent's will and, as such, the homestead is protected and vested by operation of law at the time of the decedent's death to the benefit of Respondent. There were no cash assets or assets that could be sold to pay the devise of $30,000 to the Petitioner, so that devise fails as the homestead property was not part of the probate estate.

The will in this case did not provide that the homestead would be devised to a non-lineal descendant nor that it be sold to satisfy specific gifts in the event the assets of the estate are insufficient to pay other devises. As the homestead never becomes part of the probate estate it can never be subject to division. To award the Petitioner a portion of the decedent's homestead would be contrary to the express intent of the decedent's will.

The Second District Court opinion was correctly based on fact and law and the decision should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW.

In the case before this Court there is a stipulated set of facts and there are no issues of fact presented on appeal. As this Court is applying law to known facts the Court will apply the *de novo* standard of review in rendering a decision in this cause. State v. Glatzmayer, 789 So. 2d 297 (Fla. 2001).

II. THE DECEDENT'S HOME WAS PROPERLY DEVISED UNDER THE RESIDUAL CLAUSE OF HER WILL TO A PROTECTED HEIR, AND AS SUCH, DOES NOT BECOME PART OF THE DECEDENT'S PROBATE ESTATE.

The facts of this case, to the most important extent, are indistinguishable from the facts of Snyder v. Davis, 699 So.2d 999 (Fla. 1997). In Snyder, there was a cash devise to a son, a cash devise to two friends, and then a residual devise to a granddaughter, Snyder, that included the decedent's homestead. The Personal Representative in the Snyder case sought to sell the homestead property "to satisfy creditor's claims, to fund specific bequests, and to pay the costs of administration." Snyder, at 1000. The residuary beneficiary in Snyder asserted that the decedent's

homestead passed to her free of claims based on the same protection urged here under Art. X, Section 4., Fla. Const. As in the facts of our case, there was no dispute in the Snyder case that the home was indeed the decedent's homestead property for the purpose of distribution or that said property was properly devised in the residuary clause of her will. The sole issue in the Snyder case was whether or not the granddaughter could be properly considered an heir under the homestead provision as her father was still living. In our case, it is undisputed that Respondent is an heir under Sec. 731.201(18), Fla. Stat. (2002). In Snyder, this Court found that the homestead in question was indeed exempt as it was protected homestead. So, if the only distinction between our facts and the facts of the Snyder case is that Ms. Snyder, at that time, was possibly not an heir for purposes of Art. X, Sec. 4 where the Respondent is clearly an heir for Art. X., Sec.4, then it would seem that further discussion or argument as to whether or not the homestead in our facts is exempt and not part of the estate makes no sense given the clarity of our facts and homestead protection provided by Florida law.

III. FLA. STAT. 733.805, THE ABATEMENT STATUTE, IS IRRELEVANT TO THIS CASE AS IT ONLY DETERMINES HIERACHY AMONG ASSETS THAT ARE WITHIN THE

ESTATE.

Fla. Stat. 733.805(1) provides an order in which assets would abate in order to pay expenses and superior devises under a will that does not otherwise state a priority amongst devises.

"733.805 Order in which assets abate.

(1) Funds or property designated by the will shall be used to pay pay debts, family allowance, exempt property, elective share charges, expenses of administration, and devises, to the extent the funds or property is sufficient. If no provision is made or the designated fund or property is insufficient, the funds and property of the estate shall be used for these purposes, and to raise the shares of a pretermitted spouse and children, except as otherwise provided in subsections (3) and (4) in the following order:

(a) Property passing by intestacy.

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

(c) Property not specifically or demonstratively devised.

(d) Property specifically or demonstratively devised."

Fla. Stat. 733.805 has no application in a case where the sole asset is protected homestead which passes outside of the estate as the statute itself only controls "the funds and property of the estate". Petitioner does not argue the certified question is dispositive of the case as they indicated in their summary that Fla. Stat. 733.805 "could not be dispositive as to any

case involving protected homestead."

It is clear from the Second District Court of Appeal's decision that they did not believe that the abatement statute applied; however, Fla. Stat. 733.805 was the issue utilized in the Warburton case that was certified as a conflict and for this reason it appears before this Court for its decision. It would appear that neither the Second District Court of Appeal nor the opposing party in this litigation believe that Fla. Stat. 733.805 controls in this case.

IV. PETITIONER'S ARGUMENT GOES AGAINST THE STATED INTENT OF DECEDENT'S WILL AND IS WITHOUT AUTHORITY OR PRECEDENCE UNDER FLORIDA LAW.

There is no exception within Florida statutes, or the Florida Constitution, or case law construing either that would permit the sale or division of protected homestead to satisfy a cash bequest.

The decedent clearly devised a sum of money to the Petitioner, yet the Petitioner asks that that sum of money be changed into a prorated portion of the protected homestead. The Petitioner attempts to have this Court engage in estate planning for the decedent by applying a fractional formula devise technique after death. Clearly this is one of the things that estate planning practitioners discuss with a client, depending on his assets;

however, it is completely inappropriate for the Petitioner to attempt to have the Court fractionalize protected homestead property absent an express intent on the part of the decedent. The Petitioner is unable to assert the protection and exempt status of the decedent's property as exempt homestead as she was only devised money and nothing within the residuary. The request that Petitioner is making of this Court could only be honored if the will stated that the Petitioner and the Respondent were to split the residuary that included the homestead. For this argument, the Petitioner attempts to rely on Snyder v. Davis where this Court could have awarded the son his $3,000.00 portion of the homestead; however, that was not a consideration in the Snyder case nor should it be a consideration here.

The Petitioner's argument only makes sense where we are dealing with residuary assets that are non-homestead. If the residuary were a piece of commercial property, then clearly the Petitioner's argument would have merit and would have, frankly, been resolved at the Circuit Court level as commercial property valued at the amount that this home is valued at, would be part of a fully probated estate with the Circuit Court Judge having the authority to distribute the probate assets between the two devisees.

V. TRIAL COURT CORRECTLY DID NOT CONSIDER PETITIONER'S

"HIGHER PRIORITY PRE-RESIDUARY ARGUMENT."

The Petitioner's attempt to argue that this Court should satisfy the cash devise prior to funding the residual clause fails recognize the stipulated fact that this is indeed the decedent's homestead. In Estate of Hamel v. Theodore Parker, P.A., 821 So. 2d 1276 (Fla. 2d DCA 2002), this Court noted "Despite the change in the Constitution, Florida Courts have continued to hold that homestead does not become a part of the probate estate unless the 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." Hamel, at 1279. The homestead here is clearly devisable as was the homestead in the Hamel case, as was the homestead in the Snyder case.

The Petitioner's request to have her cash devise settled out of the protected homestead is also contrary to Sec. 733.608 Fla. Stat. which specifies: "(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 of the decedent's estate."

Obviously, the only mechanism by which the Petitioner's devise could be paid was if the homestead was in the hands of the personal representative as prohibited by Sec. 733.608 Fla. Stat. Further statutory guidance is obtained from Sec. 733.607 Fla. Stat. – Possession of estate

> "(1) Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except the protected homestead, but any real property or intangible personal property may be left with, or surrendered to, the person presumptively entitled to it unless possession of the property by the personal representative will be necessary for purposes of administration…"

No case cited by the Petitioner has provided a rationale or a reason for the stipulated homestead property in our case to become part of the probate estate. In our case, it could have, for example if Ms. Mahaney, the decedent, had specifically stated within her will that she wished all of her property to be sold and the proceeds to be divided amongst her heirs. Unfortunately for the Petitioner, those are not our facts. Our facts are to the contrary; one devise of cash, everything else, which would include the homestead, to the Respondent.

The only case that actually lends support to Petitioner's position is Warburton v. McKean which is of course now under the review of this Court.

In the Warburton case, the Fourth District Court of Appeal held that "because the homestead could be freely devised, it was property of the estate subject to division in accordance with the established classifications giving some gifts priority over others." Warburton at 53. This seems not to recognize that the homestead in Snyder could have been freely devised, the homestead in Bartelt v. Bartelt, 579 So. 2d 282 (Fla. 3d DCA 1991) could have been freely devised, as could the homestead in Hamel. The rationale in Warburton makes sense only if the property involved is not protected homestead and was actually part of the probate estate, which clearly are not the facts in our case, or in the cases cited above, or frankly, in Warburton. Clearly, Warburton needs to be reversed.

CONCLUSION

The Respondent is both an heir at law and a devisee of the decedent's homestead under the decedent's will and, as such, the homestead is protected and vested by operation of law at the time of the decedent's death to the benefit of Respondent. There were no cash assets or assets that could be sold to pay the devise of $30,000 to the Petitioner, so that devise fails as the homestead property was not part of the probate estate. Under Art. X, Sec. 4 Fla. Const., the trial court properly found that a petition and order to

determine homestead and summary administration were the appropriate way to handle Ms. Mahaney's estate and pass on her homestead to the Respondent.

The certified question should be answered in the negative and the Second District Court of Appeal decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent by regular United States Mail this seventh day of July, 2005 to Cord C. Mellor, Esq., Attorney for Petitioner, Mellor & Grissinger, 13801 South Tamiami Trail, Suite D, North Port, FL 34287.

Thomas G. Tripp

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the font

requirements of Fla. R. App. P. 9.210 (a).

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Thomas G. Tripp