IN THE SUPREME COURT
OF FLORIDA

CASE No. 75,931

Florida Bar No. 323373

CITY NATIONAL BANK OF FLORIDA, et al.,

Petitioners

vs.

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

Respondents

RESPONDENTS' BRIEF

GLADYS R. NAVARRO, ESQ.
Attorney for Personal
Representatives of the Estate
of Elena Santeiro-Soublette
Rivergate Plaza, Suite 1028
444 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 372-1133

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AUTHORITIES CITED

STIPULATION OF THE PARTIES AS TO THE RECORD

On November 19, 1990, the Third District Court of Appeal has informed the parties that on December 10, 1990, the record of the case will be forwarded to this Court.

PRELIMINARY STATEMENT

The COCONUT GROVE BANK and LUIS SOUBLETTE as Co-Personal Representatives of the Estate of Elena Santeiro-Soublette, deceased, are the principal respondents in this action and they shall be referred to as "the Respondents". All other respondents are nominal parties to this action.

Elena Santeiro-Soublette, deceased, shall be referred to as "the Decedent" and her husband, Luis Soublette, shall be referred to as "the Decedent's husband".

Reference to the stipulated record on appeal shall be made by the use of the symbol "SR" followed by the appropriate page number(s) in parenthesis. Likewise the Petitioners' Brief will be referred to by the use of the symbol "PB" followed by the appropriate page number(s) in parenthesis.

STATEMENT OF THE CASE AND OF THE FACTS

While Petitioners' statement is essentially correct, the following amplification is necessary. Elena Santeiro-Soublette died on December 29, 1986, domiciled in Dade County, Florida. She was survived by two adult daughters and four adult grandchildren. The Decedent's husband, Luis Soublette, executed an antenuptial agreement in which he renounced any rights in the estate of the Decedent, including homestead rights. The validity of the antenuptial agreement has never been challenged.

The Decedent resided with her husband in a home in Dade County owned by her. On February 23, 1989, the Dade County Circuit Court entered an order authorizing the sale of the home to Mr. and Mrs. Nicholas M. Daniels. All interested parties had been served proper notice of the petition to sell (SR 26). To clear title to the real property, and at the request of the purchasers, the personal representatives (the Respondents) filed a Petition to Determine Homestead in Real Property on April 26, 1989 (SR 17-25). A Guardian ad Litem was appointed by the probate court (Donald R. Tescher, Esq.) and his report was filed on June 5, 1989 (SR 8-12). On June 15, 1989, the probate judge entered an order determining that the property met the constitutional definition of homestead. In that order, the probate judge found that the property was properly subject to devise by the Decedent. The prohibition against the devise of homestead contained in Article X, Section 4 of the Florida Constitution requires a decedent be survived by a

spouse or minor child. The children of the Decedent are adults. The spouse had executed an antenuptial agreement, which is considered to be the legal equivalent of his having predeceased the Decedent. Therefore, even though the real property met the constitutional definition of homestead, the probate court found it was properly subject to devise. Since there was no specific devise of it, the residuary clause of the Decedent's will disposed of the property.

An appeal to the Third District Court of Appeal was taken by Petitioners (SR 1-3). On February 13, 1990, the Third District Court of Appeal affirmed the probate court's decision (SR 90-93). Motion for Rehearing was denied (SR 94).

ISSUE

If a decedent owner of homestead property is survived by adult children, does the valid waiver of homestead rights in an antenuptial agreement by the spouse permit the devise by the owner to someone other than to the surviving spouse.

SUMMARY OF THE ARGUMENT

Article X, Section 4(c) of the Constitution of the State of Florida and Section 732.4015 of the Florida Statutes prohibit the devise of homestead when a decedent is survived by a spouse or

minor child. When a decedent is survived by neither a spouse nor minor child, property which otherwise meets the constitutional definition of homestead can be devised to anyone.

Florida law recognizes that spouses may freely waive property rights before marriage and thereby permit the free devise of property at death. The Decedent's husband, in a valid antenuptial agreement, waived his rights to the Decedent's property, including homestead rights. All of the Decedent's children are adults. There being no minor child and, in effect, no surviving spouse, the Decedent was free to devise her homestead. The Last Will and Testament of the Decedent contained no specific devise of the homestead. Therefore, the residuary clause of the Will disposes of the homestead.

ARGUMENT

Article X, Section 4 of the Constitution of the State of Florida reads:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations, contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> > (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land

upon which the exemption shall be limited to the residence of the owner or his family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Before the 1985 amendment to the Florida Constitution, the words "a natural person" in Section 4(a) read "the head of the family". Except for this amendment, this section of the Florida Constitution remained unchanged since 1968. There is no clear legislative history surrounding the 1985 amendment to illustrate what its proponents had in mind with respect to the devise of homestead. In re Estate of Scholtz, 543 So.2d 219 (Fla. 1989)

Three of the District Courts of Appeal have scrutinized the issue here. That is, whether a decedent, survived by adult children, with a spouse who executed a valid antenuptial agreement, could freely devise the homestead. There is no conflict among the courts. All three have held under those facts that the homestead could be devised.

The Third District Court of Appeal in this case found that the execution of a valid antenuptial agreement between the spouses was the legal equivalent of the surviving spouse having predeceased the

Decedent. And, although the decedent's husband was physically alive at the time of the decedent's death, the valid antenuptial agreement is considered the legal equivalent of his having predeceased the decedent. See Hulsh v. Hulsh, 431 So.2d 658 (Fla. 3d DCA 1983) (Provision for testator's widow's son to take upon death of his mother would be activated either by mother's death in fact or by the legal equivalent of her death as would occur if there is a valid antenuptial agreement.) Legally, therefore, the decedent was not survived by a spouse and was free to devise the homestead. See In re McGinty's Estate, 258 So.2d 450 (Fla. 1971) (Widower's devise of homestead to one of his four children was valid, notwithstanding Florida Constitutional provision that the homestead shall not be subject to devise if owner is survived by spouse or minor child, where all the widower's children were adults at the time of his death.); In re Estate of Hill, 552 So.2d 1133 (Fla. 3d DCA 1989) (Court cannot find support in either the constitutional revision of 1985 or Lopez case infra that the deceased is precluded from devising her property when at the time of her expiration she leaves neither spouse nor minor child.)

The Fifth District Court of Appeal in Wadsworth v. First Union National Bank of Florida, N.A., 564 So.2d 634 (Fla. 5th DCA 1990) found that appellants did not constitute one of two classes of persons designed to be protected by Article X, Section 4(c): surviving spouses and minor children. Appellants were the adult children of the decedent. The Court found the statute permits the surviving spouse to waive her constitutional right. She did so.

It was waived. When the decedent died with no one there to assert a homestead right, the property could pass by devise and did so under the residuary clause of the will.

In Hartwell v. Blasingame, 564 So.2d 543 (Fla. 2d DCA 1990) the Second District Court of Appeal affirmed an order of the probate court permitting the devise of homestead. The surviving spouse validly waived her constitutional rights to the house in a prenuptial agreement. All of decedent's children were adults. The court noted that individuals can freely, knowingly and intelligently forego a right which is intended to protect the property rights of the individual who chooses to make the waiver. Further, a person is sometimes permitted to contractually waive a constitutional right at a time prior to the occasion when the right normally would be invoked. Once the court determined that the spouse validly waived her right to homestead, the issue was whether such waiver is binding on lineal descendants or other statutory heirs. The result depends on whether an heir or lineal descendant is within the class of persons who is protected by this section of the constitution. The court found that the 1985 amendment that expands the class of persons entitled to protect their homes from creditors does not expand the class of persons entitled to receive the homestead beyond the surviving spouse and minor children.

This Court has promulgated a decision on a case, we submit, impacts on the instant case. In Estate of Roberts, 388 So.2d 216 (Fla. 1980) a summary final judgment was affirmed upholding the constitutionality of section 732.702(2), Florida Statutes (1979),

(waiver statute) and the validity of an antenuptial agreement. Mrs. Roberts, who had signed an antenuptial agreement, had petitioned the court to set aside homestead, as well as other property rights. By affirming the lower court, this Court not only accepted the validity of the antenuptial agreement but also permitted the devise of homestead by the Will of a decedent who was survived by adult children.

The Petitioners rely upon the Public Health Trust of Dade County v. Lopez, 531 So.2d 946 (Fla. 1988) (PB 8-9). That decision is clearly unrelated to this issue. Lopez only addresses the effect of the 1985 amendment on the exemption from forced sale provided in Article X, Section 4(a). Lopez does not address the devise of homestead, before or after the 1985 amendment, which is provided in Article X, Section 4(c).

Petitioners argue that a surviving spouse survived the decedent. Such physical survival should not, therefore, deprive the adult children of their rights. The fallacy with that argument is that adult children, by themselves, and without a spouse, have no rights to the homestead. See In re McGinty's Estate supra and In re Estate of Hill supra. If the children who survive the decedent were minors, the waiver by the spouse should not affect their rights to the homestead. But the children who in fact survived the Decedent were adults who, but for the marriage of the Decedent to her sixth husband, would have had no rights to the home. We submit that Petitioners are attempting to bootstrap rights to adult children not contemplated by the Constitution. This

Court, in analyzing the issue of constitutional adjudication has adhered to several fundamental principles, one of which is: constitutional provisions should not be construed so as to defeat their underlying objectives. See Fla. Soc. of Ophthalmology v. Fla. Optometric Assoc., 489 So.2d 1118 (Fla. 1986)

The underlying objective of the exemption from forced sale of the homestead is the protection of the debtor from being reduced to destitution. The limitation on the devise of the homestead is the protection of the family after the death of the debtor. Maines and Maines, Our Legal Chameleon Revisited: Florida Homestead Exemption, XXX U. Fla. L. Rev. 227 (1978). In 1868, when Florida first adopted this type of constitutional provision, the family sought to be protected was the surviving wife and the minor children. Constitutions are "living documents", not easily amended, which demand greater flexibility in interpretation, we submit, than that required by legislatively enacted statutes. See Fla. Soc. of Ophthalmology, supra at 1119. This Court should consider the changing family where there are several marriages, such as the case at bar. Where those challenging the freedom to devise the homestead are not members of the class intended to be protected by the constitutional provision, we urge, the freedom to devise should be upheld.

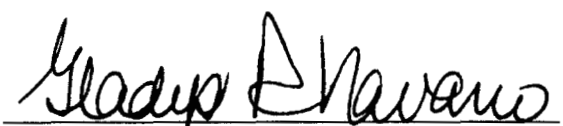
There is no question that under Florida law otherwise devisable homestead may be devised by the residuary clause of a Will. See Estate of Murphy, 340 So.2d 107 (Fla. 1976). It thus

follows that the residuary clause of the Decedent's will devised the homestead.

CONCLUSION

The Third District Court of Appeal must be affirmed.

Respectfully submitted,



GLADYS R. NAVARRO, ESQ.
Attorney for Personal
Representatives of the Estate of
Elena Santeiro-Soublette
Rivergate Plaza, Suite 1028
444 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 372 1133

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 7th day of December, 1990, upon MALLORY H. HORTON, Esq., 100 Almeria Avenue, Suite 360, Coral Gables, Florida 33134 and VEGA & PEREZ, 362 Minorca Avenue, Coral Gables, Florida 33134, Attorneys for Petitioners; ARMANDO MARAIO, Esq., 7600 Red Road, Suite 127, South Miami, Florida 33143; KYLE R. SAXON, Esq., Catlin, Saxon, Tuttle and Evans, 1700 Alfred I. duPont Building, 169 East Flagler Street, Miami, Florida 33131; NICHOLAS M. DANIELS, Esq., Therrel Baisden & Meyer Weiss, 1111 Lincoln Road Mall, Suite 600, Miami Beach, Florida 33129; DONALD R. TESCHER, Esq., Tescher, Chaves & Hochman, 9100 South Dadeland Blvd., One Datran Center, Penthouse I, Miami, Florida 33156.

Gladys R. Navarro

GLADYS R. NAVARRO, ESQ.