IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 75,931

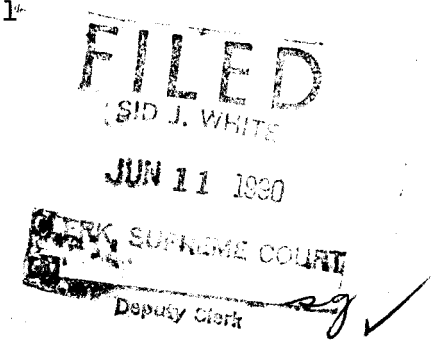
City National Bank of Florida, et al

Petitioners/Appellants,

vs.

Donald R. Tescher, et al

Respondents/Appellees.



ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

JURISDICTIONAL ANSWER BRIEF OF APPELLEES

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Circuit Court sitting in probate authorized the sale of the house owned by the decedent at the time of her death. In order to obtain clear title to the property, the buyer requested that a determination of homestead be filed. The circuit judge determined that the property met the constitutional definition of homestead but that the decedent was not survived by either minor children or a spouse and therefore was free to devise the homestead. Although the spouse was physically alive, the execution of a valid antenuptial agreement deemed him to have predeceased the decedent. The Third District Court of Appeal affirmed the decision of the probate court, finding that, legally, the decedent was not survived by either a spouse or minor children since the execution of an antenuptial agreement was the legal equivalent of death.

Appellants seek review of the decision of the Third District Court of Appeal (City National Bank et al v. Tescher, et al, 557 So.2d 615), based on Article V, section 3(b)(3) of the Florida Constitution (1980) and Rule 9.030(a)(2)(A)(ii) and (iv) of the Rules of Appellate Procedure.

ISSUES ON JURISDICTION

A. Whether the decision of the Third District Court of Appeal conflicts with the decision of another district court of appeal in Florida on the same question of law.

B. Whether the decision of the Third District Court of Appeal construed the Florida Constitution.

SUMMARY OF THE ARGUMENT

In order for conflict between two districts in Florida to exist, both decisions must be final. The decision of the Third District Court of Appeal is final but the decision of the Fifth District Court of Appeal that allegedly conflicts is not a final decision.

Mere mention of the Florida Constitution in a decision is not grounds to invoke discretionary jurisdiction. If the court does not construe the Constitution, there is no reason for the Supreme Court to grant the discretionary jurisdiction.

The Florida Supreme Court, we submit, should not grant discretionary jurisdiction either on the basis of conflict or on the basis of the Third District Court of Appeal construed the Florida Constitution in its decision.

ARGUMENT

A. There is no conflict with any other final decision of another court of appeal in Florida on the same issue of law.

In order for conflict to exist with the decision of another district in Florida, both the Florida Constitution and the Rules of Appellate Procedure implicitly require that both decisions be final. When a petition for rehearing is made pursuant to the Rules, a final decree is not appealable until such petition has been ruled upon and entered since, until such ruling is made, judgment has not been rendered. Maddox v. Camirez, 498 So.2d 680 (Fla. 1st DCA 1986). (Even though trial court subsequently denied motion for rehearing, appellate court lacked jurisdiction to entertain appeal.) The same rule is implicit in the determination of conflict jurisdiction.

In Re: Estate of Lewis E. Wadsworth, Deceased, 15 F.L.W. D511 (Fla. March 2, 1990), a decision of the Fifth District Court of Appeal, although a reported decision that alleged to reach an opposite result, has a pending motion for rehearing en banc, filed on March 9, 1990. The Fifth District Court of Appeal has, to date, neither granted nor denied such motion. Until the motion is denied or granted and heard, the decision of the Fifth District is not final and therefore, the decision of the Third District Court of Appeal cannot be in conflict with a decision that is not yet final.

B. The decision of the Third District Court of Appeal only cites the Florida Constitution and does not construe it.

In order for Rule 9.030(a)(2)(A)(ii) to be applicable, a court of appeal needs to "construe" the Florida Constitution. The Third District Court of Appeal simply mentions the Florida Constitution. It did not construe it. The opinion states in part:

"Article X, section 4(c) of the Florida Constitution and Section 732.4015, Florida Statutes (1987), prohibit the devise of homestead property where the decedent is survived by a spouse or minor child."

It is commonly understood that "construe" means to put together; to arrange or marshall the words of an instrument; to ascertain the meaning of the language by a process of arrangement and inference. Black's Law Dictionary 285 (5th ed. 1979). The Supreme Court has found that an opinion or judgment does not construe a provision of the Constitution unless it undertakes to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitution provision. Armstrong v. City of Tampa, 106 So.2d 407 (Fla. 1958). The Third District Court of Appeal opinion did not construe the Florida Constitution; it merely mentioned the Constitution as stated above. What the Third District Court of Appeal construed was the antenuptial agreement signed by the surviving spouse, as correctly stated in Appellants' brief (p.2). Following Appellants' argument to a conclusion, all decisions which merely mention the Constitution would fall under this Rule. Appellants' jurisdictional brief should have directed the court to the portion of the district court opinion that treated the jurisdictional issue. If jurisdiction exists because decision

of a district court of appeal expressly declares valid a state statute or expressly construes a constitution, the brief must demonstrate that the validity of the statute or the meaning of a provision of a constitution was at issue and that a statue was expressly upheld or a constitution expressly construed. The word "expressly" in revised article V was intended to restrict the court's discretionary jurisdiction to cases in which the district court declares a statute valid or construes a constitution in a written opinion. Filing Briefs on Jurisdiction in the Supreme Court of Florida, Borgognoni and Keane, 54 Fla.Bar J. 510 (1980). Appellants' jurisdictional brief fails to do so.

Certiorari may not, however, be used as substitute for appeal, nor to give losing party a second appeal. The Supreme Court does not allow a litigant the right to two appeals from the same judgment. Florida Real Estate Comm. v. Harris, 134 So.2d 785 (Fla. 1961).

CONCLUSION

The opinion of the Third District Court of Appeal should stand. When the Wadsworth case is final, if it is determined that in fact there is a conflict, this Court will have an opportunity to reconsider discretionary jurisdiction in that case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the attached Jurisdictional Answer Brief of Appellee was mailed to: Mallory H. Horton, Esq., Attorney for Appellants, 100 Almeria Avenue, Suite 360, P. O. Box 144635, Coral Gables, Florida 33114-4635; Vega and Perez, 362 Minorca Avenue, Suite 101, Coral Gables, Florida 33134; Armando Maraio, Esq., 7600 Red Road, Suite 127, South Miami, Florida 33143; Kyle R. Saxon, Esq., 1700 Alfred I. DuPont Building, 169 East Flagler Street, Miami, Florida 33131; Nicholas M. Daniels, Esq., 1111 Lincoln Road Mall, Suite 600, Miami Beach, Florida 33129; Donald R. Tescher, Esq., 2100 Ponce de Leon Boulevard, Penthouse, Coral Gables, Florida 33134, this 8th day of June, 1990.

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