

SUPREME COURT OF FLORIDA

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

THOMAS MCKEAN, ET AL.,

Petitioner,

vs.

PETER WARBURTON,

Respondent.

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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**STATEMENT OF THE CASE AND FACTS**

The facts of this case are not in dispute. The Decedent died testate in Indian River County, Florida, on July 18, 2002. His will provided for two specific cash bequests: one for twenty thousand (\$20,000.00) dollars (to his friend) and one for one hundred fifty thousand (\$150,000.00) dollars (to Warburton, the Respondent)(R-62-69). The will devised the homestead, through the residuary clause, to the Decedent’s four half-brothers, Thomas McKean, John McKean, Robert McKean and David McKean, two of whom are the Petitioners herein as the Personal Representatives of the Decedent. The residuary clause reads as follows:

Article VII

All the rest, residue and remainder of my property which I may own at the time of my death, real, personal or mixed, tangible or intangible, of whatsoever nature and wheresoever situate, including all property which I may acquire or be given title to after the execution of this Will, including all

lapsed legacies and devises or gifts made by this Will which fail for any reason, including all insurances(s) on my life payable to my estate or receivable by my Personal Representative, and including any property over or concerning which I may have any power of appointment, I give, devise and bequeath to my half-brothers, Thomas McKean, John W. McKean, Robert McKean and David McKean, in equal shares, share and share alike, per stirpes.

(R-7; App. 1 hereto.)

The assets of the estate included only time shares valued at nine thousand (\$9,000.00) dollars; an automobile valued at approximately one thousand (\$1,000.00) dollars; a brokerage account valued at approximately seven hundred (\$700.00) dollars at the time of death; and the homestead, which the Personal Representative sold with permission from the Court, netting approximately one hundred forty-one thousand (\$141,000.00) Dollars. (R-62,63) By Agreed Stipulation and Court Order (R-49), the homestead funds were deposited and are being held in a separate escrow account, not having been co-mingled with estate funds.

In the probate proceedings, the Personal Representatives filed a petition to determine homestead status of real property. The trial court determined that the subject property was the homestead of the Decedent; that title to the homestead vested, by operation of law, at the time of Decedent's death, in the names of the beneficiaries who are devised the homestead; that those beneficiaries were the

Decedent's half-brothers, as the beneficiaries under the residuary clause; and that accordingly the homestead was not subject to division to satisfy cash bequests.(Order On Petition To Determine Homestead Status Of Real Property, R-62-69; App.2 hereto).

The Fourth DCA reversed the trial court and held instead that because the homestead could be freely devised, it became “**property of the estate**”, and therefore that it was “**subject to division**”, to pay the cash bequests. [Emphasis Supplied]

Both parties petitioned the Court to revisit its opinion. Petitioners herein filed a Motion for Rehearing, Rehearing En Banc, and Certification. Respondent herein filed a Motion for Clarification.

On Motions for Clarification, Rehearing, Rehearing En Banc, and Certification, the Court revised its opinion by adding a footnote indicating that notwithstanding its decision that the homestead property became property of the estate, the Court did not intend to state that the homestead was subject to the claims of creditors or the expenses of administration. The Court also certified the following question to this Court as one of great public importance:

WHERE A DECEDENT IS NOT SURVIVED BY A SPOUSE OR ANY MINOR CHILDREN, DOES DECEDENT'S HOMESTEAD PROPERTY,

WHEN NOT SPECIFICALLY DEVISED, PASS TO GENERAL  
DEVISEES  
BEFORE RESIDUARY DEVISEES IN ACCORDANCE WITH SECTION  
733.805, FLORIDA STATUTES?

**SUMMARY OF THE ARGUMENT**

Petitioner relies upon the following portion of the trial court's order as its

Summary of the Argument:

[T]he homestead never enters the probate estate and does not become a general asset of the estate subject to division when the homestead is devised in the will to heirs of the decedent. The Decedent expressed his intent in the residuary clause of his will as to who should received the homestead. Although a specific devise of the homestead is preferred, the general language of a residuary clause is a sufficiently precise indicator of intent to devise the homestead. Estate of Murphy, 340 So. 2d 107 (Fla. 1976).

The will in this case does not direct that the homestead be sold to satisfy specific gifts in the event the assets of the probate estate are insufficient to pay those gifts. Therefore, the homestead never becomes part of the probate estate subject to division. In addition, Mr. Warburton [Respondent herein] was not devised the homestead. The only thing he was given was a specific cash gift from the general assets of the estate, if those funds are available to satisfy such gift. The homestead vests, by operation of law, at the time of decedent's death, in the names of beneficiaries who are devised the homestead. There is no authority cited that a cash devisee would be entitled to any homestead protection. Therefore it is

ORDERED AND ADJUGED:

That John McKean, Thomas McKean, Robert McKean and David McKean, the beneficiaries of the residuary clause, are the owners of the homestead by operation of law and that the homestead or its proceeds are entitled to homestead protection, not subject to division to satisfy specific cash bequests or creditors' claims.

( R-68;App. 2)

## ARGUMENT

### **WHEN HOMESTEAD IS DEvised IN THE RESIDUARY CLAUSE OF A WILL TO HEIRS OF THE DECEDENT, IT NEVER ENTERS INTO THE PROBATE ESTATE AND DOES NOT BECOME A GENERAL ASSET OF THE ESTATE SUBJECT TO DIVISION.**

#### **I. Standard Of Review.**

The de novo standard of review governs these proceedings. The legal issues involve no more than a determination of whether the issue was correctly decided in the lower tribunal. The de novo standard of review governs review of decisions of law. Execu-tech Business Systems vs. New OJI Paper Co., 752 So. 2d 582 (Fla. 2000). Appellate Courts are not required to defer to the lower tribunal on issues of law. Philip Padovano, Florida Appellate Practice, Section 9.4 (2001-2002 Edition).

#### **II. The Opinion Below Confused “freely devisable homestead” with “property of the estate”.**

The court below held:

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.

The court below then concluded that, because the estate did not have sufficient assets to satisfy the cash bequests, the residuary estate must be divided to satisfy the cash or general

bequests, notwithstanding that the residuary estate consisted of homestead property.

The decision below was clearly erroneous. Homestead is simply not part of the probate estate. This issue has been addressed by several courts, and perhaps most succinctly in Estate of Hamel, 821 So. 2d 1276 (Fla. 2d DCA 2002). In that case, the court examined the legal context of homestead property and specifically whether it was or was not considered part of the probate estate. The Court discussed the historical context of disposition of a homestead by will. Prior to 1968 only decedents without children could dispose of a homestead by will. In 1968 the Florida constitutional revision allowed a devise of homestead if the decedent was not survived by a spouse or minor children. Estate of Hamel, 821 So. 2d 1279. The Court described the effect of that constitutional revision and the cases discussing it:

Despite the change in the constitution, Florida Courts have continued to hold that homestead does not become part of the probate estate unless a testamentary disposition is permitted and is made to someone other than an heir, i.e., a person to whom the benefit of homestead protection could not inure. *See Clifton v. Clifton*, 553 So. 2d 192, 194, n.3 (Fla. 5<sup>th</sup> DCA 1989)(noting, "[h]omestead property, whether devised or not, passes outside of the probate estate"); *Cavanaugh v. Cavanaugh*, 542 So. 2d. 1345, 1352 (Fla. 1<sup>st</sup> DCA 1989)(holding transfer of probate

jurisdiction to Circuit Court did not change law that homestead is not an asset of probate estate). *See also* Section 733.607(1), Fla. Stat. (2000)(requiring a personal representative to take control of the Decedent’s property “except the protected homestead”). 821 So. 2d at 1279.

In the present case, the lower court overlooked or misapprehended the fact that even though homestead could be devised, it was not part of the probate estate for any purpose.<sup>1</sup>

Even the Respondent conceded that the Appellate Court got this issue wrong. Respondent (Appellant below) filed a Motion for Clarification suggesting that the Court delete from its opinion “Because the homestead could be freely devised, it was **property of the estate.....**” and substitute instead, “Because the homestead could be freely devised, it was property **subject to division....**”.

Either homestead is property of the estate or it is not. The Respondent’s position suggests that homestead devised to an heir in a residuary clause of a will is not “property of the estate” for

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<sup>1</sup> The only exceptions to this rule were discussed by Hamel. If homestead is devised to a person who is not an heir it loses its protection. Also, if the will specifically orders that the property be sold and the proceeds be divided, it

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loses its protection. Neither of these exceptions applies in this case and neither will be discussed further.

payment of some estate debts or expenses, but that the homestead

still must be divided by order of the Court to satisfy specific cash bequests.

There is simply no precedent for this in Florida law, and Respondent cited no precedent below. Respondent relies instead upon precedents which indicate that general bequests must be must be satisfied before residuary bequests; however, none of the cases involved a residuary bequest which included homestead devised to an heir. (City National Bank of Florida v. Tescher, 578 So. 2d 701 (Fla. 1991), does not apply because the homestead protection was waived by the surviving spouse in a pre-nuptial agreement.)

Petitioners submit the reason there is no precedent for the Respondent's position is Art. X, Sec.4, Fla. Const., which exempts homestead from forced sale under the process of any Court, and from the lien of any judgment, decree, or execution except in certain situations not applicable in this case.

The Respondent's position is that no sale is required to satisfy the cash bequests: that the Court should award shares of the homestead property to the cash devisees, without involving the

Personal Representative.<sup>2</sup>

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<sup>2</sup> The Personal Representative never takes possession or control of the protected homestead, 733.607 (1), Fla. Stat. (2002), and therefore has no ability to divide homestead.

That logic is flawed for several reasons. First, any creditor could use the same logic to get around Art. X, Sec. 4; “Court, do not order sale of the homestead; simply give me an undivided fractional interest in the homestead.”

Second, who determines what percentage of the homestead is to be awarded the cash devisee? Is an appraisal to be done on the value of the homestead, and then a proportionate share given based upon the size of the cash bequest compared to the appraised value? Can the appraisal be disputed?

Third, should a distinction be made between a cash bequest to an heir under the intestacy statute and a cash bequest to a mere friend? A mere friend’s “share” of the homestead could be attached by a creditor of the friend, thus destroying the whole concept of “protected homestead”.

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The undersigned believes there are far more issues than these raised by this new concept of homestead being some sort of hybrid asset which is part of the probate estate and which must be divided to satisfy cash bequests, but which is not subject to claims of creditors. There is simply no precedent, nor any public policy to support, such a radical new direction by the Court. Further, such a decision would violate this Court's mandate in Snyder v. Davis, 699 So. 2d 999 (Fla. 1997), that the homestead protections be given a broad and liberal construction in favor of preserving the homestead.

Petitioner notes that this Court has jurisdiction based upon the question being certified as one of great public importance. However, Petitioners suggest this Court has an additional basis for jurisdiction because the opinion below finding that the homestead property was "property of the estate subject to division" expressly and directly conflicts with Estate of Hamel, supra, and the other cases cited therein.

### **III. Homestead is Not "Property of the Estate" pursuant to Florida Statutes.**

The opinion below did not address Florida Statutes which are relevant to this case.

“Protected homestead” is defined in Section 731.201 Fla. Stat. (2002), as the property described in Art. X, Sec. 4, Fla. Const. “Protected homestead” is not an asset of the estate.

Section 733.607 (1), Fla. Stat. (2002), provides that every personal representative of an estate has a right to and shall take possession and control of the decedent’s property, “**except the protected homestead.**”

Section 733.608 (1) and (1)(a) read as follows:

“(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 hand of the personal representative:  
(a) **For the payment of devises**, family allowance, elective share, estate and inheritance taxes, claims, charges, and expenses of the administration and obligations of the decedent’s estate.”

[Emphasis supplied].

Clearly, the law protects homestead and makes it clear that

(a) homestead is not in the possession or control of the personal representative, and  
(b) homestead is not a part of the estate for the payment of devises. The opinion below did not address these statutes.

The Respondent’s position below was that the personal representative is not needed to pay devises -- that the Probate Court should issue an order declaring that the cash devisees are to be awarded a share of the homestead property, skipping the

probate process established by statute, and skipping the personal representative entirely. There is no precedent for this position. It is contrary to the Florida Probate Code.

Section 733.805, Fla. Stat. (2002), is instructive as well. Section 733.805 (1) directs the personal representative with regard to the order in which assets abate. It states:

“(1) Funds or property designated by the will shall be used to pay...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....”

[Emphasis supplied].

Thus, only funds or property “of the estate” may be used to pay devises. Protected homestead, properly devised to an heir pursuant to this Court’s decision in Snyder v. Davis, is not an asset “of the estate” and is therefore not available to pay devises.

#### **IV. The Opinion Below Is In Conflict With This Court’s Opinion In Snyder v. Davis, supra.**

The facts of this case cannot be distinguished in any meaningful way from the facts before this Court in Snyder v. Davis, supra. In that case there were two specific cash bequests. One was to the decedent’s son, and the other to friends. There was no specific bequest of the decedent’s homestead; however, the residuary clause left

“all the rest, residue and remainder of my property of every kind and wherever situated as follows: all to my granddaughter, Kelli Snyder.” (Snyder, at 1000). The Personal Representative sought to sell the homestead to satisfy creditors’ claims, “**to fund specific bequests**” (Snyder, at 1000), and to pay the costs of administration. Kelli Snyder, the residuary beneficiary, asserted that the decedent’s homestead passed to her free of such claims because she was protected by Art. X, Sec. 4, Fla. Const. This Court agreed, reversing the Second DCA. This Court concluded that the homestead’s exemption from forced sale inures to the benefit of every “heir” who could potentially receive the homestead property under the intestacy statute (Snyder, at 1005). Consequently, this Court refused to permit the Personal Representative to sell the homestead to fund specific cash bequests.

The Court below attempted to distinguish Snyder by stating that even though it “might have involved some similar facts,” the only issue decided was whether Kelli Snyder, as the granddaughter of the Decedent, could properly be considered an heir under the homestead provision of the Florida Constitution.

While Petitioner agrees that this Court granted review in Snyder to answer the certified question concerning the definition of an “heir”, the result in Snyder dictates the result in this case because the facts are not materially distinguishable. In both cases the homestead was devised by the residuary clause. In both cases there were

two cash bequests ahead of the residuary clause. In Snyder, the Personal Representative sought to pay the cash bequest out of the homestead proceeds, while in this case the cash devisee seeks the same thing. In both cases one cash devisee was also an “heir” under the intestacy statute, and one was not. In Snyder, the Court found that the homestead passed to the residuary beneficiary because she was an heir, and the result was that the homestead could not be sold or divided to fund specific bequests or to pay creditors’ claims. The facts of the case at bar mandate the same result.

In Snyder, this Court not once, but three times made it clear that liberal interpretation to protect the homestead is required: (“The homestead provision is to be liberally construed in favor of maintaining the homestead property,”) 699 So. 2d at 1002; (“As a matter of policy as well as construction, our homestead protections have been interpreted broadly,”) 699 So. 2d at 1002; and (“The homestead provision must be given a broad and liberal construction.”) 699 So. 2d at 1005.

The decision advanced by the Court below represents a narrow and constrained construction, allowing homestead to be cut up and divided to pay cash bequests, even though the will does not provide for such a division, and even though the homestead was left to an heir as defined by this Court. Such a result is not consistent with a

broad and liberal construction in favor of homestead protection. Such a result is neither warranted nor desirable.

**V. As a Matter of Law the Decision Below Is Not Consistent With The Decedent's Will.**

The Decedent did not leave his homestead to the cash devisees. The Decedent left his homestead to his half-brothers, through the residuary clause. Florida law recognizes the residuary clause as the only valid indicator of a decedent's intent regarding homestead unless the will specifies otherwise. Further, Florida law has never treated homestead in a residuary devise differently from homestead left in a specific devise.

In Estate of Murphy, 340 So. 2d 107 (Fla. 1976), this Court was asked to require that any devise of homestead be by specific devise, and not by residuary devise. This Court rejected that request as follows:

Appellant concedes as much but 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. 347 2d at 109.

Similarly, in Clifton v. Clifton, 552 So. 2d 192 (Fla. 5<sup>th</sup> DCA 1989), the court found that the residuary clause was a valid indicator of the Decedent's intent with regard to his homestead. At Page 194 the Court stated:

The actual intent of a Testator not expressed in the will itself must give way to the residuary clause as the only valid indicator of the Decedent's intent. [Emphasis Supplied]

In the present case, the Decedent left no indication in his will other than the residuary clause as the only “valid indicator” of the Decedent’s intent with regard to his homestead. The Order below turns Estate of Murphy, and Clifton v. Clifton on their heads by reversing the presumption of testamentary intent.

The Decedent was entitled to rely upon the law existing at the time his will was drafted in 1995. ( R-6-9)(Appendix I)

Further, the decision below differentiates between whether the homestead was devised specifically or by residuary clause. That is also contrary to Florida law. Bartelt v. Bartelt, 579 So. 2d. 282 (Fla. 3d. DCA), was cited by this Court in Snyder v. Davis, *supra*, with approval. In Bartelt, a decedent who died without leaving a spouse, but with two surviving adult children, devised the residuary estate (which included his homestead), only to his adult son. The daughter received nothing under the will. The issue before the Court was whether the son, as a residuary devisee, was also an heir under Art. X, Sec. 4, Fla. Const., in which case the homestead would be free from the claim of creditors. The Court agreed that the son was an heir and therefore that the constitutional exemption from forced sale existed. The Court also found, at Page 284:

Article X, Section 4 of the Florida Constitution defines the class of persons to whom the Decedent's exemption from forced sale of homestead properly inures; it does not mandate the technique by which the qualified person must receive title. To hold otherwise would discourage Florida residents from making wills and promote the passage of property through intestacy laws.

The technique by which the brothers in the case at bar received title to the homestead -- by residuary clause, rather than by specific devise -- should not interfere with the Decedent's intent that the homestead pass intact, free from the claims of creditors, and free from the claims of the cash beneficiaries. There was no intent expressed in the will that the cash beneficiaries should have priority over the brothers with regard to the residual devise of homestead.

**VI. Title To Homestead Vests At The Time Of Death And Is Not Subject Divestiture.**

The trial court, not the appellate court, got it exactly right when it stated, "The homestead vests by operation of law, at the time of the Decedent's death, in the named beneficiaries who are devised in the homestead." (R-68).

This is a correct statement of Florida law. See Estate of Hamel, supra, 821 So. 2d at 1280 (Property rights passing by virtue of the death of a person vest at the time of death.) See also Wilson v. Florida National Bank and Trust Company, 64 So. 2d 309 at 313 (Fla. 1953) (the appropriate time to determine homestead status is at the death of the decedent.)

In Snyder v. Davis, supra, his Court said:

Instead, we hold that the homestead provision allows a testator with no surviving spouse or minor children to choose to devise in a will the homestead property with its accompanying protection from creditors, to any family member within the class of persons categorized in our intestacy statute. 699 So 2d at 1005

Earlier, in the same opinion, at Page 1003, this Court described

the decision in Bartelt v. Bartelt, supra. This Court's characterization of that case indicated that the Decedent "devised his homestead only to his son." This Court made no mention of the fact that the devises in Snyder and Bartelt were by the residual clause.

No court in Florida has ever lumped homestead into the general assets of an estate, available to satisfy prior bequests, simply because the homestead was included in the residuary devise.

The lower court's decision would have homestead devised by a residual clause subject to divestiture if there is insufficient cash in the estate to pay cash devisees. In other words, title to the homestead, and entitlement to the protections of homestead, could not fully "vest" at the time of death of the Decedent, because there would still need to be a determination made as to whether there were sufficient assets of the estate to pay cash devisees. Yet, specifically devised homestead would fully vest at the time of death. Again, nothing in Florida law suggests this

result.

### **CONCLUSION**

The trial court got it exactly right. Under Art. X, Sec. 4, Fla. Const., and Snyder vs. Davis, when beneficiaries of a residuary clause that disposes of homestead fall into the class of “heirs” as categorized by Florida’s intestacy statute, those heirs take the homestead free of creditors’ claims and other gifts under the will. (R-63). There is no exception in the Florida Statutes or the Florida Constitution which would permit the sale or division of protected homestead to satisfy a cash bequest. Under the Florida Constitution, the Florida Statutes, and cases interpreting both, the homestead does not even become part of the probate estate. Rather, it passes directly to the designated heir, exempt from forced sale, and exempt from division, except in the very limited circumstances described in Art. X, Sec. 4, Fla. Const.

The lower court must be reversed, and the trial court’s decision re-instated.

## **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was furnished by U.S. Mail this \_\_\_\_\_ day of August, 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.

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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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