

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DREKA ANDREWS,)
)
 Petitioner,)
)
 vs.) Case No. 01-1185
)
 DEPARTMENT OF BANKING AND)
 FINANCE,)
)
 Respondent,)
)
 and)
)
 ESTATE OF FLORA KENISTON,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tampa, Florida, on May 15, 2001.

APPEARANCES

For Petitioner: Denise Douglas
Qualified Representative
2616 Jetton Avenue
Tampa, Florida 33629

For Respondent: Staci A. Bienvenu
Assistant General Counsel
Department of Banking and Finance
Suite 526, Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0350

For Intervenor: no appearance

STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to the previously unclaimed property held by Respondent in the form of cash realized from the sale of 24 shares of AT&T.

PRELIMINARY STATEMENT

By Notice of Intent dated February 27, 2001, Respondent stated that it intended to issue a final order awarding certain unclaimed property to Intervenor, not Respondent. Petitioner timely requested a hearing.

On April 13, 2001, Intervenor filed a Motion to Intervene, which the Administrative Law Judge granted by order entered April 16, 2001.

After successfully opposing Respondent's motion to continue the final hearing, Intervenor filed a Motion for Permission to Appear Telephonically on May 11, 2001. By order entered the same day, the Administrative Law Judge denied the motion, explaining that the hearing room did not have a telephone and inadequate time remained to change the location of the hearing, which was scheduled to start in four days.

At the hearing, Petitioner called no witnesses and offered into evidence no exhibits. Respondent called two witnesses and offered into evidence one exhibit, which was admitted. The sole exhibit is a copy of Respondent's file.

The parties did not order a transcript.

FINDINGS OF FACT

1. Originally residents of New Hampshire, the now-deceased Flora and William Keniston vacationed annually in Tampa. During their visits, they became good friends with Herman Ortmann. At some point, Mr. Ortmann suggested to Mr. and Mrs. Keniston that they share his home with him--rent-free--during their annual September-to-April stay in Florida. The Kenistons accepted his suggestion and, for five or six winters, occupied Mr. Ortmann's home, which is located at 3102 Paul Avenue.

2. Mr. Ortmann died on March 8, 1966. In his will, Mr. Ortmann left five dollars to his son and the residue of his estate to Petitioner, who was his cousin. On December 19, 1966, Petitioner, as executrix of Mr. Ortmann's estate, conveyed all interest in the Paul Avenue property to Mr. Keniston for \$5500. On the same date, Mr. Keniston conveyed the fee simple interest in the Paul Avenue property, subject to a life estate in himself, to Petitioner and her husband.

3. After the sale of the Paul Avenue property, Petitioner helped the Kenistons, who did not have a car, with many chores, such as taking them to buy groceries, attend church, and get hair cuts. On November 15, 1975, Mr. Keniston died.

4. Following Mr. Keniston's death, Petitioner helped Mrs. Keniston, who no longer had a legal interest in the Paul Avenue property, find a new residence in a home shared by

several unrelated adults of similar age. Petitioner testified that Mrs. Keniston lived several years in this home; however, her death certificate states that she died on October 4, 1976-- less than one year after the death of her husband. By operation of law, Petitioner and her husband acquired the fee simple interest in the Paul Avenue residence upon Mr. Keniston's death, and Petitioner remains in the house today.

5. When Mrs. Keniston moved from the Paul Avenue property, she handed Petitioner two certificates evidencing ownership of 12 shares, each, in American Telephone and Telegraph Company (ATT). Mrs. Keniston instructed Petitioner to use these stock certificates to pay for Mrs. Keniston's funeral and "keep the rest." However, Mrs. Keniston, who was the sole registered owner of both certificates, never executed any instrument transferring an interest in these certificates to Petitioner. After delivering the certificates to Petitioner, Mrs. Keniston continued to receive and cash her monthly dividend checks of approximately \$28.

6. After Mrs. Keniston's death, Petitioner bought her a casket and paid for the funeral, at a total cost of about \$3000. Petitioner retained the original stock certificates, but, after obtaining legal advice, determined that she could not sell the certificates due to the absence of an assignment. Petitioner did not file a claim against the estate of

Mrs. Keniston for reimbursement of the \$3000, and Petitioner has not otherwise been reimbursed for these expenses. Petitioner has retained the original stock certificates.

7. At some point, ATT transferred either the stock--presumably by replacement stock certificates--or its cash equivalent to Respondent as unclaimed property; the value of the property at the time of the transfer was \$1154.70. If ATT transferred the stock to Respondent, Respondent has since sold it. Either way, Respondent maintains the cash derived from the sale of the ATT stock in a noninterest-bearing account. Due to periodic payments received since its transfer to Respondent--probably dividend payments earned prior to Respondent's sale of the stock--the current value of the account is \$3081.04 (Account).

8. Mrs. Keniston died intestate. By Order of Summary Administration entered May 24, 2000, the Hillsborough County Circuit Court, Probate Division, ordered an immediate distribution among four persons of Mrs. Keniston's assets, which consist of the Account. The order states that all interested persons were served with notice of the hearing or waived notice of the hearing, even though neither Petitioner nor Respondent seems to have received notice of the hearing. The order acknowledges that Respondent holds the Account and authorizes

persons holding any property of the decedent to transfer it, pursuant to the order.

9. On June 16, 2000, the representative of the four heirs named in the probate order filed with Respondent a claim of ownership of the Account. On June 1, 2000, Petitioner filed with Respondent a claim of ownership of the Account. Determining that Mrs. Keniston was the actual owner of the Account, Respondent concluded that her four heirs were entitled to the Account.

10. On May 8, 2001, Respondent filed with the probate court a Motion to Vacate Order and Reopen Summary Administration. The probate court had not taken any additional action by the time of the final hearing in this case.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter. Sections 120.57(1) and 717.126, Florida Statutes. (All references to Sections are to Florida Statutes.)

12. Section 717.124 authorizes persons claiming an interest in unclaimed property to file a claim with Respondent for the property. Section 717.126 provides that the burden of proof is on the claimant to prove his entitlement to the property by a preponderance of the evidence.

13. Section 717.1242 provides:

(1) It is and has been the intent of the Legislature that, pursuant to s. 26.012(2)(b), circuit courts have jurisdiction of proceedings relating to the settlement of the estates of decedents and other jurisdiction usually pertaining to courts of probate. It is and has been the intent of the Legislature that, pursuant to s. 717.124, the department determines the merits of claims for property paid or delivered to the department under this chapter. Consistent with this legislative intent, any estate or heir of an estate seeking to obtain property paid or delivered to the department under this chapter must file a claim with the department as provided in s. 717.124.

(2) Should any estate or heir of an estate seek to obtain or obtain an order from a circuit court sitting in probate directing the department to pay or deliver to any person property paid or delivered to the department under this chapter, the estate or heir may be ordered to pay the department reasonable costs and attorney's fees in any proceeding brought by the department to oppose, appeal, or collaterally attack the order.

14. Section 717.1242 vests exclusive jurisdiction in Respondent, as opposed to circuit court, to determine the ownership of property that has been transferred to Respondent. Any ambiguity left after the first two sentences of Section 717.1242(1) is dispelled by the third sentence of Section 717.1242(1), which directs "heirs" and "estates" to take their claims to Respondent for unclaimed property in its custody, and Section 717.1242(2), which provides Respondent with specific

relief if it must participate in the circuit court action to oppose a probate order awarding unclaimed property.

15. Petitioner's claim to the Account arises out of the circumstances surrounding the transfer of the stock certificates prior to Mrs. Keniston's death. Clearly, Mrs. Keniston did not intend a present, unconditional transfer when she gave the certificates to Petitioner; otherwise, she would not have continued to receive the dividends derived from the shares. The conditions attached to the transfer were that Petitioner should pay for Mrs. Keniston's funeral expenses and then use the value of the stock to pay these expenses, keeping anything remaining after these expenses were paid.

16. By agreement, after paying Mrs. Keniston's funeral expenses, Petitioner would occupy two roles as to the stock. She would be a secured creditor, to the extent of the funeral expenses, and she would be an owner, to the extent of any remainder. The small difference between the value of the Account and the cost of the funeral characterizes nearly all of Petitioner's claim as that of a creditor.

17. Section 732.701(1) requires a written agreement, witnessed by two persons, for a person to enter an enforceable, binding agreement to make a will or give a devise.

18. Section 733.710(1) limits the liability of a personal representative or beneficiary to a creditor of the decedent to

two years after the decedent's death. Section 733.710(3) provides that Section 733.710(1) does not apply to "the lien of any person in possession of personal property."

19. Section 733.702(1) requires that no claim for "funeral or burial expenses" is binding on the estate, personal representative, or beneficiary, unless filed within three months after the first publication of the notice of administration or, as to any creditor required to be served, 30 days after the date of service of notice to the creditor. Section 733.702(3) bars all claims not timely filed, unless the court extends the filing period, and the court may do so for "fraud, estoppel, or insufficient notice of the claims period."

20. Section 733.212(4)(a) requires that a personal representative "shall promptly make a diligent search to determine the names and addresses of creditors" and serve on them a copy of the notice of administration.

21. This case presents an clear jurisdictional issue. If the asset were within the jurisdiction of the probate court, Petitioner's claim would be subject to examination under the statutes described above. The small, residual portion of her claim as an owner of \$81.04 would fail under the statute prohibiting unwritten contracts to make devises. The larger portion of her claim as a creditor in the amount of \$3000 would fail unless the probate court exercised its discretion to

enlarge the period for Petitioner to file a claim, Petitioner timely filed a claim, and the court ordered that the claim be paid.

22. However, the asset is not in the jurisdiction of the probate court; it is in the jurisdiction of Respondent. And the Legislature has clearly reserved to Respondent the disposition decision. The statutes governing probate provide a carefully considered framework for resolving this matter, but application of them in this case would defeat the legislative division of responsibilities between the courts and Respondent. The Legislature did not intend that Respondent determine ownership of unclaimed property using, when applicable, the principles governing probate, but that Respondent make this determination based on its own principles.

23. Without regard to probate law, Petitioner is entitled to the Account as the equitable owner. Mrs. Keniston gave Petitioner the stock to pay for funeral expenses, with Petitioner keeping any residue. Respondent should therefore deliver the Account to Petitioner.

24. Respondent and Intervenor have each sought sanctions against the other. Intervenor filed the first such motion on May 29, 2001, primarily due to Respondent's handling of the case. Respondent filed the second such motion on June 4, 2001,

primarily due to the first motion. The Administrative Law Judge denies both motions.

RECOMMENDATION

It is

RECOMMENDED that the Department of Banking and Finance enter a final order awarding the Account to Petitioner.

DONE AND ENTERED this 14th day of June, 2001, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of June, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.