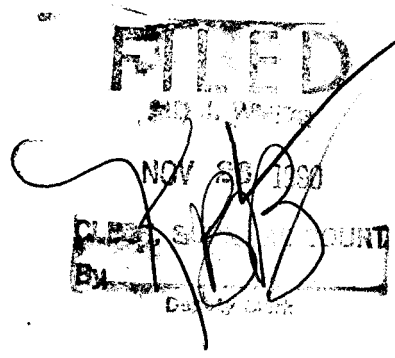
O.A. 2-8-91

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 75,931

FLA. BAR NO. 037341



CITY NATIONAL BANK OF
FLORIDA, et al.,

Petitioners/
Appellants

vs.

DONALD R. TESCHER, etc.,
et al.,

Respondents/
Appellees

_____/

BRIEF OF PETITIONERS

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TABLE OF AUTHORITIES

STATUTES

INTRODUCTION

This Court in its Order dated November 1, 1990 denied the Respondent' Motion to Dismiss, accepted jurisdiction of the cause, set oral argument for Friday, February 8, 1991, required the filing of a Petitioner's Brief on or before November 26, 1990 with Respondent's Brief on the Merits to be served within twenty (20) days after service of Petitioner's brief. The Petitioner's Reply Brief is required to be served within twenty (20) days after the service of the Respondent's Brief on the Merits.

STIPULATION OF THE PARTIES AS TO THE RECORD

Pursuant to a stipulation of the parties, the entire record on appeal from the trial court was not required. We presume the District Court of Appeal will forward the record to this Court which was based upon the stipulation of the parties.

STATEMENT OF THE CASE AND THE FACTS

On April 26, 1987 a petition to determine homestead in real property was filed on behalf of the Coconut Grove Bank and Louis Soublette as co-personal representative of the estate of the decedent (SR 17-25). A response to the petition was filed on behalf of Elda Santeiro-Martinez, individually and as co-guardian of the property of Elena Aleman, Incompetent. (SR 6). An order was entered authorizing the sale of the property to which a petition to set aside said order was filed on behalf of Elda Santeira-Martinez in her individual capacity (SR 26, 13-15). A guardian ad litem was appointed by the Court to determine if the property in question was homestead. Said guardian ad litem filed a report and

recommendation that the property was homestead (SR 8-12). An answer was filed to the petition to set aside the order authorizing the sale. On June 15, 1989 the Court entered an order determining that the property was homestead and authorizing the sale of the property (SR 4-5). Notice of appeal to the District Court of Appeal was entered on July 13, 1989 on behalf of the petitioners. The appeal was from an order determining homestead and an order on petition to set aside the order authorizing the sale of the property dated June 15, 1989.

Decedent, Elena Santeira-Martinez died on December 29, 1986 while domiciled in Dade County, Florida. At the time of her death, she owned and lived on residence property described as Lot 1, Block 14, BAY POINT, Plat Book 40, Page 63 of the Public Records of Dade County, Florida. According to the will of the decedent dated August 11, 1986 there was no specific devise of the property in question. On February 2, 1989 the personal representative petitioned the Court for approval to sell the property and an order was granted on February 23, 1989 approving said sale. In an attempt to clear title to the property, the purchaser requested that the Court determine whether the property was the homestead of the decedent. Attached to the petition to determine homestead was a copy of an ante-nuptial agreement between decedent and her surviving husband in which the husband, Louis Soublette, waived any and all homestead rights in the property of his wife, the decedent. Based upon the petition to determine homestead, petition to set aside the order authorizing the sale of property, the ante-nuptial

agreement and the fact that decedent was survived by two adult children who did not reside with her nor depended upon her for support, the Court concluded the property in question on which the decedent resided at the time of her death constituted homestead and was subject to devise. The Constitution of Florida, Section 4(c) of Article X, prohibits the devise of homestead property where the decedent is survived by a spouse or minor child. The trial court concluded that the decedent was not survived by either spouse nor minor child and that the property was not specifically devised under the terms of the decedent's will. Therefore, the residuary clause of the will, which pours property into the inter vivos trust of the decedent should govern the disposition of the property. The Court went on to authorize the sale of the property and directed how the conveyance of the property should be made to the purchasers. It was from that order determining that the property in question was homestead and refusing to set aside the order authorizing the sale of the property that an appeal was taken to the District Court of Appeal.

The District Court of Appeal, on February 13, 1990, affirmed the order of the trial court, and in so doing said, among others:

> The probate court found that the property would constitute homestead as defined by the Florida constitution, and thus was subject to the prohibition against devise of homestead property where the decedent is survived by a spouse or minor children. However, because of the antenuptial agreement, wherein the decedent's spouse waived his rights to the property, the probate court held that the husband was determined to have predeceased decedent. Thus, because decedent's children were not minors, and her spouse was deemed to have predeceased her, the property was held to be subject to devise. Since the decedent had not specifically

devised the homestead, the residuary clause of the will governed its disposition.

ISSUE INVOLVED

DID THE FACT THAT THE DECEDENT'S HUSBAND WAIVED HIS HOMESTEAD RIGHTS IN THE DECEDENT'S HOMESTEAD PROPERTY BY AN ANTENUPTIAL AGREEMENT AFFECT THE RIGHTS, BOTH CONSTITUTIONALLY AND STATUTORILY OF HER LINEAL DESCENDANTS?

SUMMARY OF ARGUMENT

Decedent was survived by her husband, although he had executed an ante-nuptial agreement relinquishing and releasing any and all rights that he may have had in the property in question. The decedent was also survived by two children, Elda Santeiro-Martinez and Elena Aleman, both over the age of eighteen (18) and four grandchildren. Elena Aleman had been previously adjudicated an incompetent by the Circuit Court with her sister, Elda Santeiro-Martinez as guardian of her person and co-guardian of her property. Since the decedent was survived by her husband, Louis Soublette, and two adult children not dependent on her, she was incapable of devising a homestead property and the same devolved to her two adult children. The District Court of Appeal, Third District, confirmed the order authorizing the sale of decedent's property and in so doing said, among other things:

> Because the decedent was not survived by a spouse or a minor child, she was free to devise the homestead without restriction. See In re McGinty's Estate, 258 So.2d 450 (Fla. 1971); In re Estate of Hill, 552 So.2d 1133 (Fla. 3d DCA 1989). In the absence of a specific devise of the homestead property, it passed through the residuary clause of the decedent's will.

In reaching this conclusion, the Court also said:

> Article X, section 4(c) of the Florida Constitution and Section 732.4015, Florida statutes (1987), prohibit the devise of the homestead property where the decedent is survived by a spouse or minor child. Here, it is undisputed that the decedent was not survived by minor or dependent children. And, although the decedent's husband was physically alive at the time of decedent's death, the valid ante-nuptial agreement which he signed is the legal equivalent of his having predeceased the decedent. Legally, therefore, the decedent was not survived by a spouse. See Hulsh v. Hulsh, 431 So.2d 1658 (Fla. 3d DCA), review denied, 440 So.2d 352 (Fla. 1983).

The pertinent question involved here is that where a homestead owner's surviving spouse executes a valid antenuptial agreement waiving his rights in or to a homestead property, can the homestead owner make a valid devise of the homestead to one other than the spouse? In this instance, the owner did not have a minor child but she did have a spouse who waived his interest in the homestead property and two adult children. Consequently the decedent was survived by a spouse notwithstanding the antenuptial agreement and at her death the homestead property passed to her lineal descendants, the two adult children.

ARGUMENT

Article X, Section 4 of the Florida Constitution (1987) in pertinent part provides as follows:

> There shall be exempt from forced sale under process of any court and no judgment, decree or execution shall be a lien thereon -- the following property owned by natural person: homestead. . . upon which the exemption shall

> be limited to the residence of the owner or his family. . . .(b) these exemptions shall inure to the benefit of the surviving spouse, or heirs of the owner. (underscoring added).

The trial judge concluded, and the District Court of Appeal affirmed his conclusion, that the property in question was homestead as defined in the Florida Constitution, but since the decedent's husband had, by an antenuptial agreement, waived his rights in all of decedent's property, he was deemed to have predeceased her. The decedent was survived by two adult children who did not reside with her and who were not dependent upon her for support. The homestead property in question became part of the decedent's residuary estate under the residuary clause of decedent's will. The District Court of Appeal stated that under Article X, Section 4 of the Florida Constitution, the devise of homestead property was prohibited when the decedent was survived by a spouse or minor children, concluding that the decedent was not survived by either spouse or minor child.

In Public Health Trust of Dade County v. Lopez, (Fla. 1988) 531 So.2d 946, this Court held that the decedent's homestead property was exempt from forced sale for the benefit of decedent's creditors even where decedent was not survived by a dependent spouse or dependent children. This decision was made against the background of the provisions of Article 10 Section 4(b) of the Florida Constitution. In concluding the opinion in Lopez, supra, the Court said: "In sum we conclude that the homestead exemption formerly only enjoyed by a head of a family can now be enjoyed by any natural person. The exemption continues after the

homesteader's death without regard to whether the heirs were dependent on the homestead owner. Thus, the homestead descends directly to the spouse or heirs free and clear of creditors' claims." The term "heirs" is defined by Section 731.201(8) Florida Statutes (1985) as those persons entitled to decedent's property under the statute of intestate succession.

Since there was no specific devise of the property in question, it would ordinarily descend through the residuary clause of the decedent's will. However, where as here the property was found to be homestead, it should not be governed by the decedent's will, but vest in the two adult children of the decedent outside of the will as "heirs" of the decedent. Since the husband had waived his rights in the homestead property such waiver could not effect the rights of the decedent's children to take the property a homestead. The fact that they were adults and not dependent upon the decedent would not serve to disenfranchise them from claiming their homestead rights.

V

CONCLUSION

The District Court was correct in ruling that the property in question was homestead. However, it erred in holding that the decedent was not survived by either spouse or minor child when in fact the decedent was survived by her husband and two adult children, none of whom resided with her or were dependent upon her for support. As homestead property, the decedent's home passed to the two adult children outside of the decedent's will and was therefore not a part of the decedent's probatable estate. The order appealed should be reversed.

Respectfully submitted,

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By: Mallory H. Horton
MALLORY H. HORTON, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to: VEGA AND PEREZ, 362 Minorca Avenue, Suite 101, Coral Gables, Florida 33134; ARMANDO MARRAIO, ESQUIRE, Attorney for City National Bank, 7600 Red Road, Suite 127, South Miami, Florida 33143; KYLE R. SAXON, ESQUIRE, Attorney for Elda Martinez, 1700 Alfred I. DuPont Building, 169 East Flagler Street, Miami, Florida 33131; and GLADYS R. NAVARRO, ESQUIRE, Attorney for Estate, Rivergate Plaza, Suite 1028, 444 Brickell Avenue, Miami, Florida 33131, this 23 day of November, 1990.

By: Mallory H. Horton
MALLORY H. HORTON