047

IN THE FLORIDA SUPREME COURT

CASE NUMBER 76,431

RUTH JURMU HARTWELL

Petitioner,

vs.

JANE BLASINGAME, personal representative of the Estate of Reino Wilho Jurmu; Harold Smith

Respondent,
_____ /

Circuit Court 89-2510-ES4
District Court 89-2859

RESPONDENT'S ANSWER BRIEF

ON EXERCISE OF DISCRETIONARY JURISDICTION

TO REVIEW DECISION OF DISTRICT COURT OF APPEAL

THE HONORABLE CHRIS W. ALTENBRAND, JUDGE

THE HONORABLE HERBOTH S. RYDER & JERRY R. PARKER, CONCURRING JUDGES

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Issue Presented for Review:

WHETHER A DECEDENT HAS THE POWER TO DEVISE HOMESTEAD PROPERTY WHEN SURVIVED BY A SPOUSE AND ADULT CHILD WHEN SPOUSE HAD WAIVED HOMESTEAD RIGHTS PURSUANT TO AN ANTENUPTIAL AGREEMENT.

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Respondent in this case is Mr. Harold Smith, who was named in the Last Will and Testament of the Decedent as the beneficiary of that certain real property located in Pinellas County, Florida, and resided upon as the homestead of the decedent.

The Statement of the Case and Facts as set forth in the Petitioner's Initial Brief is complete and accurate in so far as it sets forth the stipulations to which the Parties have agreed. The Petitioner states that the facts are not now in dispute and that the only issue is the application of Article X, Section 4 of the Florida Constitution and Florida Statutes § 732.401 and § 732.4015.

Respondent agrees that the facts are not in dispute, but would add that the issue also involves the application of Florida Statute § 732.702 in addition to the above cited provisions. The Circuit Court and District Court, in arriving at their decision relied, in part, upon the provisions of Section 732.702 of the Florida Statutes in finding that the Decedent, Reino Wilho Jurmu, was relieved of the Constitutional and statutory prohibition against the devise of homestead property.

SUMMARY OF THE ARGUMENT

The Constitutional and statutory language which limits the right of persons to devise their homestead property both specifically provide that the homestead shall not be subject to devise "if the owner is survived by a spouse or minor child." The clear effect of this prohibition is to protect surviving spouses and minor children. By the adoption of Florida Statute § 732.702 the legislature created a vehicle through which a person could waive any right they may have in the homestead of a spouse. To accept the argument of the Petitioner, would expand the Constitutional protection beyond its own language and force it to include adult children of a decedent who otherwise have no rights in the property of the decedent.

The Second District Court was correct in its conclusion in finding that the decedent was free to devise his homestead because he was not survived by any minor children and his spouse had executed a valid antenuptial agreement waiving her homestead rights. To decide otherwise would expand the protections of the Florida Constitution beyond its own language, would substantially reduce the effectiveness of Florida Statute § 732.702 in permitting citizens to plan their own estates and would clearly frustrate the plans and intent of the Decedent, Reino Wilho Jurmu, in devising his property to the Respondent, Harold Smith. The Order entered by the Second District Court should be affirmed.

ARGUMENT

A DECEDENT HAS THE POWER TO DEVISE HOMESTEAD PROPERTY WHEN SURVIVED BY A SPOUSE AND ADULT CHILDREN WHERE THE SPOUSE HAS WAIVED HER HOMESTEAD RIGHTS.

Including the instant decision, Hartwell v. Blasingame, 564 So. 2d 543 (2d DCA Fla.1991), there are three district court opinions addressing the issue in this case, all of which have reached the same conclusion. While admitting that identical reasoning was not applied, Respondent would argue that the Petitioner's position that the cases involve "three mutually exclusive fictions" is incorrect.

City National Bank v. Tescher, 557 So. 2d 615 (3d DCA Fla. 1990), citing Hulsh v. Hulsh, 431 So 2d 653 (3d DCA Fla. 1983), cert.denied 440 So.2d 352 (Fla. 1983), arrives at its conclusion that a decedent is free to devise homestead if not survived by a minor child and if the spouse has waived homestead rights through the "legal fiction" that such waiver by the spouse effectively mean she predeceased the decedent. The Court in Tescher does not even refer to the "protected class" of persons argument applied in Wadsworth v. First Union National Bank, 564 So. 2d 634 (5th DCA Fla. 1990).

The Court in Wadsworth mentions that the Appellees argued that the waiver of homestead by the spouse was the legal equivalent of her prior death. The Court never rejects this argument because it never needs to get that far. The Court's reasoning is that these are only two, strictly limited, classes of persons sought to be protected by Section 4, Article X, of the Florida Constitution, to wit, spouses and minor children. By waiving the right to homestead, a spouse removes herself from the protected class, and if there are no minor children, a decedent is free to devise his property in any manner he

deems fit.

This argument, and this conclusion, is not contradictory of, nor mutually exclusive of, the decisions in either Tescher or the instant case. The Second District in the case at bar specifically stated that they agreed that "Article X, section 4(c), is designed to protect two classes of persons only: surviving spouses and minor children."

Tescher is not contradictory of, nor exclusive of, Wadsworth because Tescher never discussed the issue of "protected classes". Once again, it was not discussed because it was not necessary to go that far. Under the reasoning of Tescher and Hulsh, once the spouse is presumed dead, and there are no minor children, the decedent is free to devise his homestead property. A discussion of "protected classes" of persons at that point is irrelevant.

Admittedly, the Second District in Hartwell v. Blasingame was reluctant to adopt the "presumed dead" argument of Tescher and Hulsh. It is important to note, however, that they did not reject or overturn that argument. Their actual language was:

> "In order to affirm the trial court, we are not anxious to rely upon the legal fiction, perhaps ultimate legal fiction, that Ivadelle Jurmu has "predeceased" her husband."

In arriving at the same conclusion at the Third and Fifth Districts, the Second District went into a deep analysis of the effect of the waiver by Mrs. Jurmu. First was an analysis that homestead was, indeed, a right which could be waived. Once this was determined, the Court stated that the issue became whether that waiver was binding on lineal descendants or other statutory heirs. Citing Wadsworth, the Court then adopted the "protected class" of persons argument and found the waiver to be binding upon the Petitioner herein.

Respondent would argue that none of the three cases are contradictory and they all reach the morally and legally correct result. While Respondent would

accept an order affirming the opinion the Second District Court of Appeal under any reasoning whatsoever, it is believed that the best legal reasoning is actually a skillful blending of Wadsworth, Tescher, Hulsh and the case at bar into one harmonious picture.

The Petitioner's argument is basically that Article X, section 4 of the Florida Constitution and Florida Statutes §§ 732.401 and 732.4015 operate to create a virtually unlimited class of protected persons when a decedent is survived by a spouse, even where such spouse has executed a valid antenuptial agreement under Florida Statute § 732.702, waiving all homestead rights. Petitioner, in the case at bar argues on behalf of an adult child of the decedent, but the logic of the Petitioner's argument cannot stop there. If there were no lineal descendants of the decedent, Florida Statute § 732.401 provides that the property shall descend as "other intestate property."

Petitioner's argument is that all decedents are prohibited from devising homestead property if they are survived by a spouse, and that despite Florida Statute § 732.702, there is nothing that a decedent can do about it. Even if Mr. Jurmu had no lineal descendants, under the Petitioner's argument he would still be prohibited from devising his homestead because it must then pass as "other intestate property," and Florida law provides an exhaustive list of this category. Both the Constitution and the Statutes permit a devise to a spouse in fee simple if there be no minor children. If there are no minor children, such spouse is the only protected party. The effect of Florida Statute 732.702 is to create the right of a spouse to waive her homestead rights, and Mrs. Jurmu, having done so, created the power for the decedent to devise his property to the Respondent, Mr. Harold Smith.

Reading the Last Will and Testament of Mr. Jurmu, it is clear that he specifically intended to exclude his daughter, the Petitioner. To overturn the

decision of the Second District would not only have the effect of totally frustrating the intent of the testator, it would grant to the Petitioner a greater interest in the property than she would have had if the spouse of the Decedent had never executed an antenuptial agreement.

Clearly, Florida Statute § 732.702 must have some meaning under Florida law. If it simply means that a spouse may waive her rights in homestead property but not entitle a person to become free of the Constitutional prohibition against the devise of homestead then it is an ineffectual law and can operate to frustrate the estate planning of many Floridians. To accept the Petitioner's argument is to rule that a Floridian is powerless to take any steps to preserve his right to decide who shall inherit his homestead if such person is married. The Petitioner suggests that a waiver should be required from the lineal descendants, but even if that existed, if the prohibition against devise was still valid, that would simply mean that the beneficiaries next in line under the intestacy laws of Florida would be entitled to distribution. Therefore the conclusion of the Petitioner is impossible.

Many Floridians are widows and widowers looking to remarry for companionship. In many cases, their homestead represents a substantial percentage of their total estate. Often the spouse-to-be is financially self-sufficient and the homestead owner has definite desires and wishes as to the distribution of his homestead property, and these desires and wishes are <u>not</u> the program set forth under Florida intestacy law. Under Petitioner's argument and unless Florida Statute § 732.702 has real meaning, a Florida citizen wishing to control the fate of his homestead, considering marriage, has only two choices:

1. Proceed with the execution of an antenuptial agreement, but recognize that you are helpless to prevent the ultimate intestate succession the property; or

2. Not get married.

The Respondent would ask this court to read the Florida Constitution and Florida Statutes §§ 732.401 and 732.4015 in conjunction with Florida Statute §732.702. The effect of Florida Statute § 732.702 as applied to the case at bar leads to the conclusion that Reino W. Jurmu, the Decedent, was not survived by a minor child and, for all legal purposes, was not survived by a spouse. Therefore the Decedent is entitled to devise his homestead property and the devise to Mr. Harold Smith, the Respondent was a devise permitted by law, as determined by the Trial Court and the Second District Court of Appeal.

CONCLUSION

For the reasons stated in this brief, this Court should affirm the Order of the Second District Court of Appeal finding that the devise of the property in question was not within the Constitutional and statutory prohibition but was, in fact, a devise as permitted by law.

Respectfully submitted,

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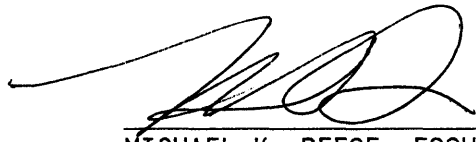
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer Brief has been furnished by regular U.S. Mail to PHILIP W. DANN, ESQUIRE, 540 Fourth Street North, St. Petersburg, Florida, 33701, and R.J. Pedgrift, Esquire, Post Office Box 293, St. Petersburg, Florida, 33731, this 11TH day of March, 1991.



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