Copy 76,431

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 BRIEF ON JURISDICTION ON DISCRETIONARY PROCEEDING TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

THE HONORABLE CHRIS W. ALTENBRAND, JUDGE

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

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Issues Presented for Review:

WHETHER THE DISTRICT COURT'S OPINION EXPRESSLY CONSTRUES A PROVISION OF THE STATE CONSTITUTION IN DETERMINING THAT **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.**

TABLE OF CITATIONS

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 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 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. This court should exercise its discretionary jurisdiction to harmonize the law of Florida on the issue.

ARGUMENT

THE DISTRICT COURT'S OPINION EXPRESSLY CONSTRUES A PROVISION OF THE STATE CONSTITUTION IN DETERMINING THAT **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.**

After reciting the text of Article X, section 4, of the Florida Constitution, and citing several pertinent statutes, the district court thoroughly analyzed the impact of the provision on the instant situation and ultimately held that the petitioner before this court had "no right to seek the protection of [the] constitutional provision."

While it is clear that this court has discretionary jurisdiction, the reasons it should be invoked are not, particularly in light of the fact that two other district courts have reached the same *result* in *City National Bank v. Tescher*, 557 So. 2d 615 (3d DCA Fla. 1990), and *Wadsworth v. First Union National Bank*, No. 89-272, (5th DCA Fla. 2/2/90) [15 FLW D1989 *(substituted on en banc rehearing* for *Wadsworth v. First Union National Bank*, 15 FLW D511.)

Including the instant decision, the are three Florida cases directly on point which reach the same result by three different approaches: the instant case is predicated on an implied waiver theory; *Wadsworth* turns on the scope of the class intended to be protected; and *Tescher* employs the fiction of a presumed death upon execution of the agreement.

Although the *Wadsworth* court certified to this court the question of whether "a spouse can waive her rights to homestead property so as to permit devise by the owner of the homestead property," the question apparently will not reach this court through the vehicle of *Wadsworth* as that case was settled prior to the rendition of the substituted opinion (per William S. Belcher, Esq., counsel for appellees in that case.)

An application for review of the *Tescher* decision is pending before this court at the present time.

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 exercise of its discretionary jurisdiction to harmonize, one way or the other, the law of Florida on this point.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail to Michael K. Reese, Esquire, 2739 US 19, Suite 206, Holiday, FL 34690 and R. J. Pedgrift, Esquire, PO Box 293, St. Petersburg, FL 33731, this 6th day of September, 1990.

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