FILED
SID J. WHITE
OCT 29 1993
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

SHIRLEY NEAL KING,
FRANCES SHERRY CLARKE AND
CHARLOTTE CLAUS,

Petitioners,

vs.

OLA DEAN T. ELLISON a/k/a
OLADEAN TALLY a/k/a OLADEAN
ELLISON, and CAROLYN ELLISON,
a/k/a CAROLYN CURTIS,

Respondents.

______________________________/

Case No. 82,300
DCA Case No. 92-02376
Fourth District

L.T. No. 92-0316-CA-21
Indian River

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioners' Statement of the Case and Facts provides a thorough review of the facts and the proceedings below. However, Respondents believe that certain facts must be added specifying the procedure that was followed in the probate of Hubert Calhoun's estate, which commenced on June 15, 1977. (R. 45) The real property, which is the subject of the case sub judice, was set out as the homestead of Hubert Calhoun in the Inventory. (R. 50) A copy of the Inventory was sent to all interested parties. (R. 50) Subsequently, a Petition to Determine Exempt Property and Petition for Family Allowance with Notice was given to all interested parties. (R. 53; R. 55; R. 56-7) An Order Determining Exempt Property and an Order Authorizing Family Allowance was then issued. (R. 60; R. 61) A Final Accounting was then filed with a proposed schedule of distribution attached (R. 62-4) with Notice thereof given to all interested parties. (R. 65) No objections having been filed, distribution was made and the estate was closed on December 5, 1978. (R. 76)

Respondents request that the Supreme Court of Florida affirm the decision of the Fourth District Court of Appeal.

SUMMARY OF THE ARGUMENT

Article X, section 4(c) of the Florida Constitution and Section 732.4015, Florida Statutes (1991), prohibit the devise of homestead property provided the owner is survived by a spouse or a minor child. This Court has consistently endeavored to uphold and follow Florida's Constitution and statutes restricting the devise of homestead.

Petitioners allege that Section 732.401(1), Florida Statutes (1991), is unconstitutional as it applies to Petitioners, the stepchildren of Hubert Calhoun. That section provides in pertinent part:

> If not devised as permitted by law and the Florida Constitution, 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 in being at the time of the decedent's death.

The classes intended to benefit from article X, section 4(c) and section 732.401(1) are surviving spouses and minor children. Unfortunately for Petitioners, they were purposefully not included in either the Constitution or the Florida Statutes. Hence, Petitioners could not be devised a portion of Hubert Calhoun's homestead. Statutes are presumed constitutional and the statute at issue is a plain statement following article X, section 4(c). Taking Petitioners' argument to its logical extent, they would have this Court ignore or in some manner invalidate article X, section 4(c).

The significance of the homestead in Florida is unquestionably great. Petitioners fail to comprehend this, and instead, attempt to treat homestead as any other property commonly devised in a will. Respondents recognize the constitutional right to devise property; however, even constitutional rights are not absolute. The Florida Constitution and statutes enacted pursuant thereto limit the right to devise property and instruct testators on how the homestead may pass. Such Constitutional limitations and instructions represent the voice and will of the people and are accordingly absolute.

The options left to Hubert Calhoun when planning his estate were not so limited as to violate his constitutional right to devise his property. The only property prevented from passing to Hubert's stepchildren through his Last Will and Testament was his homestead. Citizens are charged with knowledge of the law so that their actions or omissions are considered intentional. Presumably, Hubert Calhoun was knowledgeable of Florida homestead law and knew that his homestead would only go to his lineal descendants.

Hubert Calhoun could have taken advantage of several options if he actually intended to leave his homestead to both his lineal descendants and his stepchildren. He could have conveyed the property to them subject to a life estate in himself and his new wife, Rosemarie. Also, he and Rosemarie, at the time of their marriage, could have agreed that Rosemarie waive her right to homestead property, thus allowing the homestead property to pass by Hubert's Will. This second option was clearly articulated by the

lower court. Finally, Hubert could have adopted Petitioners so that they would be considered as lineal descendants under the laws of intestate succession.

Contrary to Petitioners' contentions, they do not have a right to inherit property. A person may challenge the constitutionality of a statute only after showing that enforcement of the statute will be injurious to that persons' personal or property rights. Rights of succession to the property of a deceased, whether by will or intestacy, are of statutory creation. The statutes are silent for Petitioners in this case. Furthermore, Petitioners, who have not been denied a constitutional right, may not be heard to raise constitutional questions on behalf of the decedent. The law provides that courts have a duty not to pass on the constitutionality of a statute if the case can be resolved on other grounds. Petitioners' case, which challenges the constitutionality of Section 732.401(1), should be properly disposed of on the basis of lack of standing, among other reasons.

The issue certified by the Fourth District Court of Appeal affects numerous citizens of Florida and is of great public importance. If the Court recognizes that Petitioners have standing, then it is imperative that the Court uphold Section 732.401(1) on the basis of precedents and that Petitioners have no right to inherit. A statute adjudged unconstitutional is rendered inoperative from the date of its enactment. If the Court finds Section 732.401(1) unconstitutional, then it will be deemed inoperative from July 1, 1975. In effect, the titles of numerous

homestead properties which have passed pursuant to Section 732.401(1) will unequivocally be called into question and deemed void. Numerous closed probate estates would be required to be reopened and many others opened for the first time if the homestead is the only asset.

Respondents respectfully request that this Court follow its precedents and therefore, uphold the constitutionality of Section 732.401(1) as enacted pursuant to article X, section 4(c) of the Florida Constitution and affirm the decision of the Fourth District Court of Appeal.

ARGUMENT

I.

SECTION 732.401(1), FLORIDA STATUTES (1991), WHICH VESTS A REMAINDER INTEREST IN HOMESTEAD PROPERTY IN ADULT LINEAL DESCENDANTS IS CONSTITUTIONAL EVEN IF APPLIED TO DEFEAT A TESTATOR'S POSSIBLE INTENT TO DEVISE HIS HOMESTEAD PROPERTY EQUALLY TO HIS ADULT STEPCHILDREN AND ADULT LINEAL DESCENDANTS.

The historical purpose underlying Florida's homestead law is to protect the family. Article X, section 4(c) of the Florida Constitution, and statutes enacted pursuant thereto, which prohibit the devise of homestead property provided the owner is survived by a spouse or minor child, are indicative of the State's concern for the protection of the family. City National Bank of Florida v. Tescher, 578 So. 2d 701, 703 (Fla. 1991); see In re Estate of Scholtz, 543 So. 2d 219, 222 (Fla. 1989). This Court has consistently endeavored to uphold and follow Florida's Constitution and statutes restricting the devise of homestead. See Tescher, 578 So. 2d at 703; In re Estate of Finch, 401 So. 2d 1308, 1309 (Fla. 1981).

A. THE CONSTITUTION OF THE STATE OF FLORIDA, THE FLORIDA STATUTES AND FLORIDA CASE LAW PROHIBIT THE DEVISE OF HOMESTEAD PROPERTY IF THE OWNER IS SURVIVED BY A SPOUSE OR A MINOR CHILD.

This Court has repeatedly held that the owner of homestead property may not devise homestead property if survived by a spouse or a minor child. The pertinent provision of the Florida Constitution provides:

> 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.

Art. X, § 4(c), Fla. Const. Section 732.4015, Florida Statutes (1991), implements this provision. Article X, section 4(c) is clearly intended to protect two classes of persons only: surviving spouses and minor children. Tescher, 578 So. 2d at 703; Wadsworth v. First Union Nat'l Bank, 564 So. 2d 634, 636 (Fla. 5th DCA 1990). Petitioners fail to qualify as either class; they are adult stepchildren.

Conceding that they are not a constitutionally protected class, Petitioners maintain that Section 732.401(1), Florida Statutes (1991), regulating the intestate succession of homestead property, is unconstitutional. That section provides in pertinent part:

> If not devised as permitted by law and the Florida Constitution, 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 in being at the time of the decedent's death.

§ 732.401(1), Fla. Stat. (1991). The persons intended to benefit from article X, section 4(c) and section 732.401(1) are similarly protected. Unfortunately for Petitioners, they were purposefully not included in either the Constitution or the Florida Statutes.

The homestead in the case sub judice was not devisable because the decedent was survived by a spouse to whom the homestead was not devised. Art. X, § 4(c), Fla. Const.; § 732.4015, Fla. Stat. (1975). Petitioners desire this Court to hold that after the life estate in the widow, Rosemarie Calhoun, has terminated, and since there are no minor children involved, the homestead should then

descend pursuant to Hubert Calhoun's Last Will and Testament. In order to do this, this Court would have to hold Section 732.401(1), which prohibits such conveyances, unconstitutional and then ignore or in some manner invalidate article X, section 4 of the Constitution.

Statutes are presumed constitutional and such presumption is normally indulged in by the courts to uphold the validity of a statute. State ex rel. Watson v. Hurlbert, 20 So. 2d 693, 695 (Fla. 1945). The statute at issue is a plain statement following the Constitution as it speaks to homestead. Construing article X, section 4 in its entirety as required, Holden v. Estate of Gardner, 420 So. 2d 1082, 1085 (Fla. 1982), refutes the logic behind Petitioners' contentions. If this Court were to hold Section 732.401(1) unconstitutional, what then happens with the exemptions provided by article X, section 4(b) that are to inure to the surviving spouse or heirs of the owners? The term "heirs" refers to those persons entitled to a decedent's property under the statutes of intestate succession. Public Health Trust of Dade County v. Lopez, 531 So. 2d 946, 951 (Fla. 1988). Following the Petitioners' reasoning, it is easy to see a scenario where a surviving spouse dies immediately after her husband, the life estate is no longer in existence, there are no minor children and the decedent's will leaves everything equally to a son, a stepdaughter and the Humane Society. There are numerous creditors of the estate. What happens now? Will the homestead exemptions be lost since two-thirds of the property is subject to the creditors'

claims and can be reached by them through levy and partition?

Petitioners' argument is similar to that argued by the petitioner, Public Health Trust, in Lopez. In that case, the decedent homeowner, at the time of her death, resided in her homestead with her three adult children. 531 So. 2d at 947. The decedent's personal representatives petitioned the probate court to have the decedent's residence set aside as homestead under article X, section 4 of the Florida Constitution. The petition was opposed by Public Health Trust, to whom the decedent was indebted. Public Health Trust argued that article X, section 4(b), extending the homestead exemption to the "surviving spouse or heirs of the owner," must be construed to include only minor or dependent heirs. Id. In a well reasoned opinion, this Court rejected petitioner's argument and agreed with the lower court's interpretation of article X, section 4(b) which made dependency or being a minor immaterial under this provision. Id. at 948.

Article X, section 4 must be construed in its entirety. Holden, 420 So. 2d at 1085. This Court in Holden specifically held that the term "homestead", as found in Section 732.4015, is synonymous with the term "homestead" used in the Florida Constitution. Because of both article X, section 4(c) and Section 732.4015, Hubert Calhoun's homestead was not subject to devise. This principle of construction was again restated by this Court in In re Estate of Scholtz, 543 So. 2d 219, 221 (Fla. 1989). In that case, it was held:

> In any event, the language of article X, section 4, is clear and unambiguous. The homestead may not be devised

> if the owner is survived by a spouse or minor child. Because John Scholtz died leaving a spouse, the descent of his property is controlled by Section 732.401(1), Florida Statutes (1987).

Id.

Hubert Calhoun died in 1977 survived by his spouse, Rosemarie Calhoun. Section 732.401(1), Florida Statutes (1975) contained the same prohibitions as it does today. Though article X, section 4 of the Constitution has been amended, the amendment does not affect the outcome of this case.

The questions posed by the Petitioners in challenging the constitutionality of Section 732.401(1) have already been resolved by this Court in favor of Respondents, Hubert Calhoun's lineal descendants.

B. THE ALTERNATIVES AVAILABLE TO THE DECEDENT, HUBERT CALHOUN, AT THE TIME HE DRAFTED HIS WILL AND AT THE TIME OF HIS RE-MARRIAGE TO ROSEMARIE, REFUTE PETITIONERS' CLAIM THAT HUBERT'S CONSTITUTIONAL RIGHT TO DEVISE PROPERTY WAS VIOLATED.

Petitioners fail to comprehend the significance of the homestead in Florida, instead attempting to treat it as any other property commonly devised in a will. Respondents recognize that many citizens of this state prepare a will to direct where their property will go upon their death, and that this is a difficult decision controlled by emotions unique to each individual. (Petitioners' Brief at 13). Further, it is recognized that the right to direct the disposition of ones property upon death is a constitutionally protected right. Art. I, § 2, Fla. Const. However, "even constitutionally protected property rights are not absolute, and 'are held subject to the fair exercise of the power

inherent in the state to promote the general welfare of the people through regulations that are reasonably necessary to secure the health, safety, good order [and] general welfare.'" Shriners Hospitals For Crippled Children v. Zrillic, 563 So. 2d 64, 68 (Fla. 1990) (quoting Golden v. McCarty, 337 So. 2d 388, 390 (Fla. 1976)). The Florida Constitution and statutes enacted pursuant thereto limit the right to devise property and instruct testators on how the homestead may pass. Such limitations and instructions represent the voice and will of the people and are accordingly absolute.

The options left to Hubert Calhoun when planning his estate were not so limited as to violate his constitutional right to devise his property. The only property prevented from passing to Hubert's stepchildren through his Last Will and Testament was his homestead. Citizens are charged with knowledge of the law so that their actions or omissions are considered intentional; presumably, Hubert Calhoun was knowledgeable of Florida homestead law and knew that his homestead would only go to his lineal descendants. Cf. Sorrels v. McNally, 105 So. 106, 112 (Fla. 1925) (a husband is presumed to know that his widow's statutory rights in his estate are paramount to his will). Neither Petitioners, nor Respondents, truly know what Hubert Calhoun intended after his re-marriage, which often invokes one to reconsider his or her will.

Hubert Calhoun could have availed himself of several options if he truly intended to leave his homestead to both his lineal

descendants and his stepchildren. For instance, he could have conveyed the property to them subject to a life estate in himself and his new wife, Rosemarie. Also, he and Rosemarie, at the time of their marriage, could have agreed that Rosemarie waive her right to the homestead property, thus allowing it to pass by Hubert's Will. This second option was clearly articulated by the lower court. King v. Ellison, 18 Fla. L. Weekly D1762, D1763 n.1 (Fla. 4th DCA August 11, 1993) (citing § 732.702(1), Fla. Stat. (1975)). In Tescher, this Court also recognized the option of waiver. 578 So. 2d at 703 ("[S]pouse's antenuptial waiver of rights in the homestead is the legal equivalent of predeceasing the decedent, for purposes of article X, section 4(c). Thus, decedent died with no one entitled to the protection of article X, section 4(c), and the property could pass by devise under the residuary clause of the will."). Finally, Hubert could have adopted Petitioners. Florida's intestacy laws provide in pertinent part:

> (1) For the purpose of intestate succession by or from an adopted person, the adopted person is a lineal descendant of the adopting parent and is one of the natural kindred of all members of the adopting parent's family, and he is not a lineal descendant of his natural parents, nor is he one of the kindred of any member of his natural parent's family or any prior adoptive parent's family, except that:
>
> (a) Adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and the natural parent or the natural parent's family.

§ 732.108(1)(a), Fla. Stat. (1991) (emphasis added).

Hubert Calhoun failed to exercise the available options appropriately tailored for situations similar to this case. Hubert Calhoun's constitutional right to devise property -- the only

property right at issue -- was not unreasonably restricted. The law clearly states that constitutionally protected property rights are not absolute; no rule of law could be more apropos when attempting to devise homestead property.

C. PETITIONERS HAVE NO RIGHT TO INHERIT PROPERTY AND THEREFORE, NO STANDING TO CONTEST THE CONSTITUTIONALITY OF SECTION 732.401(1), FLORIDA STATUTES (1991).

Fundamental principles of constitutional law dictate that a person may challenge the constitutionality of a statute only after showing that enforcement of the statute will be injurious to that person's personal or property rights. Miller v. Publicker Industries, Inc., 457 So. 2d 1374, 1375 (Fla. 1984); Sandstrom v. Leader, 370 So. 2d 3, 4 (Fla. 1979). Contrary to Petitioners' contentions, they have no constitutional right to inherit property. Furthermore, Petitioners, who have not been denied a constitutional right, may not be heard to raise constitutional questions on behalf of the decedent. See Tribune Co. v. Huffstetler, 489 So. 2d 722, 724 (Fla. 1986).

Courts have the authority to hold statutes unconstitutional only where an "imperative and unavoidable necessity" exists to enforce some rights secured under pre-existing law and where it is essential to uphold some justifiable right secured by the Constitution. State ex rel. Watson v. Kirkman, 27 So. 2d 610, 612 (Fla. 1946); Hillsborough Investment Co. v. Wilcox, 13 So. 2d 448, 453 (Fla. 1943). Generally, courts refuse to pass upon the constitutionality of a statute unless a decision upon that very point is absolutely necessary to a disposition of the case. In re

Estate of Sale, 227 So. 2d 199, 201 (Fla. 1969); In re E. B. L., 544 So. 2d 333, 335 (Fla. 2d DCA 1989). Accordingly, courts have a duty not to pass on the constitutionality of a statute if the case can be appropriately resolved on other grounds. State v. Bruno, 104 So. 2d 588, 590 (Fla. 1958).

The dismissal of the Petitioners' claim by the Circuit Court which was affirmed by the District Court should also be affirmed by this Court because the Petitioners lack standing. Petitioners simply have not been deprived of any constitutional or statutory right enabling them to challenge Section 732.401(1). "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance." Irvin Trust Co. v. Day, 314 U.S. 556, 562 (1942). The Federal Constitution does not forbid a state legislature from limiting, conditioning, or even abolishing the power of testamentary disposition of property within its jurisdiction. Id. Florida courts have similarly treated the issue. The Florida Supreme Court has approved the doctrine that the right to take real or personal property by inheritance is purely statutory. Coral Gables First National Bank v. Hart, 20 So. 2d 647, 649 (Fla. 1945); Sorrels v. McNally, 105 So. 106, 112 (Fla. 1925) ("The right to take real or personal property by inheritance is purely statutory, and a husband is presumed to know that his widow's statutory rights in his estate are paramount to his will.") Evidently, the legislature has not felt compelled to enact an

intestacy statute placing stepchildren on equal footing with lineal descendants.

The constitutionality of legislation is open to attack only by a person whose rights are affected thereby. Utilities Operating Co. v. Mason, 172 So. 2d 225, 229 (Fla. 1964). Petitioners erroneously argue, based on Shriners Hospitals, that they have a constitutional right to inherit. In Shriner's Hospitals, this Court expressly recognized only the right to devise property under article 1, section 2 of the Florida Constitution. 563 So. 2d at 67 (emphasis added). Petitioners also attempt to assert the rights of their stepfather, Hubert Calhoun, the decedent. Contrary to Petitioners belief, they do not have a right to inherit and as a result, have no right to raise constitutional questions on behalf of the decedent. See Tribune Co., 489 So. 2d at 724.

In order to support a determination that legislation is unconstitutional, it is the Constitution that must be found to be violated. 10 Fla Jur 2d, Constitutional Law § 56. The Legislature, pursuant to article X, section 4(c), clearly had the authority to enact Section 732.401(1). See id. Accordingly, the legislative will is supreme and it is the duty of the Court to effectuate that will. See Ideal Farms Drainage Dist. v. Certain Lands, 19 So. 2d 234, 238 (Fla. 1944). Objections applying only to policy, like Petitioners', rather than to the constitutionality of Section 732.401(1), are not subject to consideration by the Court. See Rodriquez v. Jones, 64 So. 2d 278, 279 (Fla. 1953). Hence, Petitioners have no standing to contest Section 732.401(1).

D. FINDING SECTION 732.401(1) CONSTITUTIONAL IS IMPERATIVE IN ORDER TO UPHOLD THE TITLE OF HOMESTEAD PROPERTY WHICH TRANSFERRED PURSUANT TO THAT INTESTACY SECTION SINCE ITS EFFECTIVE DATE, JULY 1, 1975.

When a statute is adjudged unconstitutional, such statute is rendered inoperative by the force of the Constitution. State ex rel. Nuveen v. Greer, 102 So. 739, 743 (Fla. 1924); Bell v. State, 585 So. 2d 1125, 1127 (Fla. 2d DCA 1991). Courts do not have the authority to make a statute inoperative only from the date of an adjudicated invalidity. Further, courts are unable to declare a law constitutional as to past occurrences, but invalid as to the future, since they have no such power under the Constitution. Therefore, a statute or a part thereof which is declared unconstitutional by the Constitution is inoperative from the time of its enactment. State ex rel. Nuveen, 102 So. at 743.

The issue certified by the Fourth District Court of Appeal affects numerous citizens of Florida and is of great public importance. If the Court finds Section 732.401(1) unconstitutional, then it will be deemed inoperative from July 1, 1975. See Ch. 74-106, at 212, Laws of Fla. In effect, the title of homestead property which has been transferred pursuant to Section 732.401(1) will unequivocally be called into question and deemed void. Legislative enactments are prospective in application. Therefore, it is imperative that this Court uphold Section 732.401(1) on the basis of precedents and that Petitioners have no right to inherit.

Persons with objections similar to those of the Petitioners should seek relief in the legislative forum through an amendment to Section 732.401(1) or by availing themselves of the methods for amending the Constitution. A move to amend article X, section 4(c), pursuant to article XI, section 1 of the Florida Constitituion, occurred without success in the Legislature during the 1992 and 1993 legislative sessions. Specifically, bills from both sessions attempted to repeal the current language in article X, section 4(c) which provides that "[t]he 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."[1] If the people of this state truly wish a change in the homestead distribution scheme, then their desire may be appropriately accomplished through the initiative provision of article XI, section 3 of the Constitution.[2]

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[1] The bills introduced in the 1992 Legislative session were House Joint Resolution 2147 and Senate Joint Resolution 922; those introduced in the 1993 session were House Joint Resolution 1107 and Senate Joint Resolution 142.

[2] Article XI, Section 3 provides:

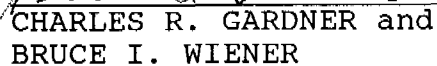
> The power to propose the revision or amendment of any portion or portions of this Constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

Art. XI, § 3, Fla. Const.

CONCLUSION

Respondents respectfully request that this Court uphold the constitutionality of Section 732.401(1) as enacted pursuant to article X, section 4(c) of the Florida Constitution and therefore, affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to **MIKE KRASNY**, Krasny & Dettmer, P.A., 780 S. Apollo Blvd., Melbourne, FL 32901, this 29th day of October, 1993.

BRUCE I. WIENER