

6-18

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 75,931

CITY NATIONAL BANK OF FLORIDA,  
et al,

Petitioners/Appellants,

vs.

DONALD R. TESCHER, etc.,  
et al,

Respondents/Appellees.

*[Handwritten signature and stamp]*  
JUL 23 1975  
CLERK OF COURT

ON DISCRETIONARY REVIEW FROM THE  
THIRD DISTRICT COURT OF APPEAL

---

JURISDICTIONAL BRIEF OF APPELLANTS

---

MALLORY H. HORTON, ESQUIRE  
FLORIDA BAR NUMBER 037341  
Attorney for Appellants  
100 Almeria Avenue  
Suite 360  
Post Office Box 144635  
Coral Gables, Florida 33114-4635  
Telephone: (305) 445-5566

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
ISSUES ON JURISDICTION	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	4
A.    CONFLICT EXISTS WITH In RE: THE ESTATE OF LEWIS E. WADSWORTH, DECEASED, (5th DCA, Case Number: 89-272) and SUPPORTS THIS COURT'S JURISDICTION UNDER Rule 9.030 (a) (2) (A) (iv)	
B.    THE COURT SHOULD EXERCISE ITS DISCRETION AND REVIEW THE DECISION IN THIS CAUSE PURSUANT TO Rule 9.030 (a) (2) (A) (ii) and Article 5, Section 3 (b) (3) of the Florida Constitution.	
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
In Re: The Estate of Lewis E. Wadsworth, Deceased, (5th DCA, Case Number: 89-272)	3, 4, 5, 7
<u>City National Bank of Florida v. Tescher</u> 557 So.2d 615	1, 4
 <u>STATUTES AND RULES</u>	
Rule 9.030 (a)(2)(A)(ii) Rules of Appellate Procedure	1, 3, 6
Rule 9.030 (a)(2)(A)(iv), Rules of Appellate Procedure	
Article 5, Section 3 (b)(3) of the Florida Constitution	1, 3, 6
Article 10, Section 4C of the Florida Constitution	2, 3, 4, 5 6, 7, 8
Section 732.4015 of the Florida Statutes (1987)	2, 4, 7

### STATEMENT OF THE CASE AND FACTS

Appellants seek review of a decision of the Third District Court of Appeal affirming a judgment of the Circuit Court in Probate. The basis of jurisdiction is Article 5, Section 3 (b) (3) Florida Constitution (1980) and Rule 9.030 (a) (2) (A) (ii) of the Rules of Appellate Procedure. The facts of the case are as follows: Decedent, Elena Santeiro-Soublette was survived by her husband, two (2) adult children and four (4) adult grandchildren. The decedent's spouse had executed an antenuptial agreement prior to their marriage waving all rights in the estate of the decedent, including homestead rights. The will of the decedent did not specifically devise the homestead property in question. The trial court found that the property constituted homestead as defined by the Florida Constitution, was subject to the prohibition against devise where a decedent is survived by a spouse or a minor child, and that since the spouse had waived his rights to the property, the trial court held that he was deemed to have predeceased the decedent; that since the decedent's children were not minors and the husband was deemed to have predeceased her, the property was subject to devise under the residuary clause of the decedent's will.

The District Court of Appeal, Third District, affirmed the decision of the trial court, 557 So.2d 615, holding that since the decedent was not survived by a spouse or minor child, she was free to devise the homestead without restriction. There,

of course, was no question that the decedent was not survived by minor children, and although the husband was physically alive at the time of the decedent's death, the court construed the antenuptial agreement which he executed as the legal equivalent of his having predeceased the decedent. The Third District Court of Appeal specifically referred to Article 10, Section 4C of the Florida Constitution and Section 732.4015 of the Florida Statutes (1987) which prohibits the devise of homestead property where the decedent is survived by a spouse or minor child.

ISSUES ON JURISDICTION

A. Whether the decision of the Third District Court of Appeal conflicts with In Re: Estate of Lewis E. Wadsworth, February 22, 1990, D5, FLW D511. \*

B. Whether the District Court of Appeals, Third District, in discussing and specifically construing Article 10, Section 4C of the Florida Constitution rendered a decision subject to review by this court under Article 5, Section 3 (b)(3) of the Florida Constitution and Rule 9.030 (a) (2) (A) (ii) of the Rules of Appellate Procedure.

\* Although timely petition for rehearing and other post-decision motions were filed on March 9, 1990, none of said post-decision motions have been ruled on by the Fifth District Court of Appeal.

### SUMMARY OF THE ARGUMENT

This court has jurisdiction to review decisions of District Courts of Appeal "expressly and directly" in conflict with the decisions of other courts of appeals or this court on the same question of law. The instant decision conflicts directly and on the same specific question with the decision and opinion of the District Court of Appeal, Fifth District In Re: Estate of Lewis E. Wadsworth vs. First National Bank of Florida, 15 FLW D511.

Further the decision sought to be reviewed specifically construed Article 10, Section 4C of the Florida Constitution, hence this court would have jurisdiction to review the opinion and decision of the Third District Court of Appeal.

### ARGUMENT

A. Conflict exists with In Re: Estate of Lewis E. Wadsworth, deceased. Lewis E. Wadsworth, III, Appellant, vs. First Union National Bank of Florida, et al, Appellees, 5th DCA, Case Number: 89-272; Opinion Filed February 22, 1990, 15 FLW D511.

In City National Bank of Florida, etc., et al, Supra, the Third District Court of Appeal specifically construed Article 10, Section 4C of the Florida Constitution, and Section 732.4015 of the Florida Statutes (1987) to prohibit the devise of homestead property where the decedent was not survived by a spouse or minor child. The court concluded that the decedent was not

survived by a minor or a dependent child; that because the decedent's husband was physically alive at the time of the decedent's death, he had executed a valid antenuptial agreement. The Third District concluded that the antenuptial agreement was the "\*\*\* legal equivalent of his having predeceased the decedent." It then concluded that legally the decedent was not survived by a spouse.

The Third District Court of Appeal in their decision concluded that the homestead owned by the decedent at the time of her death was subject to devise and therefore passed under the residuary clause of her will. She was found not to have been survived by her husband or minor child, although she was survived by two (2) adult children and four (4) adult grandchildren. The holding by the Third District Court of Appeal is in direct and unqualified conflict with the decision of the Fifth District Court of Appeal in In Re: Estate of Lewis E. Wadsworth, deceased, etc., et al. In Wadsworth the court there was construing Article 10, Section 4C of the Florida Constitution and as a matter of fact quoted verbatim those provisions of that section of the constitution. The Fifth District stated the question to be "If the homestead owner's surviving spouse executes a valid antenuptial agreement waiving all of her rights in and to the homestead property, can the homestead owner make a valid devise of the homestead to one other than his spouse?" The Fifth District answered the question unequivocally in the negative,



pointing out that to assume otherwise would indicate that the constitutional framers did not understand (1) that if the owner was prohibited from devising the homestead it would pass by intestate succession to the spouse, if any, and if not, to his lineal descendants, and (2) that the framers of the constitution did understand that lineal descendants and heirs of the homesteader included "adult" children as well as "minor" children, all of whom inherit an interest in the homestead. The Fifth District said "The language of the constitution is clear and it provides that the homesteader cannot devise the homestead if he is survived by a minor child or a spouse." The trial court's order upholding the devise of the homestead to persons other than surviving spouse was reversed. There was a dissent to the majority opinion.

B. This court should exercise its discretion and review the decision in this cause pursuant to Rule 9.030 (a)(2)(A)(ii) and Article 5, Section 3 (b)(3) of the Florida Constitution which provides jurisdiction upon the expressed construction of a provision of the state or federal constitution.

The decision of the Third District Court of Appeal specifically construed and interpreted Article 10, Section 4C of the Florida Constitution concluding that the decedent was not

survived by a spouse or minor child, and therefore, she was free to devise her homestead without restriction and the same could pass under the residuary clause of her will. The opposite effect on a similar set of facts resulted from the Fifth District Court of Appeal' decision in the construction of Article 10, Section 4C of the Florida Constitution. The Third District Court of Appeal held that the language of the constitution was clear and provided that a homesteader could not devise the homestead if he was survived by a minor child or a spouse. Of particular significance and importance is the fact that the Fifth District Court of Appeals in the Wadsworth case specifically held that the execution of a antenuptial agreement, waiving interest in the homestead property did not thereby constitute the basis of a denial of or a determination that property was homestead. In Wadsworth there were no minor children although the wife had executed an antenuptial agreement waiving all of her interest in and to the homestead property. The court nevertheless concluded that the constitutional limitation was that if the owner was survived by a minor child or if he had no minor child, but had a surviving spouse, the homestead could not be devised to the surviving spouse, and if the homestead is not devised to the surviving spouse, the homestead could not be devised to anyone and would descend as intestate property under Section 732.4015 of the Florida Statutes, and the surviving spouse, if any, would take a life estate with the lineal descendants in being at the

time of the homesteader's death, as remaindermen. The results reached by the Third District Court of Appeal and the Fifth District Court of Appeal are diametrically opposed on an identical if not synonymous set of facts. In addition, each of the courts have construed the same provisions of the Florida Constitution, to wit, Article 10, Section 4C. This conflict should be resolved by this court and the construction placed on the provision of the constitution in question that would enlighten the trial as well as the appellate courts of this state.

#### CONCLUSION

The opinion and decision of the District Court of Appeal, Third District, is in direct and irreconcilable conflict with the Fifth District Court on the same question of law based upon an almost identical if not synonymous set of facts.

Each of the district courts of appeal in question have construed Article 10, Section 4C of the Florida Constitution and have reached the results which the appellants respectfully suggest should be clarified by a decision of this court.

Respectfully submitted,

MALLORY H. HORTON, ESQUIRE  
100 Almeria Avenue, Suite 360  
Post Office Box 144635  
Coral Gables, Florida 33114-4635  
Telephone: (305) 445-5566

By: Mallory H. Horton  
Mallory H. Horton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the attached Jurisdictional Brief of Appellants was mailed to: Gladys R. Navarro, Esquire, Attorney for Appellee, Rivergate Plaza, Suite 1028, 444 Brickell Avenue, Miami, Florida 33131; Vega and Perez, P.A., 362 Minorca Avenue, Suite 101, Coral Gables, Florida 33134; Armando Maraiio, Esquire, 7600 red Road, Suite 127, South Miami, Florida 33143; Kyle R. Saxon, Esquire, 1700 Alfred I DuPont Building, 169 East Flagler Street, Miami, Florida 33131; Nicholas M. Daniels, Esquire, 1111 Lincoln Road Mall, Suite 600, Miami Beach, Florida 33129; Donald R. Tescher, Esquire, 2100 Ponce de Leon Boulevard, Penthouse, Coral Gables, Florida 33134 this 24th day of May, 1990.

MALLORY H. HORTON, ESQUIRE  
100 Almeria Avenue, Suite 360  
Post Office Box 144635  
Coral Gables, Florida 33114-4635  
Telephone: (305) 445-5566

By: Mallory H. Horton  
Mallory H. Horton