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FILED
SID J. WHITE
FEB 20 1991
CLERK, SUPREME COURT
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IN THE FLORIDA SUPREME COURT

Case Number 76,431

RUTH JURMU HARTWELL,

Appellant / Petitioner,

vs.

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

JANE BLASINGAME,
personal representative
of the Estate of Reino
Wilho Jurmu,

Appellee / Respondent.

______________________________/

PETITIONER'S INITIAL BRIEF

ON THE MERITS

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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WHETHER A DECEDENT HAS THE POWER TO DEVISE HOMESTEAD PROPERTY WHEN SURVIVED BY A SPOUSE WHO HAD WAIVED HER HOMESTEAD RIGHTS AND AN ADULT CHILD WHO HAD NOT WAIVED HER HOMESTEAD RIGHTS.

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STATEMENT OF THE CASE AND FACTS

This proceeding is taken from an order of the District Court of Appeal, Second District, affirming an order of probate division of the Circuit Court of Pinellas County determining that certain property, although homestead, was subject to devise.

The parties stipulated to the following:

> 1. Reino Wilho Jurmu died a resident of Pinellas County on January 17, 1988. His Will was duly admitted to probate. . .. Jane Blasingame, the nominated personal representative was appointed and letters of administration issued on April 21, 1988.
>
> 2. Mr. Jurmu was survived by his spouse, Ivadelle E. Purdue Jurmu, an adult daughter, Ruth Jurmu Hartwell, and five grandchildren, all of whom are the children of Ruth Jurmu Hartwell.
>
> 3. One of the assets of the estate as disclosed on the inventory was a condominium located in Pinellas Park. The original title was taken in the name of Reino Jurmu and Winona Jurmu. Winona Jurmu died in Pinellas County on January 12, 1975 thereby vesting title to the property in the name of Reino Jurmu alone.
>
> 4. On May 25, 1979, prior to his marriage to Ivadelle Purdue, the decedent and Ms. Purdue entered into an ante-nuptial agreement. The original of this agreement was filed with this court as an attachment to the petition to determine homestead on September 9, 1988 . . . Per the terms of this agreement [Ivadelle Purdue] relinquished any rights to homestead property.
>
> 5. The facts of this case are not now, nor have they ever been, at issue. The only matter at issue is the application of Article X, section 4 of the Florida Constitution and Florida Statutes 732.401 and 732.4015 to the case at hand.

After consideration of the personal representative's petition to determine homestead and responses by a guardian ad litem for unknown heirs, the devisee of the property, and the adult daughter who claimed the property through operation of the homestead laws, the trial court determined (1) the property to be homestead (2) in which the surviving spouse had waived her homestead interest (3) which, in the absence of a minor child, relieved the decedent and the property of the constitutional

prohibition against devise of homestead and therefore (4) held the property to be not subject to section 732.401, Florida Statutes, and properly devised according to law.

Upon review, the order was affirmed by the district court, with its opinion reported as *Hartwell v. Blasingame,* 564 So. 2d 543 (2d DCA Fla. 1990), and this timely proceeding ensued.

SUMMARY OF ARGUMENT

Although three district courts have reached the same *result* on the question involved in this matter, they have done so by differing and conflicting approaches. In each instance the decisions ignore the clear and literal intent of the framers of the constitution by employing various fictions which upon analysis prove to be unsound.

This court should overrule each of the three opinions and leave the task of establishing policy and passing legislation the legislature and the people through constitutional initiative.

ARGUMENT

A DECEDENT DOES NOT HAVE THE POWER TO DEVISE HOMESTEAD PROPERTY WHEN SURVIVED BY A SPOUSE WHO HAD WAIVED HER HOMESTEAD RIGHTS AND AN ADULT CHILD WHO HAD NOT WAIVED HER HOMESTEAD RIGHTS.

In addition to the instant decision, *Hartwell v. Blasingame*, 564 So. 2d 543 (2d DCA Fla. 1990), two other district courts have addressed the same point in *City National Bank v. Tescher*, 557 So. 2d 615 (3d DCA Fla. 1990), and *Wadsworth v. First Union National Bank*, 564 So. 2d 634 (5th DCA Fla. 1990), *substituted on en banc rehearing for Wadsworth v. First Union National Bank*, 15 FLW D511.

The instant case is predicated on an implied waiver theory; *Tescher* employs the fiction of a presumed death upon execution of the agreement; and *Wadsworth* turns on the scope of the class intended to be protected.

Appellant has the unenviable burden of convincing this court that only three of the thirteen district court judges who have considered this question have reached the appropriate conclusion, *i.e.*, that the controlling constitutional and statutory provisions are to be read literally, per the dissent of Judge Cowart in *Wadsworth*.

An analsis of each case, however, inexorably leads to the conclusion that the majority in each case, in far reaching attempts to set right what each considered to be blunders by the framers of the constitution and drafters of enabling legislation, groped about until finding a legal fiction which seemingly mandated the equitable result each majority desired.

That there are three cases and three mutually exclusive fictions producing the same result demonstrates the paucity of intellectually sound reasoning behind the decisions.

City National Bank of Florida v. Tescher, supra, was the first published decision on point although it was not available until several months after the instant order was rendered by the trial court.

The *Tescher* panel, citing *Hulsh v. Hulsh*, 431 So. 2d 658 (3d DCA Fla. 1983), *cert. denied* 440 So. 2d 352 (1983), recognized that the execution of a valid antenuptial agreement is the legal equivalent of an individual's having predeceased another from whom, but for the fiction, he would have acquired certain rights. It then, however, takes a tremendous metaphysical leap in equating a *civil* death (akin to one's filing for bankruptcy) to the *temporal* concept of survivorship embodied in the homestead laws.

Under §732.702 (1), Florida Statutes, a spouse is permitted to commit civil suicide by the execution of a valid antenuptial agreement, even as it pertains to that spouse's matrimonially derived homestead rights. The underlying issue of whether a spouse can waive the rights of persons not parties to a marriage or to an antenuptial agreement without their consent, implied or otherwise, is sidestepped by *Tescher's* flawed analogy.

Tescher stretches the analogy too far by extending the orbit much beyond its initial parameters. *Tescher* fails to recognize that lineal descendants, including children of a prior spouse, have rights which simply cannot be waived by one not in privity with them.

Tescher was orally argued before this court on February 8, 1991.

Hartwell v. Blasingame, supra, was decided about six months after *Tescher* and at a time when the dissenting opinion in *Wadsworth v. First Union National Bank, supra*, was the majority opinion, before the *en banc* hearing which resulted in a 4-3 reversal from the original *Wadsworth* decision.

Although the Second District obviously had the benefit of *Tescher's* reasoning, it rejected it in favor of a narrow reading of the scope of the class which was entitled to invoke the protection of the constitutional provsion. *Hartwell* is logical as far as it goes but its failure to integrate §732.401(1), Florida Statutes, into its equation is fatal

to its logical integrity. §732.401(1) exists and must be dealt with if one desires to harmonize and rationalize Florida's law of homestead descent and antenuptial agreements.

Hartwell fails to recongize that there are three classes of persons, i.e., spouses, minor children, and lineal descendants, protected by the constitutional and statutory which has been in place for substantial period, presumably with some sort of purpose other than giving courts cause to invent resons to skirt their clear and literal meaning.

The *Wadsworth* court, relying on *In re Estate of McGinty*, 258 So.2d 450 (Fla. 1971), concludes that adult children are unprotected by the constitutional prohibition against devise of homestead and relies on the flawed civil death analogy to negate the rights of lineal descendants of a testator survived by a spouse.

Judge Cowart's dissent in *Wadsworth* is a logical, common sense approach to a difficult problem and warrants close scrutiny by this court. It follows in its entirety:

> **Cowart, J., dissenting.**
>
> Article X, Section 4(c) of the Florida Constitution provides in part:
>
> > 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 question in this case is: if the homestead owner has no minor children and his surviving spouse executes a valid antenuptial agreement waiving all of her rights in and to the homestead property, does this constitutional provision still apply to prohibit a valid devise of the homestead to one other than his spouse? The answer should be "yes." A common sense reading of the plain and ordinary meaning of the language to effectuate the intent of the framers is that the homesteader cannot devise the homestead if he is survived by a minor child or a spouse. To hold otherwise is to assume that the framers of this constitutional provision did not understand that if the owner is prohibited from devising the homestead, it will pass as the legislature may provide by statute.
>
> In this case, the owner did not have a minor child but he did have a spouse who, by antenuptial agreement, waived her interest in the homestead property. The constitution does *not* state that the homestead is not subject to devise if the owner is survived by a spouse who has not waived her rights or

by minor child, a concept easy enough to state if intended. Neither does the constitution state or imply the converse - that the homestead is subject to devise if the owner is survived by a spouse who has waived her rights in the homestead property. A surviving spouse is a surviving spouse without regard to whether she has, or has not, waived her rights in the homestead property.

The result of Article X, section 4(c) is that if the owner is survived by a minor child, or if the owner has no minor child but has a surviving spouse and the homestead is not devised to the surviving spouse, the homestead property cannot be devised to anyone and it descends as provided by the legislature by statute. The legislature understands this constitutional provision to authorize it to decide how the homestead should pass in this event and by section 732.401(1), Florida Statutes, has specifically provided that "the homestead shall descend in the same manner as other intestate property ... but if the decedent is survived by a spouse and *lineal descendants*, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the *lineal descendants*..." Under the present statute, the exemption and the property descends to minor and adult heirs, as lineal descendants of the homestead owner, in precisely the same manner. There is nothing illegal or immoral or unconstitutional about the legislature providing that, as to their ancestor's homeplace, the ancestor's lineal descendants will be treated equally whether they are, or are not, of majority age. Under this statute, the children (perhaps minor children) of a deceased child of a homesteader would likewise inherit a deceased adult child's share of the ancestor's homeplace but not under the majority opinion.

While the majority opinion purports to only hold that the constitution "primarily controls" rather than section 732.401(1), Florida Statutes, the real but latent effect is to not only hold that the statute is unconstitutional, but to hold that the legislature cannot constitutionally provide for the descent of the homestead other than to the surviving spouse and minor children.

The constitution does not provided that in the event the owner cannot, under the constitution, devise his homestead the legislature must provide that the homestead can only be inherited by the spouse and minor children. By reading this limitation into the constitution, the majority opinion is using the judicial power to interpret the constitution in a manner that usurps the legislative power to provide for the inheritance of homestead property as the legislature sees fit and is thereby violating Article II, section 3 of the Florida Constitution, which prohibits any branch of government from exercising any power appertaining to another branch of government.

Under prior Florida constitutional homestead provisions,[1] it has been long recognized that, whatever may be argued to have been the constitutional "intent," the effect was to cause all of the lineal descendants of the owner of the homestead to have a right and interest in the homestead real estate exemptions that were secured by the constitution and that, neither by inter vivos deed nor by testamentary disposition, could the owner alienate the homestead and defeat the rights of his lineal descendants except

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1 For the consideration of this point under prior constitutional homestead provisions, *see Cumberland & Liberty Mills v. Keggin*, 139 Fla. 133, 190 So. 492 (1939); *Church v. Lee*, 102 Fla 478, 136 So. 242 (1931); *Miller v. Finegan*, 26 Fla. 29, 7 So. 140 (1890).

in strict accordance with a literal reading of the exceptions permitted by the constitution. Under the present constitutional homestead provisions and the present statute, this is still the effect and result.

It is of the very essence of this dissent that, as recognized in *In re Estate of McGinty*, 258 So.2d 450 (Fla. 1971) and *In re Estate of McCartney*, 299 So.2d 5 (Fla. 1974), there is a significant difference between the terms "lineal descendants" and "minor children" and that the legislature knows this difference and when the legislature provided in section 732.401(1), Florida Statutes, that the homestead shall descend to the spouse and "lineal descendants," the legislature meant "lineal descendants" and not minor children. It is the majority opinion that assumes that the legislature does not understand that lineal descendants and heirs of the homesteader include "adult" children as well as "minor" children, all of whom under the present statute, section 732.401(1), Florida Statutes, inherit an interest in the homestead. More importantly, if the constitution itself provides, as the majority opinion implies, that, in the vent the homesteader is survived by spouse or minor children, they alone receive the homestead, or, alternatively, if the constitution mandates that the legislature must provide for the spouse and minor children only to receive the whole title to the homestead then the present statute providing that in such event the homestead goes to the surviving spouse for life with remainder to the homesteader's lineal descendants (which terms includes both minor and adult children and others) must be held to be unconstitutional.

The majority opinion states that Article X, section 4(c) was "designed to protect two classes of persons only: surviving spouses and minor children." If that were the intent of the framers, the *constitution* would merely provided that if the homestead owner is survived by spouse or minor children, they, and only they, inherit the homestead. The constitution does not so provide. In fact nowhere does the constitution provided that either a surviving spouse or minor children must receive an interest in the homestead. Upon the death of the owner, the title to homestead property, like all other property, can pass in only two ways:[2] by devise by will or by inheritance as provided by statute. When property is devised, the owner makes the decision as to who acquires it; when property passes by intestate succession, the legislature makes the decision. As revealed by the way it is worded and its effect, the true intent of Article X, section 4(c) is that, in the event the homestead owner is survived by spouse or minor child, the title to homestead property will pass as intended and provided by the legislature by statute rather than as intended and provided by the homesteader by will. The specific intent of the original framers of this constitutional limitation on the constitutional right[3] of the owner to devise his homestead was that if the homesteader was survived by a spouse or minor children the legislature acting by statute in the general public interest should direct to whom, and in what interests, the title to homestead property should pass, rather than permitting that decision to

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2 Disregarding in this case, the possibility of undevised property of one dying without heirs passing to the state by the doctrine of escheat (section 732.107(1), Florida Statute), or ultimate heir.

3 This is brand new constitutional right. *See Shriners' Hospitals for Crippled Children v. Zrillic*, 563 So.2d 64 (Fla.1990).

be made by the specific homesteader as to his specific homestead. This is plain, clear and simple enough.[4]

The next question is what is the intent of the legislature as to this proposition. By section 732.401(1) and section 732.4015, Florida Statutes, the legislature has clearly answered that question by providing for the homestead to descend to the homesteader's spouse, if any, for life, and to the homesteader's "lineal descendants" rather than to the homesteaders's "minor children." Completely consistent with the constitution, the legislature can at any time by statute provide, as could the constitution, that if the homesteader is survived by spouse or minor children, they alone inherit the homestead. The present statutes does not so provide and this court should not disregard the plain language of the constitution and the statutes and substitute its preference for that of the people who adopted the constitution and elected the legislature for the purpose of exercising the legislative function and making public policy by enacting statutes, such as section 732.401(1), Florida Statutes. Judicial action in so doing is correctly condemned by all those who object to the judiciary establishing social and political policy in the guise of finding ambiguity in constitutional provisions and legislative enactments and then construing plain language to achieve a result the judiciary prefers over that which the constitution and statutes provide. Stating that an antenuptial agreement waiving homestead rights is the "functional equivalent of death" is but legal sophistry to reach a judicially preferred result.

Courts should not assume that the constitution was intentionally written so as to obscure its meaning from all but those specially trained to read, construe, interpret and explain it. It was written to be read and understood by all literate citizens. Neither should the reader of the constitution assume that the reader understands the meaning and effect of the writing better than the writer was able to write and express its true meaning and effect. The constitution should be read with the sense that appears on its surface, not that one thing is stated but another meant, but that the very thing is meant which is stated and that the sense is literal, not figurative nor hidden. With good reason much of the public believes that the legal profession is so accustomed to "construing" vague, difficult and obtuse language that, in the habitual attempt to fathom or deduct some subtle intent, meaning or purpose, the profession seems to have the ability to understand or believe that a plainly written statement may have been truly intended to, and does, mean exactly what it states - no more and no less.

A spouse has, and should have, the right to waive her rights but neither under the constitution nor statute does she have the right or the authority to "waive" the rights of the homesteader's lineal descendants, nor by her acts to change the effect of the constitution or the statute of descent distribution so as to defeat the constitutional and statutory hereditary rights

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4 This does not mean that either the constitutional prohibition against devise or the present statutory provisions for the descent of homestead are not in need of reform, *see* Article: An Update on the Legal Chameleon: Florida's Homestead Exemption and Restrictions, 40 University of Flroida Law Review, 919, 945 (1988). However, such reforms should come by constitutional and statutory amendment and through the legislative process and not by the courts.

> of the homesteader's lineal descendants. In this case, although the spouse executed an antenuptial agreement and waived her life estate in her husband's homestead, the homesteaders was nevertheless survived by a spouse and, under the constitution, the result is that the homesteader could not devise his homestead, and his attempt to do so was invalid. At his death under section 732.401(1), Florida Statutes, the homesteader's homestead property passed to his lineal descendants who inherited it as homestead. This statute is a valid exercise of the legislative policy making power enacted pursuant to the constitutional prohibition of a devise of the homestead. The statute should be upheld and effectuated, not circumvented, by the court. The trial court's order upholding the devise of the homestead to persons other than the homesteader's lineal descendants should be reversed.[5]

564 So. 2d 636-39. (Footnotes and emphasis in original).

CONCLUSION

Although the various district courts which have addressed the issue are in harmony as to the result, their disjunctive reasons for reaching the result warrant this court's harmonizing the law of Florida on this point.

Petitioner submits that the reasoning of Judge Cowart's dissent in *Wadsworth* is the only viable legal conclusion before this court at the present time.

Respectfully submitted,
PHILIP W. DANN, P.A.

By:______________________

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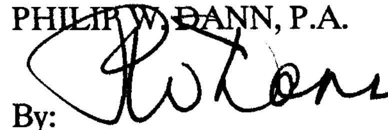
5 Since the original opinion in this case (now withdrawn by an en banc majority) the Third District Court of Appeal has held, consistent with the en banc majority opinion, that when the homesteader's spouse signs a valid antenuptial agreement and dies without minor children, the homesteader can devise the homestead away from his lineal descendants. *See City National Bank of Florida v. Tescher*, 557 So.2d 615 (Fla. 3d DCA 1990).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail and by fax to Michael K. Reese, Esquire, 2739 US 19, Suite 206, Holiday, FL 34690 and by regular mail to R. J. Pedgrift, Esquire, PO Box 293, St. Petersburg, FL 33731, this 19th day of February, 1991.

PHILIP W. DANN, P.A.



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