SUPREME COURT OF FLORIDA

SHIRLEY NEAL KING,
FRANCES SHERRY CLARKE
and CHARLOTTE CLAUS,

Petitioners,

Case No. 82,300
DCA Case No. 92-02376, Fourth District
L.T. No. 92-0316-CA-21 INDIAN RIVER

v.

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

Respondents.

PETITIONERS' REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondents indicate that certain facts relating to procedure are somehow relevant in the determination of the issue presented by this appeal as certified by the Fourth District Court of Appeal. We do not believe that the procedures in the probate of Hubert Calhoun's estate are relevant to determining the constitutionality of S. 732.401.

The mere listing of the property on the estate inventory as homestead does not affect or determine the status of the homestead property. (R-50). Cavanaugh v. Cavanaugh, 542 So.2d 1345, 1351 (Fla. 1st DCA 1989). The determination of whether the property is homestead or not is based upon the language of the Florida Constitution and the facts of the particular case. No adjudication was ever made that the property was homestead as defined in the Constitution.

Likewise, listing of the property in pleadings or other probate proceedings does not establish the status of the property as homestead or non-homestead. Id. at 1351. Respondents point to the Order Determining Exempt Property and Order Authorizing Family Allowance as somehow relevant. (R-61 and R-62). However, the homestead is not a probatable asset. Cavanaugh at 1351. If the property, in fact, was homestead property, it "passes outside of the will and thereby outside of probate by virtue of S. 732.401." Id. at 1351. It is the constitutionality of Florida Statutes S. 732.401 which is directly at issue in this case.

REBUTTAL

Petitioners contend and Respondents agree that Article X, Section 4(c) is intended to protect only two classes of persons: surviving

spouses and minor children. (Respondents' brief page 7.) Respondents then argue that because Petitioners failed to qualify as either surviving spouse or minor children, that they are somehow barred from enforcing their constitutional rights. Respondents also fail to qualify as protected persons under Article X, Section 4(c). As the Florida Supreme Court has noted, the constitutional restriction on devise of homestead was not intended to protect adult lineal descendants. City National Bank of Florida v. Tescher, 578 So.2d 701, 703 (Fla. 1991). Wadsworth v. First Union National Bank, 564 So.2d 634, 636 (Fla. 5th DCA 1990).

Contrary to Respondents' assertion that S. 732.401 is a "plain statement following the constitution as it speaks to homestead", it is clear that those who are meant to be protected by the constitutional restriction and those who benefit under the statutory language are different persons. The constitutional restriction is designed to protect surviving spouses and minor children, yet the statute inexplicably vests a remainder in the lineal descendants of the decedent. In this case, the statute unreasonably vests the remainder interest to Respondents at the expense of the decedent's constitutional right to devise and Petitioners' constitutional right to inherit property.

Respondents point to Article X, Section 4(b) as some support for their position, although it is not exactly clear how Section 4(b) resolves the question of the constitutionality of S. 732.401(1). Section 4(b), like the restriction on devise, was enacted to protect and benefit the family. However, the restrictions on devise contained

in Article X, Section 4(c), are entirely different from the "exemptions" from forced sale which "inure to the surviving spouse or heirs of the owner". (Article X, Section 4(b), Fla. Const.)

Respondents contend that finding Florida Statutes S. 732.401(1) unconstitutional will somehow affect the forced sale provision. Petitioners are not challenging or questioning the language of the forced sale provisions of the Florida Constitution. It is unclear how the scenario urged by the Respondents in their brief sheds any light on the issues of this case. (Respondents' brief page 8.) Either the beneficiaries fall into the class "heirs of the owner" and are allowed the exemption from forced sale or they are not. This issue should not be confused with the determination of whether the decedent or any other citizen of the State of Florida is entitled to transfer his property to those whom he chooses, subject only to the reasonable restriction under Article X, Section 4(c) which is intended to benefit only surviving spouses and minor children.

Respondents also cite two cases as supporting the general proposition that Article X, Section 4 must be read in its entirety. However, the cases hold only that the definition of "homestead" must be given the same meaning under subparagraphs (a), (b) and (c). In re Estate of Scholtz, 543 So.2d 219, 221 (Fla. 1989). The "meaning" of "homestead" is not an issue in this appeal.

In Holden v. Estate of Gardner, 420 So.2d 1082 (Fla. 1982), the issue decided by the Supreme Court of Florida was whether the restriction on devise applied only in situations where the deceased owner was the head of the family. Id. at 1083. The court held that

because the deceased wife was not the head of the family, the marital residence was not homestead and could be devised. Id. at 1085.

In In re Estate of Scholtz, 543 So.2d 219 (Fla. 1989), the issue was whether the concept of abandonment was still viable in light of the 1985 amendment to the Florida Constitution. The concept of abandonment was an issue in cases predating the 1985 amendment related to the definition of homestead which contemplated a "head of family". Id. at 221. As the court stated, "[b]ecause John Scholtz died leaving a spouse, the descent of his property is controlled by section 732.401(1), Florida Statutes." The Supreme Court, however, did not decide the constitutionality of S. 732.401(1).

The issue raised by Petitioners is whether S. 732.401(1), Florida Statutes, which vests the remainder interest in homestead property in adult lineal descendants, is unconstitutional when used to defeat a testator's intent to devise homestead equally to adult stepchildren as well as adult lineal descendants. Put a different way, is the direction in S. 732.401(1) consistent with the constitutional restriction on devise? Does S. 732.401(1) clearly meet the intent of the Florida Constitution regarding the protection of surviving spouses and minor children, or rather is it an unreasonable restriction imposing upon the constitutionally protected right of decedents to select whom their intended beneficiaries should be?

Respondents apparently do not subscribe to the constitutional right of citizens to be left alone from unreasonable government interference where there is no public purpose to be served by the governmental intrusion. Citizens of this state have the right to

"acquire, possess and protect property." (Article I, Section 2, Florida Constitution.) The Supreme Court of Florida has held that the right to devise and to inherit property is supported by the "common sense reading of the language." Shriners Hospitals for Crippled Children v. Zrillic, 563 So.2d 64 (Fla. 1990).

I. THE OPTIONS LEFT TO HUBERT CALHOUN WHEN PLANNING HIS ESTATE WERE SO LIMITED THAT HIS CONSTITUTIONAL RIGHT TO DIRECT WHERE PROPERTY DESCENDED WAS IMPAIRED.

Respondents indicate that the options left to Hubert Calhoun were not so limited as to violate his constitutional right to devise his property. Respondents urge that as part of his estate planning Hubert could have: (1) given the property away retaining a life estate; (2) had his new wife sign a prenuptial agreement waiving her rights in homestead; or (3) adopted the Petitioners.

For most citizens of the State of Florida, giving property away and retaining a life estate is not a viable option. Most people want to retain the ability to sell the homestead, if needed, and move, or to sell the property and retain the equity. Giving away a present estate in a remainder interest prevents the full use and enjoyment of the remainder interest, which many times is the only or most valuable asset. Many citizens rely on the equity in their homestead in the event that they are no longer able to take care of themselves and funds are needed to provide nursing home care. To require that one divest himself of his property and retain only a life estate in order to protect his proposed beneficiaries lacks reason.

To suggest that a reasonable alternative open to Hubert is to give the property away during his life exposes the statutory scheme as

unworkable. Citizens of this state should not be forced to give away their property during their lives in order to direct their homestead's descent. A number of other practical problems arise from this proposed solution, ranging from potential gift tax liability to potential claims from remaindermen's creditors.

As pointed out in Petitioner's initial brief, Hubert could have insisted that his future wife sign a prenuptial agreement and waive her rights under S. 732.702(1), Florida Statutes (1975). However, it was not until Tescher that the Supreme Court of Florida recognized a prenuptial agreement as a valid waiver of rights in the homestead equivalent to predeceasing the decedent for purposes of Article X, Section 4(c). Thus, at the time of Hubert Calhoun's remarriage, it was not a viable option for him to request that his new wife sign a prenuptial agreement. Assuming that Hubert and his new wife could have entered into a prenuptial agreement, it forces the one person in this scenario whose rights are to be protected by the constitution to give up that right in favor of lineal descendants or stepchildren that were not designed to be protected by the constitutional restriction. In effect, Respondents are promoting prenuptial agreements as estate planning tools to avoid the legitimate purpose of Article X, Section 4(c).

Respondents also argue that Hubert Calhoun could have adopted his stepchildren, thereby making them entitled to some interest in his homestead. Needless to say, the use of the adoption statute as an estate planning tool is not a "reasonable" option for Hubert Calhoun or citizens in Hubert's situation. It is ludicrous for a citizen of this

state to be forced to adopt individuals in order for his property interests to pass to those whom he desires. For example, should a child be forced to adopt their parent in order to guarantee that the homestead remainder goes to a deserving parent?

Adoption proceedings are not a solution to the problem. Parents are unable to prevent windfalls to lineal descendants whom parents wish to omit as beneficiaries but who may benefit from S. 732.401(1). A parent cannot "unadopt" certain undeserving adult lineal descendants in order to allow property to go to those beneficiaries who are more deserving. Also, there is no provision in the current statutory scheme which protects against windfalls for adult lineal descendants whose legacy the testator desires to limit. Therefore, a testator is unable to favor one adult lineal descendant over another with respect to homestead despite a stated intent to do so. There is no reasonable governmental purpose for denying a testator that right.

It is disingenuous of Respondents to say that "Hubert Calhoun failed to exercise the available options <u>appropriately tailored</u> for situations similar to this case." (Respondents' brief page 12.) None of the "options" suggested by Respondents is reasonable or logical. The improper use of prenuptial agreements and adoption proceedings will serve to complicate rather than simplify citizen's attempts at proper estate planning.

II. PETITIONERS' CONSTITUTIONALLY PROTECTED PROPERTY RIGHT TO INHERIT AND HUBERT CALHOUN'S CONSTITUTIONALLY PROTECTED RIGHT TO DEVISE PROPERTY HAS BEEN VIOLATED, AND THEREFORE PETITIONERS HAVE A RIGHT TO CONTEST THE CONSTITUTIONALITY OF S. 732.401(1).

It is also clear that Petitioners' property rights have been affected so as to support their challenging of the constitutionality of

S. 732.401. They have, in effect, been denied property of their mother and stepfather due to the application of S. 732.401(1), despite any reasonable or rational governmental purpose for denying them their interests. Respondents were the only parties who benefited from the application of S. 732.401, and as clearly demonstrated, they were not intended to be benefited by Article X, Section 4(c).

Petitioners' rights to inherit the property of their stepfather is a constitutionally protected right under Article I, Section 2, Florida Constitution. As the Supreme Court of Florida pointed out in Shriners Hospitals for Crippled Children v. Zrillic, 563 So.2d 64, 67 (Fla. 1990):

> There would be no need to carve out an exception for "ownership, inheritance, disposition and possession of real property" unless those property rights were already subsumed in the clause modified by the exception. Furthermore, by narrowly limiting the class of persons whose rights may be restricted by the legislature, i.e. aliens ineligible for citizenship, it is clear that the framers intended all other people, including testators, be free from unreasonable legislative restraint.

The Petitioners, in their own right, have standing to challenge S. 732.401 as it directly effects their rights to inherit property. In fact, Florida has "for some time" recognized the right of individuals to sue "upon the tort of intentional interference with an expected gift or inheritance." Dewitt v. Duce, 408 So.2d 216 (Fla. 1981). Carlton v. Carlton, 575 So.2d 239, 240 (Fla. 2nd DCA 1991). In Carlton, the court stated that this cause of action existed even while the "potential grantor of that expectancy remains alive." Id. at 241.

Petitioners, like the Appellants in Carlton, are attempting to protect their inheritance rights. The property that they are trying to

inherit is their family homestead, owned by their mother and stepfather. It was clearly the intent of Hubert Calhoun to leave this property to his children and stepchildren equally as evidenced by the mutual wills signed by Hubert and Petitioners' mother, Florence. Contrary to Respondents' assertions, if Petitioners have the right to sue persons for wrongful interference with an expected gift or inheritance, they have a right to challenge a statute which directly affects their inheritance.

Respondents argue that Petitioners are unable to assert the rights of their stepfather, Hubert Calhoun. (Respondents' brief page 15.) If Petitioners don't have the right to challenge the statute on behalf of Hubert, then who does? Hubert is not available to assert his rights. If Petitioners cannot challenge the statute now, then when will any beneficiary have the right to challenge the statute? Put more succinctly, if not Petitioners, then who, and if not now, when?

As the Supreme Court noted in Zrillic, the plain meaning of the Florida Constitution indicates that testamentary dispositions of property are a specifically expressed constitutional property right. Petitioners are the only parties in a position to raise Hubert's loss of his constitutional right to devise property, and it is proper for this court to examine the constitution and S. 732.401 to determine whether his rights were, in fact, unreasonably violated. None of the cases cited by Respondents are relevant to this issue.

As pointed out in Petitioners' Brief on the Merits, even constitutionally protected property rights are not absolute. In certain situations, it may be necessary, through regulations that are

reasonably necessary, to impose upon those constitutionally protected rights. In this case, however, there is no reasonable governmental purpose promoted by favoring Respondents over Petitioners. Contrary to Respondents' position that this is simply a policy issue, Hubert's and Petitioners' property rights have been affected by S. 732.401(1)'s failure to coincide with the purpose behind the constitutional restriction on devise.

As the Respondents note, the issue certified by the Fourth District Court of Appeals effects numerous citizens of this state and is of great public importance. (Respondents' brief page 16.) Because of its affect, this court should not be dissuaded by Respondents' claims that finding this statute unconstitutional as applied to the facts of this case will unequivocally call all homestead titles into question. It is more likely to clear title for homesteads where the testator's intent is clear, but the determination of lineal descendants may be difficult or impossible.

There is no precedent cited by Respondents which would be sufficient to justify the abridgement of Hubert's and Petitioners' constitutionally protected property rights. The use of inapplicable precedent should not justify abridgement of rights. In any event, to point to precedent as a justification for the abridgement of rights is to fall into the same argument which allowed Mortmain statutes to exist until 1990, and "separate but equal" to be the law of the land for almost half a century. Shriners Hospitals for Crippled Children v. Zrillic, 563 So.2d 64 (Fla. 1990). Plessy v. Ferguson, 163 U.S. 537,

16 S.Ct. 1138, 41 L.Ed. 256 (1896). Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

The degree of a constitutionally protected property right must be determined in light of social and economic conditions which prevail at a given time. Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881, 884 (Fla. 1974). The time has come to recognize that Fla. Stat. S. 732.401 fails to enact the constitutional intent of Article X, Section 4(c), and as a result, it imposes unreasonable restrictions on the ability of a decedent to determine where his property shall descend and which beneficiaries should receive his homestead property. As applied to the facts of this case, S. 732.401 vests in adult lineal descendants the title to Hubert Calhoun's homestead, despite Hubert's intent that the property be divided between his adult lineal descendants and his adult stepchildren, equally. Petitioners' constitutionally protected property rights have been violated with no governmental purpose given for why the restriction created by S. 732.401(1) is reasonable.

As stated in Petitioners' Brief on the Merits, this issue affects a significant number of citizens of the State of Florida. Citizens are left with no reasonable methods of planning their estates so as to carry out their constitutionally protected rights.

CONCLUSION

In light of the issues raised, Petitioners respectfully request this court to reverse the findings of the Fourth District Court of

Appeals and validate the interests of Petitioners on the grounds that Florida Statutes S. 732.401(1) is unconstitutional as applied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Reply Brief on the Merits has been furnished by mail to Charles R. Gardner, Attorney for Respondents, 1300 Thomaswood Drive, Tallahassee, Florida 32312, this 18th day of November, 1993.

_____
Mike Krasny