Thomas McKean v. Peter Warburton

GOOD MORNING. AND THE THIRD CASE ON TODAY'S CALENDAR IS MCKEAN VERSUS WARBURTON. THE PARTIES ARE READY? ALL RIGHT. YOU MAY PROCEED.

I ALWAYS GET CONFUSED DECIDING WHO IS GOING TO BE HERE.

WE WEREN'T HERE IF THERE WAS A PROTOCOL.

USUALLY WE SEE THEM ON THIS BUT IT DOESN'T MATTER.

MAY IT PLEASE THE COURT, MY NAME IS BRUCE BARKETT AND I'M HERE REPRESENTING THE PETITIONERS WHO ARE THE BROTHERS OF THE DECEDENT, HENRY MCKEAN. THE ISSUE IS WHETHER PROTECTED HOMESTEAD IS PART OF THE PROBATE ESTATE SUBJECT TO FOR SALE AND DIVISION. WE CONTEND THAT IT IS NOT. WE CONTEND THAT THERE IS A LONG LINE OF UNBROKEN CASES THAT SAY JUST THAT, HOMESTEAD IS NOT PART OF THE ESTATE AND NOT SUBJECT TO FOR SALE AND DIVISION AND WE CONTEND THAT OUR POSITION IS SUPPORTED BY THE CASES BEFORE THE THE FLORIDA STATUTES AND THE CONSTITUTION.

SO ALL THE CASE REALLY RESTS ON THE NATURE OF THIS PROPERTY OF HOMESTEAD. IF IT HAD BEEN ANOTHER PIECE OF REAL ESTATE THAT WAS NOT PROTECTED BY HOMESTEAD, UNDER THE AND THE WILL DID NOT CONTAIN THE PROVISION THAT SAYS THAT IT SHALL, YOU KNOW, THAT PROPERTY IS SOLD, WOULD IT GO TO THE RESIDUARY BENEFICIARY OR WOULD IT BE USED TO SATISFY THE GENERAL BEQUEST?

I MISSED THE FIRST PART OF YOUR QUESTION.

DOES THIS WHOLE CASE RISE AND FALL ON THE FACT THAT IT IS HOMESTEAD?

ABSOLUTELY.

SO IF IT HAD BEEN A PIECE OF REAL ESTATE, A HOME BUT IT WASN'T PROTECTED BY HOMESTEAD EXEMPTION THEN WOULD THE WOULD THE PROCEEDS BE USED FIRST TO SATISFY THE GENERAL BEQUEST BEFORE THE RESIDUARY BEQUEST?

THEY WOULD BE USED FIRST TO SATISFY THE COST OF ADMINISTRATION, CREDITORS AND THEN THE GENERAL BEQUEST.

SO THEY, NOW, IS IT THE STATEMENT THAT THE RESIDUARY BEQUEST IN THIS CASE, WAS ACTUALLY A BEQUEST OUTSIDE THE WILL OF THE HOMESTEAD PROPERTY?

YES.

IS THERE ANY ISSUE OF THE TESTATE {OOR}'S TESTATEOR'S INTENT THAT GOES INTO IT? IN OTHER WORDS, HOW DO WE GET TO THE FACT THAT THAT WAS OR IS THAT AN ISSUE?

THIS COURT ACTUALLY DECIDED THAT THAT VERY ISSUE IN THE ESTATE OF MURPHY IN 1976. THE DEED {ENT} LEFT DECEDENT LEFT NO SPECIFIC DEVISE. LEFT A RESIDUARY CLAUSE THAT WAS LIKE ALL RESIDUARY CLAUSES THAT BASICALLY INCLUDE EVERYTHING ELSE I MAY OWN,

INCLUDING ALL REAL AND PERSONAL PROPERTY AND ALL TANGIBLE AND INTANGIBLE PROPERTY AND EVERY RIGHT THAT I MAY HAVE OF EVERY KIND AND NATURE AND HE LEFT THAT TO HIS WIFE. THE SON OR ACTUALLY CREDITOR, I THINK, CHALLENGED THAT SAYING BECAUSE IT WAS NOT A SPECIFIC DEVISE, BECAUSE IT WAS A RESIDUARY DEVISE THEN IT SHOULD LOSE THE HOMESTEAD PROTECTION. THIS COURT IN 1976 SPECIFICALLY SAID A SPECIFIC DEVISE WOULD BE NICE BUT IT IS NOT NECESSARY IN THE ABSENCE OF A SPECIFIC DEVISE THE RESIDUARY DEVISE IS WHAT GOVERNS THE TESTATOR'S INTENT WITH REGARD TO HOMESTEAD AND THIS COURT SAID THAT WITHOUT ANY AMBIGUITY, WITHOUT ANY ROOM FOR VAGUE INTERPRETATION THAT WAS THE ISSUE IN THE CASE AND THAT WAS THE HOLDING OF THIS COURT.

CAN YOU HELP ME UNDERSTAND ON THE ONE HAND HOMESTEAD, YOUR ARGUMENT, PASSES OUTSIDE OF IT IS NOT PROPERTY OF THE ESTATE.

YES, SIR.

ON THE OTHER HAND, THEN IT IS CONTROLLED BY THE TESTATE ESTATE AND IT GOES TO THE RESIDUARY CLAUSE.

{KI} HELP YOU UNDERSTAND THAT.

PLEASE.

I WOULD LIKE TO REFER FIRST TO THE CASE OF HAMEL WHERE THAT VERY ISSUE WAS DISCUSSED AND IN THE ESTATE OF HAMEL THE COURT DISCUSSED, THEY ANALYZED THE HISTORY OF THE DEVISE OF HOMESTEAD AND THEY CORRECTLY DETERMINED THAT PRIOR TO 1968 YOU COULD NOT EVEN DEVISE HOMESTEAD. THE 1968 CONSTITUTIONAL CONSTITUTIONAL REVISION PERMITTED THE DEVISE OF HOMESTEAD IF YOU WERE NOT SURVIVED BY A SPOUSE OR MINOR CHILD OR YOU COULD DEVISE IT TO YOUR SPOUSE BUT THE COURT SAID DESPITE THE CHANGE IN THE CONSTITUTION, FLORIDA COURTS HAVE CONTINUED TO HOLD THAT HOMESTEAD DOES NOT BECOME A PART OF THE PROBATE ESTATE UNLESS A TESTAMENTARY DISPOSITION IS MADE TO SOMEONE OTHER THAN A HEIR, OKAY? SO IT IS NOT PART OF THE ESTATE. IT IS CLEAR IT IS NOT PART OF THE ESTATE. IT HAS NEVER BEEN PART OF THE ESTATE AND UNLESS IT IS MADE TO SOMEBODY OTHER THAN A HEIR SO AS FAR AS THE HEIRS OR AS FAR AS THE HOMESTEAD IS CONCERNED, IT IS AS IF THE DECEDENT HAD DIED IN TEST ATE ESSENTIALLY? IT IS SOMETHING ELSE?

NO, THE RESIDUARY CLAUSE, WHETHER IT IS RESIDUARY OR SPECIFIC, THE WILL DOES SAY TO WHOM THE HOMESTEAD GOES.

I GO BACK TO JUSTICE LEWIS' QUESTION THEN HOW IS IT PART OF THE ESTATE BUT NOT PART OF THE ESTATE?

I WAS GOING TO GET TO THAT BECAUSE THE VERY LAST SECOND TO THE LAST PARAGRAPH OF HAMEL, I WANT TO READ THIS BECAUSE IT IS IMPORTANT. GENERALLY PETITIONS TO DETERMINE HOMESTEAD ARE INITIATED FOR THE PRACTICAL PURPOSES OF CHANGING RECORD TITLE TO THE PROPERTY OR RELEASING THE PERSONAL REPRESENTATIVE OF ANY OBLIGATION REGARDING THE PROPERTY, AND THEY CITE TO ROHAN KELLY. SUCH PROCEEDINGS ARE SIMILAR TO ACTIONS FOR DECLARATORY RELIEF THAT EXPLAIN OR CLARIFY EXISTING RIGHTS, RATHER THAN DETERMINE NEW RIGHTS. IT PASSES OUTSIDE OF THE ESTATE, THE WILL SERVES ONLY TO IDENTIFY TO WHOM THE HOMESTEAD GOES.

EXCUSE ME. THAT'S NOT TO MY MIND THAT'S NOT A SATISFACTORY RESPONSE. IS THAT THE FULL RESPONSE?

MAYBE I DIDN'T UNDERSTAND YOUR QUESTION.

THE QUESTION WAS THAT IT IS NOT THE PROPERTY OF THE ESTATE. IT PASSES OUTSIDE OF THE ESTATE.

CORRECT.

THE ONLY REASON THAT YOU EVEN LOOK TO RESIDUARY CLAUSE IS THAT IT IS IN THE WILL. IT IS PART OF THE ESTATE.

YES.

AND I JUST ASKED YOU IF THAT WAS YOUR REASONING AS TO WHY TO RECONCILE THOSE TWO THAT WAS TOTALLY IT?

IT IS OUTSIDE OF THE ESTATE AND THE WILL SERVES TO IDENTIFY TO WHOM THE HOMESTEAD GOES. THE RESIDUARY CLAUSE OF THE WILL WAS THE ONLY EVIDENCE OF THAT.

LET ME CLARIFY IS WHAT YOU ARE SAYING THAT THE HOMESTEAD IS NOT AN ESTATE ASSET SUBJECT TO THE PAYMENT SCHEMES, ET CETERA, THAT ARE SET FORTH IN THE STATUTE, BUT TO WHOM THE PROPERTY GOES MAY BE STATED IN THE WILL?

THAT IS EXACTLY CORRECT, SIR. THANK YOU AND THAT, I BELIEVE, WAS THE CONFUSION OF THE DISTRICT COURT OF APPEALS. WHAT THE 4TH DISTRICT COURT OF APPEALS IN THIS CASE SAID THAT BECAUSE THIS GENTLEMAN DIED WITHOUT A SPOUSE OR MINOR CHILD HE WAS FREE TO DEVISE HIS HOMESTEAD, AND THEY THEN CONCLUDED THAT BECAUSE HE COULD DEVISE THE HOMESTEAD, THE HOMESTEAD WAS AN ASSET OF THE ESTATE.

AND THEN I GUESS JUST READING FROM THE OPINION BUT ALSO JUST IF THIS IS CORRECT THAT AFTER THE TRIAL COURT FOUND THAT THE CONDOMINIUM WAS HOMESTEAD PROPERTY AND THAT NOBODY IS CONTESTING THAT.

THAT'S CORRECT, YES, MA'AM.

THAT IT WAS VALIDLY DEVISED IN THE WILL. IF IT WAS VALIDLY DEVISED IN THE WILL THE TRIAL COURT FOUND IT WAS VALIDLY DEVISED TO

TO THE HEIR.

THE TRIAL COURT THEN ORDERED THE HOMESTEAD PROPERTY TO BE SOLD AND PLACED IN A SEPARATE ESCROW ACCOUNT.

THAT WAS BY STIPULATION.

THE TRIAL COURT ALSO

THAT WAS BY STIPULATION.

AND I GUESS IN TERMS OF LOOKING AT THIS AND MAYBE WE'RE JUST DEALING ABOUT THE PROTECTED NATURE OF HOMESTEAD. IS THE WHOLE PURPOSE OF THE HOME HOMESTEAD EXEMPTION EXISTING FROM NOT BEING SUBJECT TO FOR SALE IS TO PRESERVE THE HOMESTEAD?

YES.

THEN IN A SITUATION LIKE THIS, WHERE YOU'VE GOT A, YOU KNOW, A GENERAL GIFT OF $150,000, AND I DON'T KNOW IF IT WAS ANY EVIDENCE AT THE TIME HE HAD ANY OTHER ASSETS AND HE GIVES THAT CASH GIFT, AND ALL HE HAS IS THE CONDOMINIUM, WHY IS THERE JUST AM I OFF

BASE IN TRYING TO UNDERSTAND WHY IT WOULDN'T HAVE BEEN JUST AS LIKELY THAT THE TESTATOR. MAYBE I'M DOING WHAT THE 4TH DISTRICT DID, WOULDN'T HAVE WANTED THAT TO HAVE GONE TO THE PERSON FIRST THAT HE GAVE THE GIFT TO OF THE CASH MONEY?

LET ME FIRST SAY I WOULD NEVER SAY YOU WERE OFF BASE, BUT I WILL SAY THAT THE IT COULD HAVE JUST AN EASILY BEEN AND, IN FACT, I WISH THE FACTS HAD BEEN FURTHER BUT AT THE TIME HE WROTE THE WILL WHICH WAS WAY BACK IN 1994 HE HAD $700,000 AND HE JUST WANTED TO MAKE A GIFT TO HIS NEPHEW BECAUSE HE RECOGNIZED THE FAMILY, BUT

BUT ALL HE WOULD HAVE HAD TO SAY IN THE WILL WOULD HAVE BEEN MY ALL OF MY PROPERTY, INCLUDING HOMESTEAD, CAN BE SOLD TO SATISFY GENERAL BEQUEST OR SOMETHING.

THAT'S CORRECT AND IF HE HAD SAID THAT, THAT WAS DECIDED BY THE ESTATE OF KNADLE THEN THERE WOULD HAVE BEEN NO HOMESTEAD PROTECTION AND IT WOULD SATISFY GENERAL BEQUEST BUT YOU, AS I SAID, THIS COURT IN THE STATE V MURPHY DECIDED THAT UNLESS THE WILL SPECIFIES OTHERWISE A RESIDUARY GOVERNS THE TESTATOR'S INTENT WITH RESPECT TO HOMESTEAD.

IN THIS CASE I THINK IT IS UNDISPUTED THAT HE DEVISED THE HOMESTEAD OR THE RESIDUARY CLAUSE WENT TO A HEIR.

YES, SIR.

IF IT HAD NOT BEEN A HEIR, IF HE HAD DONE IT TO A FRIEND WOULD THAT CHANGE THE .

YES, SIR. ABSOLUTELY. THEN IT WOULD NOT BE PROTECTED HOMESTEAD UNDER THE STATUTES. AGAIN, I REFER TO YOUR CASE IN SCHNEIDER VERSUS DAVIS WHICH REALLY RESOLVED THAT ISSUE COMPLETELY. THE FACTS WERE THAT THE DECEDENT DIED THEY ARE ACTUALLY ALMOST IDENTICAL TO THE CASE AS FAR AS THE DECEDENT DIED WITHOUT A SPOUSE OR MINOR CHILD. HE LEFT TWO CASH BEQUESTS, ONE TO A FRIEND AND ONE TO A HEIR JUST AS WE DID IN THIS CASE. THE DISTRICT COURT OF APPEALS LET ME SEE.

HE GAVE IT TO HIS CHILDREN.

WELL, THAT'S CORRECT.

MONEY TO THE CHILDREN.

THAT'S RIGHT. THE FACT WAS THAT THE HEIR TO WHOM HE DEVISED HOMESTEAD BY RESIDUARY CLAUSE WAS NOT THE NEXT IN LINE UNDER THE STATUTE. SHE WAS IDENTIFIED IN THE STATUTE BECAUSE SHE WAS A BLOOD RELATIVE BUT SHE WAS NOT THE NEXT IN LINE. THE DISTRICT COURT OF APPEALS CERTIFIED THE FOLLOWING QUESTION TO THE TO THIS COURT: DID THE PROTECTED HOMESTEAD, IS IT PROTECTED FROM FORCED SALE TO PAY CREDITORS AND GENERAL DEVISEES WHEN IT IS NOT DEVISED TO A HEIR BECAUSE THEY ASSUMED THAT SHE WAS NOT A HEIR BECAUSE SHE WAS NOT THE NEXT IN LINE AND THIS COURT, JUSTICES ANSTEAD AND WELLS CONCURRED AND SAID IT DOESN'T MATTER WHERE SHE FALLS IN THAT STATUTE. IF SHE IS A HEIR SHE IS PROTECTED BY THE HOMESTEAD AND AT THE TIME OF DEATH I'M SORRY, YOU DIDN'T SAY THAT. YOU DIDN'T SAY OUTSIDE THE WILL IN SCHNEIDER. YOU HAVE SAID THAT PREVIOUSLY.

TO GET BACK TO JUSTICE CANTERO'S QUESTION, IF THAT RESIDUAL CLAUSE HAD IN THIS CASE IF UNDER THE RESIDUAL CLAUSE IT SAID I GIVE EVERYTHING THAT I HAVE REMAINING TO MY BEST FRIEND, JOE, THEN THE HOMESTEAD WOULD NO LONGER BE HOMESTEAD. YOU COULD SELL IT, PAY THE COSTS OF ADMINISTRATION, THE DEBTS AND THEN YOU GO TO THE GENERAL DEVISEES.

JUSTICE QUINCE, THAT'S ABSOLUTELY CORRECT AND THAT IS BY STATUTE AND BY CASE LAW. THAT IS ABSOLUTELY CORRECT. IT IS ONLY IF THE HOMESTEAD IS DEVISED WHETHER SPECIFICALLY OR BY RESIDUAL CLAUSE TO A HEIR THAT IT IS AFFORDED HOMESTEAD PROTECTION. THAT'S ABSOLUTELY CORRECT, AND THAT IS THE MISTAKE THAT THE DISTRICT COURT OF APPEALS MADE. THEY ASSUMED BECAUSE HE DEVISED IT AT ALL THEN IT BECAME AN ASSET OF THE ESTATE, BUT THIS IS LARGELY A MATTER OF STATUTORY, I WOULD SAY, CONSTRUCTION. IT IS REALLY NOT CONSTRUCTION BUT STATUTORY APPLICATION. 733.608 IS THE FLORIDA STATUTE THAT TELLS THE PERSONAL REPRESENTATIVE WHAT PROPERTY OF THE DECEDENT HE IS TO TAKE POSSESSION AND CONTROL OF TO ADMINISTER THE ESTATE. AND IN 733.608 SAYS ALL REAL AND PERSONAL PROPERTY OF THE DECEDENT EXCEPT THE PROTECTED HOMESTEAD SHALL BE ASSETS IN THE HANDS OF THE PERSONAL REPRESENTATIVE.

WHAT IS THE ROLE OF THE CERTIFIED QUESTION INCLUDES REFERENCES TO SECTION 733.805.

YES, MA'AM.

HOW DOES THAT FIT INTO THIS WHOLE SCHEME THAT YOU SET OUT?

IF I COULD AS I SAID, 733.608, TELLS THE PERSONAL REPRESENTATIVE THAT HE CAN TAKE POSSESSION, CONTROL OF ALL OF THE PROPERTY OF THE DECEDENT EXCEPT THE PROTECTED HOMESTEAD AND THEN SPECIFICALLY FOR THE PAYMENT OF DEVISES AND THEN 733.805 SAYS, THAT IF THE DECEDENT DICTATES IN THE WILL THE SOURCE OF FUNDS TO PAY ADMINISTRATION DEBTS, OTHER DEVISES THEN THAT'S THE SOURCE OF FUNDS YOU USE. IF THE DECEDENT DOESN'T SPECIFY IN THE WILL WHICH SOURCE OF FUNDS HE USED TO PAY THOSE THINGS THEN THE PERSONAL REPRESENTATIVE, IT SAYS IF NO PROVISION IS MADE OR DESIGNATED IF NO PROVISION IS MADE OR THE DESIGNATED FUNDER OF PROPERTIES IS INSUFFICIENT THEN THE FUNDS AND PROPERTY OF THE ESTATE SHALL BE USED FOR THESE PURPOSES. ONLY FUNDS OR PROPERTY OF THE ESTATE. WELL, THE LEGISLATURE WAS AWARE OF THIS COURT'S DECISION IN SCHNEIDER, WAS AWARE OF CAVANAUGH VERSUS CALF A {NAU} AND HAMEL WHICH IS NOT AMBIGUOUS. IN FACT, THE LEGISLATURE SAID THAT EARLIER.

SO JUST THE {LIFERN} PIN OF THIS, AND INNING IT MAYBE GOES BACK TO MY FIRST QUESTION IS THAT BECAUSE IT IS HOMESTEAD OF PROPERTY AND BECAUSE BASED ON STATUTES, THE CONSTITUTION AND OUR PRIOR CASE LAW YOU SAY IT IS JUST NO QUESTION, IT IS UNQUESTIONABLE THAT THIS HOMESTEAD PROPERTY DOES NOT PASS THROUGH THE ESTATE, AND THAT'S THE KEY AS TO WHETHER IT IS GOING TO BE SUBJECT TO BEING ABLE TO BE SOLD FOR GENERAL

ABSOLUTELY CORRECT, YOUR HONOR.

AND WHETHER IT MAKES SENSE OR DOESN'T.

WELL, I DON'T LIKE THE TAIL YOU PUT ON THAT BECAUSE IT DOES MAKE SENSE IN THE TERMS OF FIRST OF ALL THAT

I GUESS I'M LOOKING AT SCHNEIDER THAT SAYS THE WHOLE PURPOSE OF THE HOMESTEAD PROVISION IS TO PROTECT AND MAINTAIN THE FAMILY HOMESTEAD AND THIS WAS A CONDOMINIUM AND SOMEONE GIVING A SUBSTANTIAL GIFT AND THEN THERE ARE FOUR HALF BROTHERS AND HARD TO BELIEVE THAT THERE IS GOING TO BE A MAINTAINING OF THE FAMILY HOMESTEAD SINCE THEY HAVE STIPULATED TO SELL IT, OBVIOUSLY IT WAS JUST ANOTHER SOURCE OF CASH JUST LIKE ANYTHING ELSE. SO I GUESS THAT'S WHY EXPRESSING SOME

NOT NECESSARILY. JUST BECAUSE THE PROCEEDS OF A SALE OF HOMESTEAD ARE ALSO PROTECTED, SO THE FACT THAT THEY STIPULATED TO SELL IT TO PROTECT THE PROCEEDS IS STILL CONSISTENT WITH HOMESTEAD STATUTE AND IN SCHNEIDER, THIS COURT SAID NOT ONCE

BUT I THINK FOUR TIMES YOU HAVE TO INTERPRET THE HOMESTEAD PROTECTION LIBERALLY IN FAVOR OF PROTECTING THE HOMESTEAD.

SO ARE YOU SUPPOSED TO ARE THE PROCEEDS, BECAUSE THIS WAS WHAT BOTHERS ME, ALSO, ABOUT THIS CASE IS THE FACT THAT IT IS NO LONGER PROPERTY. IT IS NOW JUST MONEY, AND SO ARE THE PROCEEDS FROM THE SALE OF THE HOMESTEAD SUPPOSED TO BE NOW REINVESTED IN A HOMESTEAD?

IT DOESN'T MATTER. IT DOESN'T MATTER, BECAUSE IT IS EITHER THE HOMESTEAD OR THE PROCEEDS THAT ARE PROTECTED FROM CREDITORS.

SO IT SEEMS TO ME THAT THE WHOLE POINT OF THE HOMESTEAD THEN IS LOST ONCE YOU HAVE CONVERTED THIS THING TO CASH AND YOU CAN USE THE CASH IN ANY MANNER THAT YOU SEE FIT.

JUSTICE QUINCE, THAT'S CORRECT BUT LET'S SAY THIS CASE HAD COME HERE BEFORE THEY SOLD IT. THEY SOLD IT BY STIPULATION, BY ORDER OF THE COURT, KNOWING WHAT THE LAW WAS, THAT PROCEEDS THAT THE HOMESTEAD AND THE PROCEEDS ARE PROTECTED. IF THEY HAD JUST WAITED UNTIL AFTER THE PROBATE WAS FINISHED AND AFTER THE TIME FOR APPEAL HAD RUN AND THEN SOLD IT, THEY WOULD HAVE THE SAME THING. ALL HOMESTEAD BENEFICIARIES HAVE THAT SAME PRIVILEGE.

WAS HIS NEPHEW QUALIFY AS BEING A HEIR UNDER THE STATUTE?

YES, MA'AM.

SO IT WOULDN'T HAVE BEEN A QUESTION IF IT HAD BEEN REVERSED AS FAR AS IF THAT WOULD HAVE BEEN THE SCHNEIDER SITUATION IF THE FOUR HALF BROTHERS HAD BEEN GIVEN A CASH ADVANCE; IS THAT CORRECT?

THAT'S CORRECT. BUT THE FACT THAT THERE WAS ALSO ANOTHER NONHEIR IS TROUBLING BECAUSE WHAT MY OPPONENT IS ASKING YOU TO DO IS SAY, OKAY, WE CAN GET AROUND ARTICLE 10, SECTION 4. YOU DON'T HAVE TO ORDER THAT THE HOMESTEAD BE SOLD. JUST ORDER THAT THE HOMESTEAD BE DIVIDED AND GIVE MY CLIENT A FRACTIONAL INTEREST ALONG WITH THE OTHER GENERAL DEVISEES THAT HE GETS ONE FOURTH OR ONE FIFTH OR WHATEVER HIS INTERESTS WOULD BE AS WELL AS THE OTHER DEVISEE. THE OTHER DEVISEE ISN'T PROTECTED BY HOMESTEAD. HE IS JUST A FRIEND.

I SEE WITH OUR HELP YOU ARE IN YOUR REBUTTAL.

THANK YOU VERY MUCH.

MR.^HEIDT?

TROY HAFNER FOR RESPONDENT.

I AM SORRY. I WAS ON THE LAST CASE. MR.^HAFNER, SORRY.

DO YOU AGREE THAT THE PROPERTIES PROTECTED HOMESTEAD?

I DO.

AND DO YOU AGREE IT IS NOT AN ESTATE ASSET?

I LIKEWISE AGREE TO THAT. MY OPPONENT DOES WANT TO TEND TO CHARACTERIZE MY ARGUMENT THAT I AM WANTING TO BRING THIS INTO THE ESTATE AND THAT IS NOT THE CASE.

WE DO AGREE IT IS HOMESTEAD. WE DO AGREE IT IS EXEMPT FROM THE ESTATE AND IT IS TOTALLY OUTSIDE OF THE REACH OF THE PERSONAL REPRESENTATIVES.

SO HOW DO WE GET TO YOUR CLIENT?

THE TESTATOR HAS ISSUED A WILL WHICH SAYS GIVE THE FIRST 170,000 DOLLARS OF MY WEALTH TO THESE TWO PEOPLE, AND IF THERE IS ANYTHING LEFT, IF THERE IS ANYTHING LEFT YOU GIVE THE RESIDUE TO MY FOUR HALF BROTHERS SO HE HAS MADE A PRECONDITION THAT RESIDUE, YOU DON'T TAKE ANYTHING UNTIL EVERYBODY ELSE IS SATISFIED.

THEN YOUR OPPONENT SAID THAT THE ESTATE OF MURPHY SETTLED THAT ISSUE.

IT IS A GREAT CASE TO BE DISTINGUISHED. THE LANGUAGE IN MURPHY.

AGAIN. SO YOU ARE SAYING THIS GOES TO JUSTICE LEWIS' INITIAL QUESTION AND WHAT MY CONCERN HAS BEEN THAT YOU ARE SAYING THIS GOES BACK TO NOW A QUESTION OF WHAT THE TESTAMENTARY INTENT WAS AND THAT NOT JUST SIMPLY HAVING A RESIDUARY CLAUSE THAT SAYS ALL OF THE RESIDUE REMAINDER DOESN'T CONSTITUTE A BEQUEST OF THE HOMESTEAD OR DEVISE OF THE HOMESTEAD?

ABSOLUTELY. THAT'S THE LINCH PIN AND I THINK ALSO JUSTICE CAN TEAR O SAID THAT. THERE IS NO SUCH STIPULATION. IT WAS DEVISED PER THE WILL TO THE PRIORITY DEVISEES BECAUSE THAT'S ALL THERE WAS AND WE STILL HAVEN'T FULLY SATISFIED THEM.

SO ARE YOU LIMITING YOUR ARGUMENT THAT YOUR CLIENT IS THE POOL OF THE STATUTORY HEIRS?

ANY ACTUAL TAKER OF THE HOME STEAD PROPERTY AFTER YOU APPLY THE PROPER PROCESS OF PROCESS OF THE WILL, THE PRIORITIES STATED, YOU RUN THROUGH THE WHOLE PROCESS YOU WOULD WITH ANY OTHER ASSET AND CREDITORS CANNOT REACH IT. ASIDE FROM THAT IT IS THE SAME AS ANY OTHER ASSET.

SO IS IT YOUR POSITION THEN THAT THE GENERAL DEVISEE WHO IS NOT A HEIR, THE FRIEND HERE, STANDS IN THE SAME SHOES AS A HEIR?

AGREED.

SO LET ME CHANGE THE HYPOTHETICAL IN THIS CASE AGAIN. LET'S SAY THAT THIS GENTLEMAN HAD SOMEBODY THAT WAS A CAREGIVER AND OUT OF THE LARGENESS OF HIS HEART HE WANTS TO GIVE HIM OR HER $100,000 BUT HE WANTS TO MAKE SURE THE HOMESTEAD GO TO THE ADULT CHILDREN, NO MINOR CHILDREN AND NO SPOUSE. WE ACCEPT YOUR ARGUMENT AND THIS OCCURS AND THERE ARE NOT ENOUGH ESTATE ASSETS TO SATISFY THAT GENERAL DEVISE TO THE CAREGIVER THAT IF WE ACCEPT YOUR ARGUMENTS AND ACCEPT THE DCA'S POSITION THAT THE HOMESTEAD THAT HE INTENDED TO GO TO THE ADULT CHILDREN WOULD HAVE TO BE SOLD IN ORDER TO SATISFY THE GENERAL DEVISE OF 100,000.

PLEASE DON'T ATTRIBUTE THE SECOND DCA'S DECISION TO MY ARGUMENT.

WHAT'S YOUR ARGUMENT THEN?

IF HE WANTED THE HOMESTEAD TO GO TO AN INDIVIDUAL AND NOT BE AVAILABLE TO GO TO THE CAREGIVER THERE ARE A COUPLE OF WAYS HE COULD HAVE DONE THAT. ONE WOULD BE TO SPECIFICALLY DEVISE THE HOMESTEAD TO HIS INTENDED RECIPIENT. ANOTHER WOULD JUST BE TO BE MORE CLEAR IN HIS INTENT TO SAY I HAVE AN UP FRONT GENERAL DEVISE TO MY CAREGIVER, BUT I DIRECT THAT MY HOMESTEAD SHOULD NOT BE USED TO SATISFY THAT

BEQUEST AND IF IT NEED BE THEN IT NEEDS TO PASS THROUGH THE RESIDUE NOTWITHSTANDING THAT SHE MAY NOT HAVE BEEN FULLY FUNDED.

DOES THAT PROTECT THE LIBERAL CONSTRUCTIONS OF THE HOMESTEAD PROTECTION?

ONCE {DPEN}, THE PROTECTION ITSELF EXISTS SOLELY TO PROTECT THE RECIPIENT WHO IS, IN FACT, A HEIR BUT IT DOESN'T HAVE ANYTHING TO DO WITH THE DETERMINATION OF WHO THAT RECIPIENT IS TO BE. THE WILL DRIVES THAT DETERMINATION. HOMESTEAD IS WILL GOVERNED PROPERTY, BUT IT IS NOT ESTATE PROPERTY. SO IT IS STILL GIVEN THE TESTATEOR'S ORDERS PRIORITIES AND YOU APPLY THOSE RULES BEFORE YOU EVER ASK THE QUESTION OF WHAT DOES THE PROTECTIVE ASPECT NOW DO? IF THE HOMESTEAD HAS BEEN DIVIDED ONE SHARE AMONG MY CLIENT AND ONE SHARE AMONG THE NONHEIR OTHER DEVISEE AND A REMAINING PORTION LET'S SAY TO THE RESIDUE THEN WE HAVE THREE SHARES

IN MY HYPOTHETICAL THE HEIR IS NOT PROTECTED, THE STATUTORY HEIR, CORRECT, THE CAREGIVER GETS PRIORITY.

CAN YOU GIVE ME YOUR HYPOTHETICAL AGAIN?

$100,000 TO THE CAREGIVER. THE RESIDUARY SAYS EVERYTHING GOES TO MY FOUR ADULT CHILDREN. UNDER YOUR ARGUMENT AND YOUR POSITION, THE HOMESTEAD WOULD BE SOLD TO SATISFY A GENERAL BEQUEST TO A NONHEIR, AND THE PROTECTION OF THE HOMESTEAD FOR THE HEIRS IS HE {LEM} ELIMINATED.

IT IS MY POSITION THAT $100,000 WORTH OF THE HOMESTEAD DOES, IN FACT, GO TO THAT NONHEIR PREDEVISEE.

SO WE ARE NOT IN A SITUATION OF CONSTRUING THE HOMESTEAD EXEMPTION. IN ANSWER TO MY EARLIER QUESTION, YOU WOULD TAKE WHETHER THIS IS HOMESTEAD PROPERTY OR NONHOMESTEAD PROPERTY, THE RULE WOULD BE THE SAME THAT IS THAT THE SPECIFIC CASH BEQUEST, THE GENERAL TRUMP RESIDUARY?

ABSOLUTELY.

NOW, WHAT ABOUT THIS CASE, AND I HAVE GOT TO LOOK AT IT, BUT YOUR OPPONENT ARGUES IS RIGHT ON POINT THAT SAYS WE'VE ALREADY SETTLED THAT QUESTION. THAT IS, THAT THE WILL DOES GOVERN WHO RECEIVES THE HOMESTEAD BUT IF THE IT IS BASED ON WHO THE RESIDUARY OF THE ESTATE IS GIVEN TO IF THERE IS NOT A SPECIFIC BEQUEST OF THE HOMESTEAD.

I THINK YOU MENTIONED TWO CASES. MURPHY IS A CASE THAT INVOLVED THE DISPUTE BETWEEN IN TESTATE HEIRS OUTSIDE OF THE WILL AND THE RESIDUARY DEVISEES UNDER A WILL THAT HAD GENERAL LANGUAGE AND NEVER MENTIONED THE HOMESTEAD. SO THEY ASSERTED THE WILL STILL SPEAKS TO THE PROPERTY AND THE IN TESTATE HEIRS SAID, NO, YOU NEED TO BE MORE SPECIFIC TO DO THAT SO THAT WAS THE DEBATE BETWEEN WILL AND UTTER INTESTACY SO THE COURT SAID WE LIKE SPECIFIC DEVISES THAT ARE CLEAR BUT IN THE ABSENCE OF THAT CLEAR LANGUAGE WE STILL MEAN THAT THE RESIDUE SPEAKS TO EVERY ASSET THIS INDIVIDUAL OWNS AND THAT DARN WELL INCLUDES THE HOMESTEAD SO WE'RE NOT GOING TO LET IT LAPSE INTO INTESTACY. THIS IS SPECIFIC INDICATION OF INTENT TO PASS THE HOMESTEAD. IF WE TAKE THAT OUT OF THAT CONTEXT AND TRY TO APPLY IT AND SAY IT IS DEEMED SUFFICIENT INDICATION OF INTENT TO DEFEAT ALL OTHER INTENDED HIGHER PRIORITY DEVISEES. THAT'S AN INCREDIBLE STRETCH.

SO ALL OF THE LAWYERS ALL OF THESE YEARS HAVE BEEN SAYING YOU BETTER PUT IN THAT I DIRECT THAT MY ALL OF MY PROPERTY CAN BE SOLD AND SATISFIED THESE SPECIFIC GIFTS, THAT DOESN'T NEED TO BE UNDER YOUR INTERPRETATION THAT WOULD NOT NEED TO BE IN WILLS IN

ORDER FOR THE HOMESTEAD TO BE SOLD TO SATISFY GIFTS TO A SPECIFIC NATURE. IS THAT CORRECT?

IT IS NOT NECESSARY TO PUT A SALE ORDER IN ORDER TO HAVE YOUR PRIORITY DEVISES FULFILLED IF NEED BE WITH THE HOMESTEAD AS THE LAST ASSET. HOWEVER, IF I MANDATE THE SALE AND THAT'S A LITTLE BIT OF DISTINCTION BETWEEN WHAT MR.^BARKETT SAID. IF I MANDATE THE SALE IN THE WILL, THEN IT AUTOMATICALLY LOSES ITS PROTECTION, THE HOMESTEAD DOES AND NO MATTER WHO IT GOES TO, IT HAS LOST ITS PROTECTION.

SO BASED ON YOUR ARGUMENT, IT SEEMS TO ME THAT WE WOULD HAVE TO RECEIVE FROM SCHNEIDER VERSUS DAVIS, BECAUSE WE REALLY HAVE BASICALLY THE SAME SET OF FACTS HERE WHERE WE HAVE SPECIFIC DEVISES MADE IN A WILL, AND THEN WE HAVE THE RESIDUAL AND THIS COURT SAID THAT THE PERSON THAT WAS THE BENEFICIARY OF THE RESIDUAL CLAUSE ACTUALLY WAS ENTITLED TO THE PROPERTY AND NOT THE SPECIFIC DEVISEES.

RIGHT.

THE FACTS IN SCHNEIDER ARE ESSENTIALLY INDISTINGUISHABLE. I CAN SEE THAT THE ISSUE BEFORE YOU TODAY WAS NOT ADDRESSED IN SCHNEIDER AT ALL. THE GENERAL DEVISEES WHO MIGHT HAVE HAD THE SAME CLAIM THAT MINE DO THAT THEY WERE ENTITLED TO GET PAID NEVER ASSERTED THEMSELVES. THEY WERE FOR 3,000 AND $2,000 RESPECTIVELY AND THEY WERE NEVER PARTIES TO THE MATTER SO WE HAD A DEBATE BETWEEN THE PERSONAL REPRESENTATIVE WHO SAID IT IS NOT HOMESTEAD AT ALL FOR ANY PURPOSE. GIVE IT TO ME AND LET ME SELL IT AND TREAT IT AS THOUGH IT IS ANY NONEXEMPT ASSET NO MATTER WHAT BECAUSE THE RESIDUARY DEVISEE IS A NONHEIR SO THE DEBATE WAS WHETHER HE QUALIFIED AS A NONHEIR AND THE COURT SAID, YES, A GRANDDAUGHTER EVEN THOUGH NOT IMMEDIATE PRED {SEZ}OR IS A PERSONAL REPRESENTATIVE, YOU LOSE. THAT IS THE EXTENT OF THE DECISION AND THIS COURT WENT TO GREAT LENGTHS TO SAY THE ONLY THING WE'RE DOING IS DECIDING ON THIS STIPULATED ISSUE. WENT TO GREAT LENGTHS TO LIMIT ITS DECISION TO THE CERTIFIED QUESTION.

IT IS THE EXACT SAME SITUATION WE HAVE HERE.

IT IS ALTHOUGH I WOULD POINT THE COURT TO THE CITY OF MIAMI CASE CITED IN MY BRIEF THAT SAYS EVEN IF THE FACTS ARE IDENTICAL AND LEND THEMSELVES TO THE SAME ISSUE, IF THAT ISSUE IS NOT RESOLVED THAT CASE IS NOT PRECEDENT FOR THE ISSUE.

COULD YOU ANSWER A VERY PRACTICAL QUESTION, AND I WOULD ASK THE OTHER SIDE TO ADDRESS THIS ON YOUR REBUTTAL AS WELL IF YOU ARE NOT SATISFIED WITH THE ANSWER, BUT WE'RE TALKING ABOUT HOMESTEAD IS A PIECE OF REAL PROPERTY, A PIECE OF DIRT, AND WE KNOW THAT THERE ARE CERTAIN THINGS THAT NEED TO BE DONE IN FLORIDA TO TRANSFER THAT. IF IT IS A HUSBAND AND WIFE THEN WE KNOW WE'VE GOT ENTIRETIES AND WE CAN FILE SOME AFFIDAVITS FOR A CLEAR TITLE. IN THIS CASE, IF I WANTED TO BUY THE PROPERTY FROM SOMEONE, WHO WOULD BE ABLE TO GIVE ME A DEED AND WHERE WHO SIGNED THEIR DEED? ASSUME THIS PROPERTY WAS NOT SOLD. I WANT TO BUY THIS CONDOMINIUM, AND SOMEBODY IS GOING TO SELL IT TO ME AND I JUST WONDER WHO SIGNED THEIR DEED.

LET ME TAKE IT IN TWO WAYS. AS A PRACTICAL MATTER WE HAD AN URGE EVENSY AND WE REALLY NEEDED A SALE TO HAPPEN QUICKLY.

NO, I'M AT THE END. THIS IS ALL OVER. WHO GETS WHO SIGNS THE DEED OR WHAT IS THE INSTRUMENT THAT TRANSFERS TITLE TO WHOEVER GETS IT?

THE WILL IS THE MENAMENT OF TITLE. SO WHAT WE HAVE TO DO IS HAVE THE COURT REACH ITS DETERMINATION AS TO AFTER APPLICATION OF ALL OF THE PROBATE ASSETS AND AFTER WE'VE

DONE ALL OF THE THINGS THAT WE ARE SUPPOSED TO DO WITH THE PROBATE ASSETS AND THE PERSONAL REPRESENTATIVE SITS DOWN WHAT NOW HAS HAPPENED TO THE HOME? DO WE HAVE PEOPLE LEFT UNFUNDED? DO WE HAVE BENEFICIARIES UNSATISFIED OR ARE WE GOING TO SEND IT STRAIGHT AHEAD TO THE RESIDUE? THE COURT IS GOING TO MAKE THAT DETERMINATION AND SAY, NO, WE'VE STILL GOT PEOPLE UNFUNDED. WE'VE GOT TO HONOR THEIR PRIORITIES. IT DOESN'T HAVE TO BE SALES PROCEEDS. IT CAN BE IN KIND SHARES OF THE HOME STEAD AND THAT ORDER WILL REFLECT

WELL, IT IS A JUDGE'S ORDER. IS THAT WHAT YOU ARE SAYING?

IT WILL BE THE ORDER DETERMINING HOMESTEAD IN RESPONSE TO THE PETITION.

SO IF A JUDGE IS MAKING THAT DETERMINATION, THE PROBATE JUDGE, WHAT JURISDICTION DOES THE PROBATE JUDGE HAVE OVER ASSETS OVER A NONPROBATABLE ASSET?

THE SAME THAT THEY HAVE ALWAYS HAD. THE PETITION TO DETERMINE HOMESTEAD IS STANDARD PRACTICE IN FLORIDA. THAT'S HOW HOMESTEAD TITLE IS EVEN WHEN IT GOES TO RESIDUARY.

SOMEONE MUST SIGN THE DEED OR SOMETHING TO THEM.

IT IS NOT A DEED.

IT COMES AN ORDER FROM THE JUDGE. SO WE'RE SAYING THAT A JUDGE THAT DOES NOT HAVE JURISDICTION OVER THE ASSETS BECAUSE THIS IS NOT A PROBATE ESTATE, THAT THAT'S THE ORDER THAT CONTROLS THE REAL ESTATE?

BUT LET ME DISTINGUISH BETWEEN THE JUDGE'S JURISDICTION AND THE PERSONAL REPRESENTATIVES CONTROL OF THE ASSET ARE TWO VERY DIFFERENT THINGS. THE PERSONAL REPRESENTATIVE DOES NOT HAVE CONTROL OF THIS ASSET. IT HAS TO BE SEGREGATED AND SET ASIDE FROM THE REST OF THE PROBATE ESTATE AND HE'S NOT A PLAYER IN THAT GAME BUT THE WILL STILL IS, THE COURT STILL IS, THE JUDICIAL PROCESS STILL IS.

OKAY. SO NOW ONCE YOU SAY IF THERE WAS A SALE ORDER, AND THEN YOU'VE MANDATED THE SALE AND THE ASSET LOSES ITS HOMESTEAD PROTECTION, YOU HAD SAID THAT.

IF THERE IS A SALE ORDER IN THE WILL.

RIGHT. NOW, IF THERE IS NOT ONE AND THERE ARE STILL, AND THERE IS NOT INSUFFICIENT ASSETS TO SATISFY CREDITORS AND SO FORTH, AND THE THEN THE TRIAL JUDGE, WHO HAS THE AUTHORITY THEN TO ORDER THE SALE OF THAT ASSET?

WHAT WILL HAPPEN, IF IT NEED BE SOLD AND IT MAY NOT NEED TO BE SOLD, BUT IF THE SALE IS DESIRED BY THE PEOPLE WHO ARE ENTITLED TO IT, ONCE THE TITLE IS ESTABLISHED PER THE ORDER OF THE COURT THAT SAYS HERE ARE THE RIGHTFUL OWNERS AFTER FULL APPLICATION OF THIS WILL, WE NOW KNOW THAT THERE IS A 37% SHARE VESTED IN THIS INDIVIDUAL, 3% IN THIS INDIVIDUAL AND THEY CAN EITHER SELL IT TOGETHER.

AND MAYBE THAT'S WHERE I AM MISSING THIS, BECAUSE IF LET'S JUST ASSUME INSTEAD OF IT BEING DRAMATIC, $150,000, SAY THE GIFT TO THE NEPHEW WAS $10,000, STILL NOT ENOUGH. WOULD THE HALF BROTHERS BE ABLE TO BE ABLE TO SAY, WE WANT TO KEEP THIS HOMESTEAD PROPERTY BECAUSE IT IS OURS AND WE'LL PAY YOU 10,000, OR DO THEY IS IT NOT THEIRS AND ARE YOU SAYING IT IS REALLY A PERCENTAGE OF FIRST THE CASH? THAT'S WHEN IT STARTS TO BECOME SOMEWHAT LESS LOGICAL TO ME.

UNDERSTOOD. UNDERSTOOD. IF WE HAVE A $10,000 GENERAL DEVISEE AND WE HAVE NOTHING BUT THE HOMESTEAD THEN, YES, WHAT WILL HAPPEN IS $10,000 WORTH OF THE HOMESTEAD, WHATEVER FRACTIONAL SHARE THAT IS, WILL BELONG TO THAT INDIVIDUAL.

AND THAT WAS AND YOU WOULD SAY THAT'S BECAUSE THE WILL?

ABSOLUTELY.

INTENDED THAT THAT PERSON IF THERE WASN'T ENOUGH IN CASH TO OWN A PART OF THE HOMESTEAD?

RIGHT. NOT ONLY INTENDED, COMPELLED, GAVE NO OTHER ALTERNATIVE.

DO THE CREDITORS STILL GET PAID FIRST? DO THEY OWN PART OF THE HOMESTEAD, TOO?

WE FIGURE OUT WHO BECAME VESTED WITH IT, AND UNDER OUR SCENARIO WE HAVE A $10,000 BENEFICIARY VESTED WITH IT, WHO IS A PROTECTED HEIR, SO TO ANSWER YOUR QUESTION, CREDITORS CANNOT REACH HIS $10,000 SHARE OF THE HOMESTEAD. NOR CAN THEY REACH THE REMAINDER OF THE HOMESTEAD THAT'S OWNED BY THE FOUR OTHER HEIRS.

HOW WOULD YOU DEFINE YOUR VERSED INTEREST OF YOUR CLIENT IN THIS CASE, THE FOUR HALF BROTHERS WHO TAKE A ONE QUARTER INTEREST AS TENANTS IN COMMON, ABSENT YOUR 10,000, SO HOW WOULD YOU DESCRIBE OR DEFINE IN REAL ESTATE TERMS WHAT YOUR CLIENT'S VESTED INTEREST IN THIS HOMESTEAD WOULD BE?

TENANTS IN COMMON ALONG WITH THE FOUR BROTHERS, JUST AT A DIFFERENT PERCENTAGE.

SO HE WOULD NOT ONLY BE ENTITLED TO THE $10,000 BUT THEN THE ACCUMULATED VALUE OR RENTS RECEIVED? SO ACTUALLY TAKING A PERCENTAGE INTEREST IN THE PROPERTY AND NOT A SPECIFIC DOLLAR AMOUNT?

RIGHT. OR IF THEY AGREE TO SELL, THEY ARE ABLE TO DO THAT.

SO YOU ARE NOT CONSIDERING IT AS A LIEN TYPE INTEREST?

NO.

A FEE INTEREST AS A TENANT IN COMMON?

NOT AT ALL. MY OPPONENT WANTS TO CHARACTERIZE MY POSITION AS I'M JUST A MERE CLAIMANT. I'M A PRIORITY DEVISEE BUT SOMEHOW I HAVE NOW BEEN RELEGATED TO A MERE CLAIMANT AGAINST THE LOWEST PRIORITY DEVISEE WHO IS PRESUMED TO RECEIVE EVERYTHING AT THE START. THAT ISN'T HOW IT WORKS. THE WILL ALLOCATES THE PRIORITIES. THE AGE OLD CONSTRUCTION STATUTES GOING BACK TO ENGLISH COMMON-LAW GO BACK TO THE PRIORITIES.

YOU ARE SAYING IT IS THE LOWEST PRIORITY BUT IF THIS WILL HAD GIVEN YOUR CLIENT $15 AND THE SILVER COINS TO SOMEBODY ELSE AND $2 MILLION TO THE RESIDUARY, I WOULD TEND TO THINK AS A RESIDUARY I GOT THE PRIORITY IN THIS ESTATE.

YOU CERTAINLY GOT THE LION'S SHARE MAGNITUDE BUT YOU DID NOT GET THE PRIORITY. MY $15 BECAME BEFORE YOUR FIRST NICKEL.

AS TO DISTRIBUTION.

AS TO THE ENTITLEMENT AND THE DISTRIBUTION.

BUT IN ESSENCE, YOU'VE ANSWERED THE QUESTION. WHAT YOU ARE SAYING IS THIS TAKES AN EQUIVALENT TENANCY INTEREST IN THE ESTATE.

CORRECT.

EVEN THOUGH THERE IS NO INTENT STATED IN THE WILL.

BUT THERE WOULDN'T BE IF THIS WERE NONHOMESTEAD, EITHER. I DON'T THINK WE WOULD HAVE THIS DEBATE IF WE WERE TALKING ABOUT VACANT LAND THAT WE GAVE HIM AN IN KIND INTEREST IN.

SO IF IT WASN'T HOMESTEAD, THEN THE SAME THING WOULD OCCUR, EXCEPT THAT THE THOSE THAT WERE NOT HEIRS, ANYTHING WOULD BE SUBJECT THEN TO CREDITORS?

WELL, YES, THE CHARACTER OF THE PROPERTY THAT WOULD DEFINE THE FACTS THERE ARE NO EXEMPTION. HEIRS OR NONHEIRS WOULD BE IRRELEVANT AT THAT POINT. IF WE ARE TALKING ABOUT NONHOME STATE IT IS {REEJ} {NAM} BY CREDITORS AND IT WILL ABATE FROM THE RESIDUE AND THEN IT WILL COME AND GET MY PRIORITY CLIENT LAST.

SO IF THE GENERAL IF NONE OF THE GENERAL DEVISEES OR HEIRS WHAT WOULD BE THE STATUS OF THIS PROPERTY?

AGAIN IF WE JUST HAD HOMESTEAD AND NOTHING MORE, THEY WOULD STILL GET A SHARE EQUAL TO THE VALUE OF THEIR HOMESTEAD INTEREST.

AFTER THE CREDITORS.

THEY WOULD GET IT AT THE RISK OF CREDITORS. THEY WOULD BE ENTITLED TO THEIR SHARE, $150,000 BUT IF THERE IS A $120,000 CREDITOR THAT IS NOT PAID, THEY ARE SUBJECT TO FORFEITURE TO MAKE THAT PAID.

SO YOU HAVE AT LEAST ONE PERSON WHO IS THE GENERAL DEVISEE WHO IS ALSO A HEIR, THEN THE PROPERTY CONTINUES TO HAVE ITS HOMESTEAD CHARACTERISTICS.

THE PIECE THAT IS OWNED BY ANY HEIR WHEN ALL OF THE DUST SETTLES, THE PIECE THAT IS OWNED BY EACH AND EVERY HEIR IS PROTECTED. THE PIECE THAT IS OWNED BY EACH AND EVERY NONHEIR IS NOT PROTECTED AND BECOMES SUBJECT TO PROBATE, SUBJECT TO ALL OF THE CLAIMS.

SO THAT WOULD RESULT IN THE FOR SALE OF HOMESTEAD PROPERTY IN ORDER TO SATISFY THE DEVISE?

IT WOULD RESULT ENFORCED SALE OF THE NOW NONPROTECTED HOMESTEAD BUT NOT THE PROTECTED HOMESTEAD BECAUSE

IN THIS CASE, THE ONE HEIR WHO IS A GENERAL DEVISEE, REALLY HAS THE LION'S SHARE OF $150,000, SO THEY WOULD BE ENTITLED TO THE ENTIRE HOMESTEAD?

NO, THEY ARE ENTITLED TO NO MORE THAN $150,000.

THE HOMESTEAD WAS ONLY WORTH 140, CORRECT?

BUT THERE IS A NONHEIR THAT STANDS BESIDE HIM, AGAIN PRIORITIES OF THE WILL ARE THE FIRST ANALYSIS, THE PROTECTION IS A SECONDARY CONSIDERATION. SO WE ASK THE QUESTION, HOW DO WE DIVIDE THESE ASSETS AND WE DIVIDE IT PROPORTIONATELY, $150,000 TO MY CLIENT, $20,000 TO THE OTHER. IF WE DON'T HAVE 170 IN TOTAL THEN WE REDUCE PROPORTIONATELY

BETWEEN THE TWO. THAT'S ALL THERE IS.

ISN'T THAT PRIORITIZATION AND ALLOCATION TIPLY DONE IN AN ABATE TYPICALLY DONE FOR ABATEMENT ASSETS AND AREN'T YOU APPLYING THIS UNDER ABATEMENT THAT'S ALWAYS BEEN APPLIED TO STATE ASSETS AS OPPOSED TO SOMETHING WE HAVE AGREED IS PART OF THE ESTATE?

I DISAGREE WITH MY OPPONENT ON HOW ABATEMENT WORKS. THE ORDER OF PRIORITY OF DEVISES AND THE ESTABLISHMENT OF THOSE SHARES OCCURS NOT THROUGH A ABATEMENT. IF THE WILL SAYS ONLY THE REST, WE NEVER GET THERE. IF WE RUN OUT OF MONEY BEFORE WE GET THERE. THE ABATEMENT STATUTE FOLLOWS THE FUNDING. ONCE WE HAVE FILLED THE BUCKETS, YOU'VE GIVEN THE PRIORITY PEOPLE AND THEY HAD A LITTLE BIT OF FAN LEFT BUT MAYBE WE DIDN'T. THEN THEY COME IN AND SAY HERE'S THE ALLOCATION.

IF IS A NONESTATE ASSET AS IN THIS CASE, I MEAN, WE HAD IN THIS MAN'S WILL HE HAD ASSETS OF EXXON HE THOUGHT HE HAD FOR AN INTEREST IN EXXON. THAT'S GONE. WHY ISN'T THE MONEY THAT APPARENTLY NO LONGER THERE TREATED LIKE THE EXXON ASSET THAT'S NO LONGER THERE AT THE TIME OF HIS DEMISE?

BECAUSE AGAIN A GENERAL DEVISEE IS NOT DEPENDENT UPON THE CHARACTER OF ANY PARTICULAR ASSET BEING THERE. IT IS TO BE SATISFIED BY EACH AND EVERY DEVISEABLE ASSET UNTIL IT IS FULFILLED.

SO THE GENERAL DEVISEE STANDS IN A BETTER DEVISEE THAN A SPECIFIC DEVISEE OR A RESIDUARY DEVISEE OF A HOMESTEAD.

IF THE ASSET EXISTS, BUT THEN NEXT PLACE IS GENERAL DEVISEE WHO TAKES THE PLACE OVER THE RESIDUARY IN EVERY SCENARIO. THEN WE ASK THE QUESTION ONCE WE'VE SORTED THAT OUT AS TO WHO GOT WHAT. NOW, WE HAD A HOMESTEAD THAT IS STILL A HOMESTEAD. ARE OUR RECIPIENTS HEIRS AND IF ALL OF THEM ARE, THEY ARE ALL PROTECTED IN THEIR RECEIPT OF THEIR SHARES. SOME OF THEM ARE NOT AND THOSE PEOPLE WHO ARE NOT LOSE THAT PROTECTION. THEY MAY STILL GET TO KEEP THE ASSET OR AT LEAST A PART OF IT, RIGHT?

AS FASCINATING AS THIS IS, WE ARE OUT OF TIME. THANK YOU VERY MUCH.

MR.^BARKETT, IF YOU TAKE A HYPOTHETICAL WHERE THERE WERE TWO PROVISIONS EARLY ON IN THE WILL THAT SAID I LEAVE 50% OF THE VALUE OF MY REAL ESTATE HOLDINGS AT THE TIME OF MY DEATH TO JOHN SMITH, AND THE NEXT PROVISION SAID I LEAVE 50% OF MY REAL ESTATE HOLDINGS TO MARY BROWN, AND TELL ME HOW THAT WOULD WORK OUT WITH REFERENCE TO IF THE ONLY PROPERTY THEN THAT IS OWNED, THE ONLY REAL PROPERTY THAT IS OWNED BY THE TESTATOR AT THE TIME OF HIS DEATH IS HOMESTEAD PROPERTY?

DID HE HAVE A RESIDUARY CLAUSE?

AND HAD A RESIDUARY CLAUSE. JUST LIKE THE RESIDUARY CLAUSE HERE. WHAT HAPPENS?

SO HE LEAVES 50% TO TWO FRIENDS AND DOES THE RESIDUARY CLAUSE GO TO A HEIR?

LET'S TAKE THE RESIDUARY CLAUSE TO BE EXACTLY WHAT WE HAVE IN THIS CASE JUST THAT THE OTHER PROVISIONS ARE THE 50% OF MY REAL ESTATE HOLDINGS.

I HONESTLY DON'T KNOW THE ANSWER TO THAT BECAUSE I DON'T KNOW I DON'T HAVE THOSE FACTS IN FRONT OF ME IN TERMS OF THE CASE. I DON'T KNOW THE ANSWER.

SO THOSE TWO DESIGNATED PEOPLE THEN WOULD NOT RECEIVE 50% OF THE REAL ESTATE

HOLDINGS OF THE TESTATOR; IS THAT CORRECT?

WELL, JUSTICE ANSTEAD, I DON'T HAVE ENOUGH FACTS. FOR EXAMPLE, IF HE IS SURVIVED BY A WIFE THEN HE CAN'T LEAVE

TAKING THE FACTS TO BE ALL THE SAME AS IN THIS CASE AND HERE WE ACTUALLY HAVE TWO PEOPLE THAT RECEIVED CASH BEQUESTS BUT I'M CHANGING THE CASH BEQUEST TO 50% OF THE VALUE OF MY REAL ESTATE HOLDINGS THAT I HOLD AT THE TIME OF MY DEATH.

THEN I WOULD SAY IN THAT CASE, BECAUSE HE IS NAMED REAL ESTATE AND HE IS SPECIFICALLY DEVISING IT TO PEOPLE WHO ARE NONHEIRS THEN THAT BEQUEST PASSES TO THOSE DEVISEES BECAUSE IT IS NOT HOMESTEAD ANY MORE. IT LOST ITS PROTECTION.

AND HOW DID IT LOSE ITS PROTECTION?

BECAUSE HE SAID TAKE ALL OF THE REAL ESTATE THAT I OWN AND GIVE IT TO THESE PEOPLE WHO ARE NOT HEIRS. THAT'S MY DEVISE. THAT'S MY SPECIFIC DEVISE. I SPECIFICALLY DEVISE MY REAL ESTATE, ALL OF MY REALIZE TO THESE REAL ESTATE TO THESE NONHEIRS AND IT LOSES ITS HOMESTEAD PROTECTION.

SO YOU WOULD BE CONSTRUING THE INTENT OF THE TESTATOR TO BE THAT INTENT; IS THAT NOT CORRECT?

HE SAID IT. I'M NOT CONSTRUING IT. HE SAID IT, TAKE MY REAL ESTATE AND HOMESTEAD IS REAL ESTATE AND GIVE IT TO THESE TWO PEOPLE, SO I WOULD SAY THAT HE HAS INTENTIONALLY DIVESTED THE PROPERTY FROM THE HOMESTEAD PROTECTION.

IF HE LEFT THESE SAME BEQUESTS THAT ARE INVOLVED IN THESE CASES AND HAD THE PROVISION AND SELL ANY REAL ESTATE THAT I OWN AS NECESSARY, PAY THESE BEQUESTS, THAT THEN WOULD HAVE, YOUR OPPONENT WOULD WIN?

ABSOLUTELY AND THERE IS A CASE ON POINT. KNADLE VERSUS KNADLE AND THAT'S THE EXCEPTION.

THE DISTINCTION ON MURPHY, YOU SEEM TO THINK THAT WAS, YOU KNOW, BECAUSE YOU AGREED THAT THE WILL GOVERNS WHO RECEIVES THE HOMESTEAD, CORRECT? THE WILL?

YES, CORRECT.

MURPHY, AND I SEE {THEER}IZE, BUT HOW DO YOU TAKE WHAT WAS STATED ABOUT THIS REALLY WAS IN TESS TATE?

I DIDN'T UNDERSTAND THAT BECAUSE IT THE DECEDENT'S SON, BUT IN MURPHY, IT SAYS THE SON CONTENDS, THE HOMESTEAD PROPERTY IS NOT PART OF THE PROBATE ESTATE AND CANNOT, THEREFORE, PASS UNDER A CLAUSE IN A WILL DIRECTING POSSESSION OF THE ENTIRE REMAINING ESTATE. IT WASN'T A NONHEIR. IT WAS THE SON THAT WAS CONTESTING IT IN MURPHY AND THIS COURT SAID NOTWITHSTANDING THAT IT IS NOT AN ASSET OF THE STATE, NOTWITHSTANDING THAT IT IS NOT AN ASSET OF THE STATE, THE RESIDUARY CLAUSE TELLS US WHAT THE WILL OF THE TESTATOR WAS AND THAT'S WHERE THE HOMESTEAD GOES AND IT WAS INITIATED BY A HEIR, A SON, NOT A NONHEIR.

THANKS TO BOTH OF YOU. I TRULY MEAN THIS. SOMETIMES IT IS REFRESHING FOR US TO HAVE A DIFFERENT SUBJECT OTHER THAN THE DEATH PENALTY CASES AND YOU BOTH WERE VERY RESPONSIVE TO OUR QUESTIONS, AND I APPRECIATE THE PROFESSIONAL WAY IN WHICH THE ARGUMENTS WERE CONDUCTED.

THANK YOU, CHIEF JUSTICE.