IN THE SUPREME COURT OF FLORIDA
Case No. 65,296

Third District Court of Appeal
Case No. 83-465

IN RE: ESTATE OF RALPH JAMES EDSELL, JR.

Deceased.

LISA EVERED and JOHN E. EDSELL, as
Co-Personal Representatives,

Petitioners,

v.

MARY JUNE EDSELL,

Respondent.

PETITIONERS' BRIEF ON JURISDICTION

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PETITIONERS' BRIEF ON JURISDICTION

This brief is submitted by Petitioners, Lisa Evered and John E. Edsell, as co-personal representatives, pursuant to Fla.R.App.P. 9.120(d), in support of their petition seeking to invoke the discretionary jurisdiction of this Court pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv).

PROCEDURAL HISTORY

This action was tried before Judge Helio Gomez in Key West on January 3, 1983. At the conclusion of the Wife's case,* Judge Gomez granted the Estate's motion for a directed verdict. An extensive Final Judgment, containing factual findings and legal conclusions, was entered on January 17, 1983. (App. A).

By opinion filed November 8, 1983 (App. B), the Third District Court of Appeal reversed Judge Gomez' final judgment, and remanded the case for a new trial. By opinion filed April 10, 1984 (App. C), the Third District denied the Estate's motion for rehearing.

On May 9, 1984, the Estate filed its Notice of Appeal with the Third District, pursuant to Fla. R.App.P. 9.120(b).

This Court's jurisdiction is invoked on the basis that the decision of the Third District expressly and directly conflicts with a decision of the Second District Court of Appeal, and also with a decision of this Court, on the same question of law.

BASIS OF JURISDICTION

A. Nature of the conflict

This case involves the enforceability of an antenuptial contract in a probate setting. Mary June

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* Mary June Edsell, the respondent here, was the petitioner in the trial court. She will be referred to in this brief as "the Wife." The petitioners will be referred to jointly as "the Estate."

Edsell, the surviving spouse, filed a petition in the Estate proceeding, seeking a pretermitted spouse's share pursuant to §732.301, Fla. Stat. (1983). The Estate's response admitted that the decedent's will was executed prior to the marriage of the parties and did not make any provision for the Wife, but raised as an affirmative defense an antenuptial agreement between the parties by which each spouse waived any right in the estate of the other. The Wife's reply admitted the execution of the agreement, but alleged that the agreement was void because of "unfairness" and "overreaching" on the part of the husband. Thus, the validity of the antenuptial agreement was the issue to be tried.

At trial, Judge Gomez granted the Estate's motion for a directed verdict at the conclusion of the Wife's case. As set forth in the Final Judgment, Judge Gomez' ruling was based on two independent grounds: First, that in a probate case the defenses of "unfairness" and "overreaching," developed in dissolution cases such as Lutgert v. Lutgert, 338 So.2d 1111 (Fla. 2d DCA 1976) are not available because of the effect of §732.702, Fla. Stat. (1983); and Second, even if Lutgert did apply, the wife had failed to adduce sufficient facts to support any claim of unfairness or overreaching.

On appeal, the Third District reversed. In its opinion, the Court explicitly relied on the Lutgert presumption of undue influence or overreaching which "places

on the husband the burden of coming forth with evidence showing that the wife's execution of the agreement was voluntary." (8 FLW at 2674; App. B-4). Because the Third District found that, under the Lutgert standard, the wife had adduced sufficient facts to raise the presumption of overreaching, the Court reversed and remanded for a new trial.

In applying Lutgert in a probate setting,* the Third District was in direct conflict with the Second District's opinion in Ellis First National Bank of West Pasco v. Downing, 443 So.2d 337 (Fla. 2d DCA 1983) ("Downing"). In Downing, the Second District (which also decided Lutgert) reversed a trial court judgment which had set aside an antenuptial agreement in a probate context. The basis of the reversal by the Second District was that "the trial court erred in relying on Lutgert v. Lutgert,

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* In its initial opinion, the Third District stated that "[t]he parties agree that the Lutgert standard is applicable." (Edsell, 8 FLW at 2674; App. B-3.) This is wrong. As Judge Ferguson pointed out in his dissent from the order denying rehearing:

> On rehearing appellees contend that, contrary to the statement in this Court's original opinion, they have never agreed that the rule from Lutgert v. Lutgert, 338 So.2d 1111 (Fla. 2d DCA 1976) controls this case. They are correct. (9 FLW at 875; App. C-2).

In any event, the opinion of the Third District expressly applies Lutgert and in so doing creates a direct conflict with the cases cited in this brief.

which deals solely with an antenuptial agreement in the context of a dissolution of marriage action. Weintraub v. Weintraub, 417 So.2d 629 (Fla. 1982)." (443 So.2d at 338).

The conflict could not be more patent: the Third District applied Lutgert to a probate case; the Second District held that Lutgert could not be applied to a probate case.* We agree fully with Judge Ferguson's dissent: "The majority opinion herein squarely conflicts with Downing." (9 FLW 875; App. C-3).

In applying Lutgert, and in particular by applying the Lutgert presumption of overreaching, the Third District also created direct conflict with this Court's decision in Estate of Roberts, 388 So.2d 216 (Fla. 1980). The presumption applied by the Court here "places on the husband the burden of coming forth with evidence showing that the wife's execution of the agreement was voluntary." (8 FLW at 2674; App. B-4). Roberts, however, allows a wife to attack an antenuptial agreement in a probate setting only if she is "able to show that her signature on such an agreement had been coerced or otherwise improperly obtained or that she was incompetent at the time she signed ...."

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* Because the facial conflict on this legal issue is so apparent, we will not dwell on the startling factual similarities between the two cases. It is sufficient to say that the cases are factually indistinguishable. Thus, the different results occurred solely because of the disagreement over the application of Lutgert.

(388 So.2d at 217). Under Roberts, that is, the burden is on the wife, and the burden is to demonstrate coercion; under the Third District's opinion here, the burden is on the Estate, and the issue is overreaching, rather than coercion. In shifting the burden of persuasion to a deceased party, and in redefining the issue involved, the Third District's opinion is in conflict with Roberts and, as discussed below, with the settled law of this State.

B. Reasons for invoking discretionary jurisdiction

In adopting §732.702, the Legislature has determined that antenuptial agreements are to be favored in the probate context. As stated by Judge Ferguson in his dissent:

> The legislature apparently intended that a spouse seeking to overturn such an agreement after the death of the other spouse carry a heavy burden in proving the invalidity of the agreement. (9 FLW at 875; App. C-3).

This Court and others have recognized that there are sound policy reasons for placing different burdens on those attacking antenuptial agreements in the probate context, as opposed to the dissolution context. In Weintraub v. Weintraub, 417 So.2d 629 (Fla. 1982), for instance, this Court stated that §732.702 "makes valid all agreements entered into before marriage, even in the absence of disclosure," (417 So.2d at 630), and approved of this blanket validation because of "the difficulty that the

estate might encounter in proving disclosure after the death of the wealthy spouse." (Id. at 631). Similarly, the Third District itself has noted that antenuptial agreements should generally be upheld in the probate context "particularly in view of the fact that generally, as in this case, the complaining wife awaits until death has sealed the lips of her husband before she makes an attack on the agreement." Cantor v. Palmer, 166 So.2d 466, 468 (Fla 3d DCA 1964), cert. denied 168 So.2d 144; see also Potter v. Collin, 321 So.2d 128, 132 n. 5 (Fla. 4th DCA, 1975), cert. denied 336 So.2d 1180 (1976). In his dissent, Judge Ferguson approved of the different approaches in the two contexts, stating:

> The policy reasons are obvious. In most cases the only witness to circumstances surrounding execution of the antenuptial agreement is the other party whose lips are sealed by death. (9 FLW at 875; App. C-2).

The decision here, far from placing a "heavy burden" on the surviving spouse, actually shifts the burden of persuasion to the Estate. Such a result is not only in conflict with Downing and Roberts; it is in conflict with fundamental concepts of due process of law.

In addition to the issue of fairness raised by these authorities, there are other sound policy reasons for favoring antenuptial contracts. Florida is a mecca for senior citizens. Often, as here, two mature adults, with

children born of prior marriages and assets accumulated in earlier years, meet in Florida and marry. It is no reflection on their love and affection for each other that they want to maintain their separate assets for the benefit of their separate families after their deaths. The antenuptial agreement makes this possible, and in so doing removes what might otherwise be an obstacle to such marriages. The Legislature and courts of this State have determined, as a matter of public policy, that such agreements are to be encouraged:

> Antenuptial or so-called "marriage settlement" contracts by which the parties agree upon and fix the property rights which either spouse will have in the estate of the other upon his or her death have, however, long been recognized as being conducive to marital tranquility and thus in harmony with public policy. (Posner v. Posner, 233 So.2d 381, at 383 (Fla. 1970)).

Now, the decision of the Third District puts such agreements at risk. The decision -- if allowed to stand -- will encourage bitter litigation between surviving spouses and the natural heirs of deceased citizens. In so doing, it will create uncertainty about the effectuality of such agreements, and so discourage marital and family harmony. Such a result conflicts with the settled public policy of this State. If such a change is to be judicially made, it should be made by this Court.

CONCLUSION

Certiorari should be granted, and the decision below should be reversed.

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