

DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

J. Scott Lanford, Trustee of the Kirk Family Foundation, v. Robin Phemister, Personal Representative of the Estate of Mary L. Dillard and as Trustee of the Testamentary Trust of Mary L. Dillard

No. 5D21-1015, 2022 WL 1069825 (Fla. 5th DCA Apr. 8, 2022) · No. 5D21-1015

SUMMARY

In Lanford v. Phemister, the Florida Fifth District Court of Appeal held that Florida’s constitutional homestead protections prohibit using proceeds from the sale of a decedent’s protected homestead to pay personal representative fees and estate administration expenses, because the homestead passes outside the probate estate. However, the court affirmed that trustee fees and costs incurred in administering a testamentary trust that holds the homestead proceeds may be reimbursed from those proceeds under Florida trust law. The court also declined to disturb the reasonableness determination due to the absence of a hearing transcript, applying the Appellate rule.

CASE DETAILS

COURT	District Court of Appeal of Florida, Fifth District
WRITING FOR THE COURT	Traver, J.; Edwards, J.; Eisnagle, J.
JURISDICTION	Florida
DOCKET	5D21-1015
DISPOSITION	affirmed in part; reversed in part
PROCEDURAL POSTURE	Appeal from the Circuit Court for Brevard County, David E. Silverman, Judge.
STANDARD OF REVIEW	de novo for constitutional homestead protection issues; abuse of discretion for trustee fees
PRECEDENTIAL VALUE	published
PARTIES	J. Scott Lanford, Trustee of the Kirk Family Foundation v. Robin Phemister, Personal Representative of the Estate of Mary L. Dillard and as Trustee of the Testamentary Trust of Mary L. Dillard

TOPICS

- probate procedure
- probate
- homestead
- trusts
- fiduciary duty

PRACTICE AREAS

Probate and Trust

Homestead Exemption

Attorney Fees

QUESTIONS PRESENTED

1. Whether the probate court erred in authorizing reimbursement of personal representative fees and costs from homestead sale proceeds.
2. Whether the probate court correctly allowed reimbursement of trustee fees and costs from homestead sale proceeds.
3. Whether the fees and costs awarded were reasonable.

HOLDINGS

1. The probate court erred in allowing reimbursement of Phemister's personal representative fees and costs from the homestead sale proceeds because Florida's constitutional homestead provisions forbid it.
2. The trial court correctly allowed reimbursement of Phemister's fees and costs as testamentary trustee from the homestead sale proceeds.
3. The court will not disturb the probate court's determination that fees and costs were reasonable and incurred for the testamentary trust's benefit because there are no transcripts of the evidentiary hearing.

KEY QUOTATIONS

*“The probate court erred in allowing for reimbursement of Phemister's personal representative fees and costs from the homestead sale proceeds because Florida's constitutional homestead provisions forbade it.” (at *7)*

*“The trial court correctly allowed for reimbursement of Phemister's fees and costs as testamentary trustee from the homestead sale proceeds.” (at *9)*

*“Without a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or an alternate theory.” (at *11)*

FACTUAL BACKGROUND

Mary Lee Dillard died in 2016, leaving her homestead and residuary estate to a testamentary trust for her sister Billie Jo Schell, with the Kirk Family Foundation Charitable Trust as contingent remainder beneficiary. Phemister was appointed personal representative and testamentary trustee. The probate court determined the home was exempt homestead property, and the protections inured to Phemister as trustee for Schell's benefit. The homestead was sold and proceeds placed in escrow. Schell died in 2018, and the residuary passed to the Kirk Trust. Phemister sought to use the sale proceeds to pay her fees and costs as both personal representative and trustee.

PROCEDURAL HISTORY

Decedent died in 2016. Probate court appointed Phemister personal representative and testamentary trustee. Probate court determined decedent's home constituted exempt homestead and that protections inured to

Phemister as trustee for Schell's benefit. Phemister sold the homestead and placed proceeds in escrow. After Schell died, residuary passed to Kirk Trust. Phemister petitioned to disburse sale proceeds for fees and costs incurred as personal representative and trustee. Lanford objected. Probate court held evidentiary hearing and granted amended petitions, authorizing payment from escrowed homestead proceeds. Lanford appealed.

DISPOSITION

affirmed in part; reversed in part

CASES CITED

- Anderson v. Letosky, 304 So. 3d 801 (Fla. 2d DCA 2020)
- Morey v. Everbank, Morey v. Everbank, 93 So. 3d 482 (Fla. 1st DCA 2012)
- Est. of Shefner v. Shefner-Holden, 2 So. 3d 1076 (Fla. 3d DCA 2009)
- Dorothy M. Clifton v. Lonnie R. Clifton, Sr., et ux., et al., Clifton v. Clifton, 553 So. 2d 192 (Fla. 5th DCA 1989)
- Thompson v. Laney, 766 So. 2d 1087 (Fla. 3d DCA 2000)
- Bronstein v. Bronstein, 332 So. 3d 510 (Fla. 4th DCA 2021)
- Genna Demircan v. Igor Mikhaylov, Demircan v. Mikhaylov, 306 So. 3d 142 (Fla. 3d DCA 2020)
- Charles Barnett v. William R. Barnett, Barnett v. Barnett, 340 So. 2d 548 (Fla. 1st DCA 1976)
- Hicks v. Am. Integrity Ins. of Fla., 241 So. 3d 925 (Fla. 5th DCA 2018)
- Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979)
- Lanford v. Phemister, 280 So. 3d 79 (Fla. 5th DCA 2019)

OPINION

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT
NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED J. SCOTT LANFORD, TRUSTEE OF THE KIRK FAMILY
FOUNDATION, Appellant, v. Case No. 5D21-1015 LT Case No. 05-2017-CP-027176-X ROBIN
PHEMISTER, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY L. DILLARD
AND AS TRUSTEE OF THE TESTAMENTARY TRUST OF MARY L. DILLARD, Appellee.
_____/ Opinion filed April 8, 2022 Appeal from the Circuit
Court for Brevard County, David E. Silverman, Judge.

Robert C. Wilkins, Jr., of Robert C. Wilkins, Jr., P.L., Orlando, for Appellant. Scott Krasny, of Krasny and Dettmer, Melbourne, for Appellee. 2 TRAVER, J. J. Scott Lanford, trustee of the Kirk Family Foundation Charitable Trust (“Lanford”), appeals the probate court’s final order authorizing reimbursement from the sale of the homestead property of Mary Lee Dillard (“Decedent”).

We have jurisdiction. See Fla. R. App. P. 9.170(b)(21), (23). The probate court awarded Robin Phemister and her attorneys their reasonable fees and costs incurred while Phemister performed two discrete functions: 1) administering Decedent's estate as personal representative; and 2) acting as trustee to the testamentary trust Decedent created in her will. 1 It also awarded Decedent's estate expenses Phemister advanced to maintain the homestead after Decedent died.

2 Because Florida's constitutional homestead protections forbid it, the probate court erred by authorizing reimbursement of Phemister's personal representative fees and costs from the homestead sale proceeds. The probate court correctly 1 A property transfer is "testamentary" when the property owner had no intention of making a transfer during her lifetime.

See Restatement (Third) of Trusts § 17 cmt. a (2003). A "testamentary trust" is created by will and must satisfy the formalities required to execute a will. *Id.*; see also § 736.0401(1), Fla. Stat. (2016). Therefore, a testamentary trust is created if the property owner only intends to transfer the property to a trust after death. See Restatement (Third) of Trusts § 17 cmt. a (2003).

2 We affirm without further discussion this portion of the probate court's order. 3 determined, however, that Phemister and her lawyers could be reimbursed from the sale proceeds for fees and costs incurred on the testamentary trust's behalf.

Finally, Lanford does not meet his appellate burden to show these fees and costs were unreasonable. We therefore affirm in part and reverse in part. I. Background Decedent died in 2016, leaving certain personal property to her sister, Billie Jo Schell. She left the residuary of her estate, 3 including her homestead, to a testamentary trust. Schell was the testamentary trust's primary beneficiary and the Kirk Family Foundation Charitable Trust ("Kirk Trust") was the testamentary trust's contingent remainder beneficiary.

4 Although Decedent's will designated Lanford as her personal representative 3 A residuary estate is "[t]he part of a decedent's estate remaining after payment of all debts, expenses, statutory claims, taxes, and testamentary gifts (special, general, and demonstrative) have been made." Residuary estate, Black's Law Dictionary (11th ed. 2019).

Accordingly, the testamentary trust was Decedent's residual beneficiary. A residuary beneficiary is a devisee of all assets remaining after the estate's obligations are satisfied. § 731.201(2), (35), Fla. Stat. (2016). 4 A contingent remainder is a future interest arising in a third party who is intended to take after a condition precedent. Contingent remainder, Black's Law Dictionary (11th ed.

2019). Decedent's will provided that "upon the death of [Schell] or if [Schell] shall not survive me, then my entire residuary estate shall be paid over to [the Kirk Trust]." 4 and the testamentary trust's trustee, the probate court appointed Phemister to both these roles. 5 In separate final orders, the probate court determined Decedent's home constituted exempt homestead property, and that

constitutional homestead protections inured to Phemister, as testamentary trustee, for Schell's benefit.

Nobody appealed either final order. See Fla. R. App. P. 9.170(b)(12)–(13). The probate court thereafter authorized Phemister, as testamentary trust trustee, to sell the homestead property. Lanford and Phemister stipulated that the sale would occur, and Phemister would place the sale proceeds in escrow.

The property later sold. In 2018, Schell died, and the residuary of Decedent's estate passed to the Kirk Trust. Phemister thereafter petitioned the probate court to disburse the homestead property's sale proceeds to pay for her fees as personal representative, her fees as testamentary trustee, and her attorney's fees and costs incurred in both capacities. She later filed two amendments to this petition.

Lanford objected, contending that homestead sale proceeds could 5 In appointing Phemister, the probate court concluded that Lanford had a conflict of interest that prevented him from serving as Decedent's personal representative or the testamentary trust's trustee. Lanford did not appeal the probate court's order appointing Phemister as personal representative, and we affirmed the probate court's order appointing her as testamentary trustee.

See *Lanford v. Phemister*, 280 So. 3d 79, 79 (Fla. 5th DCA 2019). 5 not be used for these purposes. He also argued the amounts Phemister and her attorneys sought were categorically unreasonable. He contended, for example, that Phemister did not distinguish between the work she and her attorneys performed for Decedent's estate and the testamentary trust.

The probate court conducted an evidentiary hearing on the amended petitions, at which it heard testimony on the necessity and reasonableness of the fees incurred. The hearing transcript is not part of our record. Following the hearing, the probate court issued an order reflecting that the parties agreed to the hourly rates of Phemister's lawyers. It also directed Lanford to submit objections to Phemister and her attorney's fees, "either by timeline or line item entries, as to the necessity or reasonableness of the line items...." Lanford did not comply with this directive.

The probate court granted Phemister's amended petitions. It awarded reimbursement of Phemister's and her attorney's fees and costs. The probate court's order did not, however, differentiate between fees and costs incurred by the estate and the trust.

To the extent Decedent's estate had insufficient funds, the probate court authorized payment to Phemister and her lawyers from the escrowed homestead sale proceeds. The parties agree Decedent's estate cannot comply with the probate court's order without drawing on the homestead sale proceeds. Lanford challenges the trial 6 court's authorization of payments from the homestead sale proceeds and the reasonableness of the awards to Phemister and her attorney.

We first address the homestead issue, starting from the perspective of Phemister’s role as personal representative of Decedent’s estate, and then from her position as testamentary trustee. We then discuss whether the probate court’s awards were reasonable. II. Homestead Proceeds to Phemister, as Personal Representative The probate court erred in allowing for reimbursement of Phemister’s personal representative fees and costs from the homestead sale proceeds because Florida’s constitutional homestead provisions forbade it.

We review de novo an issue concerning the constitutional homestead protection. See *Anderson v. Letosky*, 304 So. 3d 801, 803 (Fla. 2d DCA 2020). The Florida Constitution protects a homestead from “judgment[s], decree[s] or execution[s],” except for payment of certain limited debts. Art. X, § 4(a), Fla. Const. These homestead exemptions inure to the owner’s “surviving spouse or heirs.” Art. X, § 4(b), Fla. Const.

After a decedent’s death, her heir “has legal ownership of the property,” and “she may sell it without regard to decedent’s creditors or administrative expenses.” *Morey v. Everbank*, 93 So. 3d 482, 488 (Fla. 1st DCA 2012) (quoting *Est. of Shefner v. Shefner- Holden*, 2 So. 3d 1076, 1078 (Fla. 3d DCA 2009)).⁷ Here, Lanford concedes that Schell, as Decedent’s sister and the testamentary trust’s beneficiary, was Decedent’s heir for purposes of homestead protections.

⁶ When protected homestead ⁷ property is devised to an heir, it passes outside of the probate estate. See § 733.607(1), Fla. Stat. (2016) (“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...” (emphasis added)); § 733.608(1)(c), Fla. Stat. (2016) (“All real or personal property of the decedent, except the protected homestead... shall be assets in the hands of the personal representative... for the payment of... expenses of the administration and obligations of the decedent’s estate.”) (emphasis added); see also *Clifton v. Clifton*, 553 So.

2d 192, 194 n.3 (Fla. 5th DCA 6 The probate court entered a final order determining Phemister, as the testamentary trust’s trustee, was entitled to constitutional homestead protections for Schell’s benefit. Lanford did not appeal this order. See Fla. R. App. P. 9.170(b) (limiting appeals in probate and guardianship proceedings).

Therefore, for the purposes of this decision, we must accept that Schell, as the testamentary trust’s beneficiary, is an “heir” for purposes of constitutional homestead protections. Accordingly, we do not determine whether a trust’s beneficiary is entitled to constitutional homestead protections as an “heir” under Florida law. Our decision is not intended, and should not be cited, to stand for this proposition.

⁷ “‘Protected homestead’ means the property described in § 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner’s surviving spouse or heirs under § 4(b), Art. X of the State Constitution.” § 731.201(30). ⁸ 1989)

(“Homestead property, whether devised or not, passes outside of the probate estate.”). Phemister insists that the Kirk Trust is not Decedent’s “heir” for the purpose of constitutional homestead protections, but this misses the point.

Because the parties did not appeal the trial court’s previous order, which found that Decedent’s homestead, complete with its constitutional protections, passed to Schell at the moment of Decedent’s death, the sale proceeds from Decedent’s devised homestead cannot be used to pay the estate’s administrative fees and costs. See § 733.608(1)(c). Similarly, a general directive in a testamentary trust instrument—such as Decedent’s will—to pay “debts, claims, or expenses” does not subject protected homestead to estate obligations or administrative estate expenses.

See § 736.1109(2), (4), Fla. Stat. (2021). Here, the escrowed funds are proceeds from the sale of Decedent’s protected homestead. The homestead passed outside of the probate estate, and the proceeds from the sale became an asset of the testamentary trust to be used for Schell’s benefit. See *Thompson v. Laney*, 766 So. 2d 1087, 1088 (Fla. 3d DCA 2000) (reiterating that in absence of will provision stating otherwise, devisee entitled to sell homestead property and keep proceeds of sale); see also *Est. of Shefner*, 2 So.

3d at 1078 (“The heir’s sale of the 9 property, after the decedent’s death, does not change the legal consequences of the bequest from the decedent to the heir.”). Accordingly, we reverse that portion of the probate court’s final order reimbursing Phemister and her attorneys, in her capacity as personal representative of Decedent’s estate, their fees and costs from the homestead sale proceeds.

III. Homestead Proceeds to Phemister, as Testamentary Trustee Our conclusions differ as it relates to Phemister and her attorney’s services to the testamentary trust. The trial court correctly allowed for reimbursement of Phemister’s fees and costs as testamentary trustee from the homestead sale proceeds. Our review of an issue involving the constitutional homestead protection is *de novo*.

See *Anderson*, 304 So. 3d at 803. We review an order involving trustee fees for an abuse of discretion. See *Bronstein v. Bronstein*, 332 So. 3d 510, 514 (Fla. 4th DCA 2021); *Demircan v. Mikhaylov*, 306 So. 3d 142, 149 (Fla. 3d DCA 2020). Phemister bore the burden of proof below to prove her and her lawyers’ fees and costs were reasonably necessary. See *Bronstein*, 332 So.

3d at 514 (quoting *Barnett v. Barnett*, 340 So. 2d 548, 550 (Fla. 1st DCA 1976)). She also had to prove that these fees and costs inured to the trust’s benefit and not anyone else’s. *Id.* 10 Under Florida law, trustees have the power to pay trust expenses, their own compensation, and their attorney’s fees from trust assets. § 736.0816(15), (20), Fla. Stat. (2021).

Decedent’s will is silent on how the testamentary trustee will be paid, but it did not contemplate that the testamentary trustee would work for free. Further, Florida law also does not require trustees to work for free.

Under Florida law, trustees have the power to pay trust expenses, their own compensation, and their attorney's fees from trust assets. § 736.0816(15), (20), Fla. Stat. (2021). Trustees are "entitled to compensation that is reasonable under the circumstances." § 736.0708(1), Fla. Stat. (2021); see also § 736.05053(4), Fla. Stat. (2021) (providing that trust administration fees, including trustee fees and trustee's attorney's fees, should be paid before estate administration fees).

Trustees are also allowed reimbursement for reasonable trust expenses. § 736.0709(1), Fla. Stat. (2021). Similarly, an attorney who provides "services to a trust may be awarded reasonable compensation from the trust" following an application for fees. § 736.1005(1), Fla. Stat. (2021). Lanford argues that a homestead willed to a trust is entitled to the same constitutional protections against claims from the trustee as it is to estate administration claims.

He concedes, however, there is no legal authority supporting this argument, and he otherwise fails to explain why homestead 11 protections should apply against the trustee. Instead, he suggests we rely on a per curiam affirmance without opinion case. Per curiam affirmances without opinion, however, have no precedential value because the reasons for affirmance are indeterminable.

Hicks v. Am. Integrity Ins. of Fla., 241 So. 3d 925, 929 (Fla. 5th DCA 2018). Accordingly, Lanford cannot demonstrate the probate court erred in awarding Phemister and her lawyers statutorily authorized fees and costs for administering the trust, including allowing reimbursement from homestead sale proceeds.

We therefore affirm that portion of the probate court's order. IV. The Reasonableness of the Expenses, Fees, and Costs We have no transcripts of the evidentiary hearing regarding Phemister's and her attorney's fees and costs incurred in administering the testamentary trust.

Accordingly, we will not disturb the probate court's determination that these items were both reasonable and incurred for the testamentary trust's benefit. See Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979) ("Without a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or an alternate theory.").

12 Lanford's categorical objection to Phemister's failure to distinguish between work she and her lawyers performed for the estate versus services performed for the trust might have had some merit. That said, without a transcript or Lanford's compliance with the probate court's order directing him to object by timeline and line item, we are unable to determine whether any of the awarded items related to tasks pertaining solely to personal representative work.

The absence of both a transcript and this critical information compels our affirmance on this point. We therefore reverse the trial court's determination that Phemister and her attorneys are entitled to reimbursement from the homestead sale proceeds for their work as Decedent's personal representative.

We otherwise affirm. AFFIRMED IN PART; REVERSED IN PART. EDWARDS and EISNAUGLE, JJ., concur.

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