Third District Court of Appeal

State of Florida

Opinion filed August 21, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2325
Lower Tribunal No. 17-1874

Janet Meliha Reno,
Appellant,

vs.

James Alan Hurchalla, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Mindy S. Glazer, Judge.

The Nguyen Law Firm and Hung V. Nguyen and Jacobeli J. Behar, for appellant.

Day Pitney/Richman Greer and Charles H. Johnson, Alan G. Greer and Katherine A. Coba, for appellee.

Before SALTER and LINDSEY, JJ., and LEBAN, Senior Judge.

SALTER, J.

Janet Meliha Reno (the "Appellant"), a niece of the late Janet Reno ("Ms. Reno"), appeals a final judgment and order modifying the Janet Reno Revocable Trust ("Trust") created by Ms. Reno before her death. The appellees are James Alan Hurchalla, (Ms. Reno's nephew and the successor trustee to Ms. Reno for the Trust ("Successor Trustee")), and five living beneficiaries under the Trust (also children of Ms. Reno's siblings) who have not objected to the modification of the Trust and have not appealed the final judgment and order under review.

The probate case below and this appeal concern Ms. Reno's historically significant homestead property (the "Reno Homestead") and her charitable intention to see the home and surrounding, undeveloped acreage preserved in perpetuity. When her originally-designated charitable donee (the University of Miami) for the Reno Homestead rejected the terms of the bequest after Ms. Reno's death, the Successor Trustee and other family members (other than the Appellant) sought to effectuate Ms. Reno's charitable intent through the trust doctrine of cy pres[1] and a

[1] "Cy pres," a French term for "as near as may be," has been incorporated in the Florida Trust Code, in section 736.0413, Florida Statutes (2018):

736.0413 Cy pres.—
(1) If a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful, the court may apply the doctrine of cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.
(2) A proceeding to modify or terminate a trust under this section may be commenced by a settlor, a trustee, or any qualified beneficiary.

transfer of the Reno Homestead to nearby Miami Dade College instead of the University of Miami. We affirm the final judgment authorizing that transfer.

I. Issues and Procedural History

The Appellant contends that the Successor Trustee must sell the Reno Homestead pursuant to Article V of the Trust, a duty allegedly triggered by the fact that each of Ms. Reno's brothers, Mark W. Reno and Robert M. Reno ("the Brothers") predeceased Ms. Reno.

The Successor Trustee and the five other appellees contend, and the trial court found, that a provision within Article VI of the Trust specifically controls the charitable transfer of the Reno Homestead because the Trust "still owned" the Reno Homestead at the date of Ms. Reno's death. Our task on review is made considerably easier by the professionalism of counsel for the parties. Counsel stipulated in the trial court proceeding that the trust language is unambiguous and the parties' differing textual readings could be decided on the papers presented to the trial court.[2]

The trial court agreed with the parties that the Trust terms were unambiguous, and agreed with the Successor Trustee that Article VI.C. of the Trust was controlling because the Reno Homestead was "still owned by the Trust" at the date of Ms.

[2] Each side also addressed the possibility that the trial court might disagree with their stipulation, in which event each side contended that any ambiguity had to be resolved in that side's favor. The trial court agreed with the stipulation that the applicable Trust provisions were not ambiguous, and we concur with that conclusion.

Reno's death. When the University of Miami advised the Successor Trustee of its inability to accept the gift and the attendant conditions (preservation "in perpetuity" of the Reno Homestead and its unique character and history), the Successor Trustee sought authorization to effectuate the charitable transfer and its conditions with another non-profit charitable and educational institution, Miami Dade College.

The trial court found, and the Appellant does not dispute, that Miami Dade College[3] is prepared to accept the conditions in the "Real Estate Transfer and Preservation Agreement" required to effectuate the charitable gift and Ms. Reno's intentions evidenced by the language of Article VI of the Trust. The trial court then determined "that a substitution of Miami Dade College for the University of Miami under [these] circumstances is authorized by Florida Statute §736.0413 entitled 'Cy pres,'" as sought by the Successor Trustee. This appeal followed.

II. Analysis

A trial court's interpretation of the text of a last will and testament or trust instrument is reviewed de novo. See SPCA Wildlife Care Ctr. v. Abraham, 75 So. 3d 1271, 1275 (Fla. 4th DCA 2011); Timmons v. Ingrahm, 36 So. 3d 861, 864 (Fla. 5th DCA 2010).

The applicable and controlling terms of the Trust are:

[3] Miami Dade College's Kendall Campus is actually about one-quarter of a mile away from the Reno Homestead, while the University of Miami is based several miles away in Coral Gables, Florida.

Revocability. The Trust is a revocable trust, in which Ms. Reno was initially both Settlor and Trustee. This left Ms. Reno with unfettered discretion during her lifetime to revoke, carry out, not carry out, or modify terms of the Trust pertaining to the Reno Homestead, including Article V. The Successor Trustee was not appointed until after her death, at which point the Trust was irrevocable and Article VI controlled the disposition of the Reno Homestead.

Article III specifies that the rights of the contingent beneficiaries—a term which includes the Appellant—"are subject to the provisions of this Trust relating to survivorship of Settlor, rights of invasion of principal for the benefit of the Settlor and other provisions." These provisions take on special significance during the period between November 19, 2014 (when Mark W. Reno passed away, two years after his brother Robert M. Reno died) and November 7, 2016, when Ms. Reno passed away.

During that interval, Ms. Reno retained the power, but not any obligation enforceable by the Appellant, to sell the Reno Homestead and distribute the proceeds to her nephews and nieces, including the Appellant, under Article V.D.:

> Upon the death of MARK and ROBERT, in the event the homestead is still owned by the Trust, such property shall be sold and the proceeds of the sale . . . shall be distributed to Settlor's nephews and nieces, share and share alike, free of any Trust.

Because of the revocable nature of the Trust and the provisions of Article III, the rights of the Appellant and her cousins under Article V were subject to the Settlor's powers to retain the property, or to mortgage or sell it for her own needs.

Disclaimer re Inconsistency.

Article V.D. of the Trust also contains a provision that underscores the harmonization of Article V.D. and Article VI (entitled "Provisions Relating to the Homestead"): "This provision relating to the direction of the Trustee to sell the homestead shall not be deemed inconsistent with the provisions set forth in Article VI hereof."

The disclaimer provides guidance for the circumstance that ultimately arose: the Trustee (Ms. Reno, until her own death) did not sell the Reno Homestead after the death of the Brothers, and so the Trust still owned the property when Ms. Reno passed away in 2016. Article VI is devoted exclusively to the homestead and provides in pertinent part:

> A. The homestead is a **unique parcel** of real estate and has **historical importance**.
>
> B. Settlor, as Trustee, and any Successor Trustee, shall have the authority to place a reverse mortgage upon the homestead. The proceeds of such mortgage shall be held by the Trustee as part of the corpus of the Trust and administered in accordance with the provisions of the Trust.
>
> C. Upon the death of Settlor, **in the event the homestead is still owned by the Trust,** the Trustee shall offer to gift the homestead to the University of Miami upon such terms and conditions as the Trustee

> deems appropriate and in the best interest of the Trust, which terms and conditions shall include [preservation and maintenance in perpetuity, for uses that do not destroy the homestead or its unique character, and assumption by the University of any mortgage or other lien upon the homestead.]

(Emphasis provided).

From this array of provisions and the corresponding provisions in Ms. Reno's last will and testament,[4] the following conclusions follow ineluctably:

1. Ms. Reno sought to preserve, in perpetuity and for charitable and educational purposes, the Reno Homestead.

2. She also recognized that she might need to mortgage or sell the Reno Homestead to raise funds for her own needs or those of her siblings. This flexibility was attained through her own designation as the Trustee of a revocable trust and specific authorizations applicable during her life and the life of the Brothers. In making these arrangements, she expressly subordinated the rights of the "contingent beneficiaries" or "remaindermen" to her own discretion and the provisions of Article VI relating exclusively to the Reno Homestead.

3. Because her death occurred at a time when (a) "the homestead is still owned by the Trust," and (b) the Brothers had predeceased her, she could not be aware that the administrators at the University of Miami would decline her charitable

[4] Language nearly identical to that in the Trust was included in the Will, to become applicable if the Trust was no longer in existence or could not receive additional property.

gift. This is precisely the kind of circumstance in which the cy pres statute and doctrine are applicable. Section 736.0413, Florida Statutes (2018), quoted in full in note 1 of this opinion, codified this long-standing doctrine in 2006.

Seventy years ago, the Florida Supreme Court explained cy pres: "Roughly speaking, it is the principle that equity will make specific a general charitable intent of a settlor, and will, when an original specific intent becomes impossible or impracticable of fulfillment, **substitute another plan of administration which is believed to approach the original scheme as closely as possible**." Christian Herald Ass'n v. First Nat'l Bank of Tampa, 40 So. 2d 563, 568 (Fla. 1949) (citation omitted, emphasis provided). Ordinarily, the cy pres doctrine is applied "where the named beneficiary is a corporation or institution that has ceased to exist at the time of the testator's death." SPCA Wildlife Care Ctr., 75 So. 3d at 1276.

In the present case, the specified charitable donee had not "ceased to exist" when Ms. Reno passed away, but the statute's use of the terms "impracticable" or "impossible to achieve" addresses the Successor Trustee's alternative. The University of Miami's declination to accept the charitable transfer made the original disposition impossible to achieve. But the Successor Trustee identified an even-closer charitable, educational institution to accept the gift and to comply fully with Ms. Reno's conditions "in perpetuity," respecting the "unique character" and "historical importance" of the Reno Homestead.

Article VII of the Trust, "Trustee's Powers," specified in section A that in administering the Trust, "the Trustee shall have all powers granted a trustee by the Statutes of the State of Florida and laws of Florida . . . ." One such statutory power is that conferred by the cy pres statute, section 736.0413, invoked by the Successor Trustee in this case.

III. Conclusion

The trial court correctly determined that (a) Article VI of the Trust governed the disposition of the Reno Homestead following her death, as the property was still owned by the Trust, and (b) the Successor Trustee's proposed alternative charitable disposition is "consistent with the settlor's charitable purposes," after the originally-proposed charitable gift became impracticable or impossible to achieve.

For all these reasons, the final judgment authorizing the Successor Trustee's disposition to Miami Dade College is affirmed.