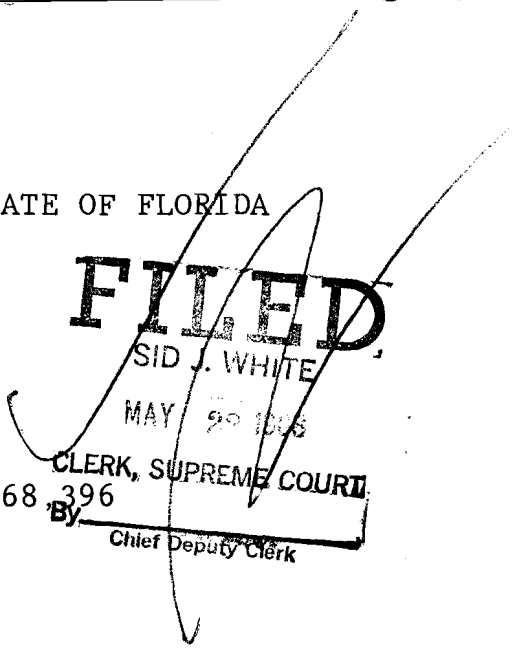
IN THE SUPREME COURT OF THE STATE OF FLORIDA



WILLIAM MARKHAM, Etc., et al.,

Petitioners,

vs. CASE NO. 68,396

EVANGELICAL COVENANT CHURCH OF AMERICA, et. al.,

Respondents. /

On Discretionary Review to the Fourth District Court of Appeal, Case No. 85-974

REPLY BRIEF OF PETITIONERS, DEPARTMENT OF REVENUE & WILLIAM MARKHAM

JIM SMITH
ATTORNEY GENERAL

J. TERRELL WILLIAMS
ASSISTANT ATTORNEY GENERAL
TAX SECTION, CAPITOL BLDG.
TALLAHASSEE, FL 32301
904/487-2142

COUNSEL FOR PETITIONER
DEPARTMENT OF REVENUE

GAYLORD A. WOOD, JR.
ATTORNEY AT LAW
304 S.W. 12TH ST.
FT. LAUDERDALE, FL 33315
305/463-4040

COUNSEL FOR PETITIONER
WILLIAM MARKHAM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The Petitioner, RANDY MILLER, as Executive Director of the Florida Department of Revenue, will be referred to as the "Department." The Petitioner, WILLIAM MARKHAM, as Property Appraiser of Broward County, Florida, will be referred to as the "Property Appraiser." The Respondents, THE EVANGELICAL COVENANT CHURCH OF AMERICA and COVENANT VILLAGE OF FLORIDA, INC., will be referred to collectively as the "Taxpayers."

The term "trial court" will be used to refer to the Honorable J. Cail Lee of the Seventeenth Judicial Circuit, in and for Broward County, Florida. The term "District Court" will be used to refer to the Fourth District Court of Appeal of Florida.

ARGUMENT

THE PROVISIONS OF §196.1975(4), (5) AND (6), FLA. STAT., ESTABLISHING MAXIMUM INCOME LIMITATIONS OF RESIDENTS OF OLD AGE HOMES AS ADDITIONAL CRITERIA FOR GRANTING AD VALOREM TAX EXEMPTION FOR CHARITABLE USE OF THE PROPERTY ARE NOT UNCONSTITUTIONAL ON THEIR FACE.

The Taxpayers commence the argument in their answer brief by apparently chiding the Department for placing greater reliance in its inital brief to this Court on the statutory provisions of subsection 196.012(6), Fla. Stat., defining the term "charitable purpose." In response to this observation on the part of the Taxpayers, the Department says:

1. That the Department did place substantial reliance below on the related provisions of §196.012(6) as reflected by its discussion of said statutory provisions on pages 11-12 and 15-16 of its answer brief filed with the District Court.

2. The Department is not aware of any appellate law that would require the parties in a proceeding where this Court has exercised its discretionary jurisdiction to review a decision of a district court to submit briefs to this Court that are basically identical to the briefs submitted in the District Court. To the contrary, this Court has repeatedly held that once it has exercised its discretionary jurisdiction, the Court has full appellate jurisdiction over the entire case as if the case had originally come to this Court directly on appeal. See,

Savoie v. State, 422 So.2d 308, 312 (Fla. 1982); and Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961). If briefs submitted to this Court in discretionary proceedings are prohibited from presenting a different focus or emphasis than was presented in the district courts, then the requirement of new briefs at the Supreme Court level would be redundant and meaningless!

The Taxpayers expend considerable time and effort in their answer brief discussing the historical development of the amendment to Art. VII, §3(a) of the Florida Constitution wherein the 1968 Revision changed the exemption test for use of educational, literary, scientific, religious or charitable property from "exclusive" to "predominant" use. However, the Department respectfully submits that the question of whether the subject property was "exclusively" or "predominantly" used for charitable purposes has never been an issue on appeal.

It has been undisputed at the appellate level that the exclusive use of all of the subject property has been the same, i.e., as a home for the aged. The issue before this Court is whether the undisputed exclusive use of the property as a home for the aged in noncompliance with the income limitation provisions of §196.1975, Fla. Stat., entitles the property to exemption from ad valorem tax on "charitable" grounds on the basis of the alleged unconstitutionality of the "income test" set forth in said §196.1975. Thus, a discussion of the "exclusive"

versus "predominant" use test for exemption of property on charitable grounds is totally immaterial to the disposition of this case.

Indicative of the Taxpayers' misplaced reliance on the immaterial "exclusive" versus "predominant" use test for exemption from taxation of property on "charitable purpose" grounds are the decisions of this Court cited on page 13 of the answer brief. The Department submits that none of these cases are controlling on the issue now before this Court, since all of these decisions were rendered prior to the year 1971. In the year 1971, the Legislature enacted the critical statutory provisions expressly defining the term "charitable purpose" for ad valorem tax exemption [§196.012(6), Fla. Stat. (1971)] and the related provisions of §196.197, Fla. Stat. (1971), setting forth an "income limitation" test as an additional requirement for exempting homes for the aged from ad valorem taxation on "charitable use" grounds.

The Department finds it interesting (and obviously self-serving) that the Taxpayers attempt to discredit the Florida Legislature's patent effort in 1976 to codify in statutory language its position that the mere old age of occupants of a facility is an insufficient basis for granting ad valorem tax exemption to such property, while placing great emphasis on a contra position in a 1965 report of the White House Conference on International Cooperation! Are the Taxpayers suggesting that

there is some doctrine of "federal preemption" as to policy questions underlying the determination of what real property in this state is entitled to the special benefit of exemption from state and local taxation?

The portion of the report of the White House Conference on International Cooperation was obviously cited in the Taxpayers' brief because it was referred to in a footnote to the majority opinion of this Court in the case of Jasper v. Mease Manor, Inc., 208 So.2d 821, 826 (Fla. 1968). The Department would note, however, that the decision of this Court in the Mease Manor case upholding the constitutionality of the former provisions of §192.06(14), Fla. Stat. (1965), allowing an exemption on charitable purpose grounds of old age homes (even though the residents were not required by the statute to be financial dependent) was issued by a sharply divided Court, with three Justices dissenting. Furthermore, two of the Justices in the Mease Manor case (White and Caldwell) joined in a dissenting opinion concluding that:

> The construction placed on the term "aged" used in statute 192.06(14) as extending to those "who are at least 62 years old or whose resident spouse meets the requirement," without regard to financial need, or physical or mental infirmity or state of senility resulting from advance age makes the statute unconstitutional as being outside the purview of the phrase "charitable purpose" as used in the Constitution. (e.s.)

Obviously in 1968 when the Mease Manor opinion was rendered, this Court did not have available any express intent of the Florida Legislature concerning its findings and conclusions as to the insufficiency of old age of residents alone to warrant ad valorem tax exemption on "charitable purpose" grounds to property as set forth in the current provisions of §196.1975. It is difficult to perceive the propriety of a State Supreme Court rendering a state statute unconstitutional by disregarding the express conclusions of the State Legislature on a critical issue and adopting a contrary position set forth in a report commissioned by the federal government not even directly related to property taxation!

The Taxpayers conclude their answer brief by suggesting that the "income test" set forth in §196.1975 is violative of the Equal Protection Clauses of the Federal and State Constitution. The primary authority cited by the taxpayers in support of their Equal Protection claim, is the dissenting opinion of Justice Roberts in Presbyterian Homes v. City of Bradenton, 190 So.2d 771 (Fla. 1966). The Department respectfully submits that (notwithstanding the conclusion of Justice Roberts in his dissenting opinion in the City of Bradenton case, supra), there are clearly material and viable distinctions that would justify an income limitation provision for home for the aged operated by a religious organization as opposed to a college or hospital owned and operated by a religious organization.

The suggestion of possible discrimination by limiting an "income test" to residents of homes for the aged apparently ignores the critical fact that a "charitable purpose" use is only one of five designated uses specified in the constitutional provisions of Art. VII, §3(a) and the implementing statutory provisions of §196.196(2), Fla. Stat., providing that property may be exempted from ad valorem taxation if the property is ". . . used predominantly for educational, literary, scientific, religious or charitable purposes. . . ." (e.s.). Thus, a college operated by a church would be entitled to an exemption from ad valorem taxation on the grounds of an "educational purpose" use under Florida law if it meets the accreditation requirements of an "educational institution" set forth in §196.012(4), Fla. Stat., irrespective of any "charitable" or "religious" use considerations.

Furthermore, this dissenting opinion of Justice Roberts in Presbyterian Homes v. City of Bradenton, supra, regrettably confuses the obvious material distinction between a "charitable" purpose use and a "religious" use as applied to homes for the aged. In the City of Bradenton case, the old aged home had applied for exemption on both "religious" and "charitable" grounds. This failure to acknowledge the separate bases for exemption and the distinctly different rationale underlying tax exemption on "religious" or "charitable" grounds is also evident

in the case of Presbyterian Homes of Synod v. Wood, 297 So.2d 556 (Fla. 1974), where the two terms were used almost interchangeably throughout this opinion.

In this proceeding, the Taxpayers have never claimed they were entitled to tax exemption on the grounds that the property was being used for "religious" purposes. The "charitable" use of the subject property has always been the sole purported basis for exemption. The Department would concede that there would appear to be substantial Equal Protection concerns if an application for exemption by a home for the aged was based on use of the property for "religious" purposes and the exemption was denied solely due to the income limitation provisions of §196.1975.

With respect to the Taxpayers' Equal Protection contention, the Department would also point out that the income limitation provisions of §196.1975 placing focus on the income of the occupants of the facility as a primary factor in determining entitlement for tax exemption on "charitable" purpose grounds is not a concept unique to the provisions of §196.1975. In the comparable provisions of §212.08(7)(a)2b., Fla. Stat., the financial needs and income of the persons to whom services are provided is also a primary criteria in determining whether a facility is a "charitable" institution for purposes of exemption from excise taxation.

The plain language of the provisions of §196.012(6), and §196.1975, and the comparable excise tax provisions of §212.08(7) clearly make the income available to residents of any facility seeking "charitable" purpose tax exemption a primary criteria in determining the eligibility of the property for such exemption. Consequently, the Department submits that the real issue is not whether any "income test" is constitutionally permissible,but whether the income limitation provisions currently embodied in §196.1975 meet the constitutional test for reasonableness. The Taxpayers have never claimed that the statutory income limitation figures are unreasonably low, but have contended that any "income test" is unconstitutional on its face.

CONCLUSION

The holding of this Court in Presbyterian Homes v. Wood, supra, was based on a judicial policy decision that the criteria of old age of residents was sufficient of itself to entitle a home for the aged to tax exemption on "charitable" purpose grounds, notwithstanding the financial ability or inability of the residents of such facilities to pay for the services. This judicial policy decision enunciated in 1974 was expressly repudiated by the Florida Legislature in 1976 pursuant to the enactment of the current provisions of §196.1975.

The subsequent policy decision of the Legislature embodied in the current statutory provisions of §196.1975 should be upheld by this Court, even though the Court may disagree with the soundness of the wisdom underlying the Legislature's statutory position that the incomes and corresponding ability of the residents to pay for the services rendered is the primary criteria in granting tax exemption to homes for the aged on the basis of "charitable purpose" use.

Finally, the imposition of reasonable income limitations of residents of old aged homes as an additional criteria for

granting tax exemption on "charitable" grounds is not invidiously discriminatory and does not violate the Equal Protection Clauses of the Federal or State Constitutions.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

J. Terrell Williams

Gaylord A. Wood, Jr., Esq.
Attorney at Law
304 S.W. 12th St.
Ft. Lauderdale, FL 33315
305/463-4040

J. Terrell Williams
Assistant Attorney General
Tax Section, Capitol Bldg.
Tallahassee, FL 32301
904/487-2142

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioners has been furnished by mail to GERALD L. KNIGHT, Esq., 540 N.E. 4th St., Ft. Lauderdale, FL 33301; and JOHN F. WADE, Assistant General Counsel, Broward County, 115 South Andrews Ave., Suite 423, Ft. Lauderdale, FL 33301, this 22nd day of May, 1986.

J. Terrell Williams
Assistant Attorney General