OA 2-5-95

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 83,660

IN RE: ESTATE OF EDGAR R. PUTNAM,

DECEASED.

MARY ANN VIA, as Personal Representative of the Estate of Edgar R. Putnam, deceased, MARY ANN VIA, Individually, PAUL DAVID PUTNAM, JOSEPH EDGAR PUTNAM, RICHARD LEE PUTNAM, RONALD ROY PUTNAM, and ROBERT BLACKBURN,

Petitioners,

v.

MARY RACHEL PUTNAM,

Respondent.

ON REVIEW FROM THE
DISTRICT COURT OF APPEAL
SECOND DISTRICT
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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QUESTION PRESENTED

IN FLORIDA, DO THE RIGHTS OF A SURVIVING SPOUSE WITHOUT KNOWLEDGE OR CONSENT TO THE ANTENUPTIAL WILL OF HER HUSBAND PREVAIL OVER THE INTERESTS OF THE BENEFICIARIES UNDER THAT WILL?

Respondent would answer the question in the affirmative.

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SUMMARY OF ARGUMENT

The Second District Court of Appeal was correct when it stated, "[T]he statutes of Florida pertaining to a surviving spouse's elective share or pretermitted share and cases discussing those rights and their predecessor, dower, suggest a strong public policy in favor of protecting a surviving spouse's right to receive an elective or a pretermitted share." Putnam v. Via, 19 FLW 1280 (Fla. 2d DCA 1994).

Florida statutes clearly set forth a consistent design for the satisfaction of conflicting interests in an estate. That design consistently provides for the superior interests of the surviving spouse.

The argument of the Petitioners begins immediately with the assumption that by the filing of claims in the estate, they have become judgment creditors of the estate, entitled to a higher priority than that of ordinary residuary beneficiaries. All other arguments of the Petitioner are built upon this faulty premise.

Even assuming that there was a valid mutual will involved, the filing of a claim by a beneficiary does not elevate his position to that of a creditor. Further, in this action, there was no breach of a contract to make a will, to keep a will in force or of the provisions of the mutual will of Joann and Edgar Putnam. Review of the terms of the will reveals that the decedent did nothing to change the position of the beneficiaries--they remain residuary beneficiaries, and Edgar Putnam did nothing to change their status.

Florida also subscribes to the view that the innocent spouse without knowledge of the prenuptial agreements of her spouse should not in equity be

bound thereby.

Florida law views the making of a testamentary disposition as a Constitutional right, and yet, this right is limited by Constitutional and other statutory protections for dependents set forth in Florida law, including the rights of the surviving spouse. Thus, the residuary beneficiaries have retained their status as residuary beneficiaries subject to the statutory and Constitutional protections afforded the surviving spouse.

Last, any apparent conflict between the decision rendered in Johnson v. Girtman, 542 So.2d 1033 (Fla. 3rd DCA 1989) and Putnam v. Via, 19 FLW 1280 (Fla. 2d DCA 1994) is resolved upon a complete review of both cases.

Thus, in Florida, law and public policy favor the rights of the surviving spouse over the residuary beneficiaries where conflicts in their interests exist.

ARGUMENT

I. THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL RENDERED IN THIS CAUSE WAS CORRECT AND BASED UPON FLORIDA LAW

The Second District Court of Appeal was correct in its conclusion and sound in its assessment of Florida law when it held in this case:

> **"We reach the same conclusion in this case [as was raised in the Maryland Supreme Court case of Shimp v. Huff, infra.], based on the same reasoning. We believe that the statutes of Florida pertaining to a surviving spouse's elective share or pretermitted share and cases discussing those rights and their predecessor, dower, suggest a strong public policy in favor of protecting a surviving spouse's right to receive an elective share or a pretermitted share. See In re Suarez's Estate, 145 Fla. 183, 198 So. 829 (1940); Donner. We believe this strong public policy requires that the surviving spouse's elective**

> **share or pretermitted share be given priority over rights arising under an antenuptial contract of the deceased spouse."** Putnam v. Via, 19 FLW D1280 (Fla. 2d DCA 1994).

In its opinion, the court recognizes a reasonable basis for its conclusion in following the decision of the Maryland Supreme Court. First, any prenuptial contract is "limited by the possibility that the survivor might remarry and the subsequent spouse might elect against the will." Putnam, supra. See also Donner, supra; Owens v. McNally, 113 Cal. 444, 45 P. 710 (1896); Gall v. Gall, 19 N.Y.S. 332 (N.Y. Sup. Ct. 1892); Patecky v. Friend, 220 Or. 612, 350 P.2d 170 (1960), stating generally that such agreements must contemplate the future remarriage of the surviving spouse, lest the entire agreement be held void as an impermissible restraint on marriage. Further, there is a strong public policy evidenced in the statutes to support the superiority of the surviving spouse's claim. Putnam.

II. LEGATEES CANNOT BECOME JUDGMENT CREDITORS

Petitioners assert that they are a third party beneficiaries of the mutual wills of Joann and Edgar Putnam, claimants who have followed proper procedure in asserting this status, and therefore, are now creditor, entitled to preference in payment from the residue. The argument fails for three reasons.

The strength of Petitioners' argument hinges upon the usage of the terms 'claimant' and 'creditor' interchangeably. According to Petitioners, a claimant rises to the status of creditor if the claim is filed. However, the argument as supported by the cases cited by Petitioners fails for the simple reason that beneficiaries of contracts to make wills, even when successful, simply establish

themselves as legatees, not creditors. In re Estate of Donner, 364 So.2d 742 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 457 (Fla. 1978), appeal dismissed sub nom. 444 U.S. 958, 100 S.Ct. 442, 62 L.Ed 371 (1979). Beneficiaries of expectancies become claimants (not creditors) because filing a claim is a mechanism to have their existence recognized. Otherwise, their names would likely not be in the court file. In some cases, they file independent actions, as in Weiss v. Storm, infra, cited by Petitioners. Such is not the case here.

The assertion of their interests, however, does not transform third party beneficiaries of a mutual will into creditors of the decedent, entitled to judgment creditor status, since the courts also recognize that third party beneficiaries become mere legatees if their suits are successful. Under Florida law, the best hope of Petitioners in the instant case is to be recognized as the same legatees as they were prior to filing claims in the Estate of Edgar Putnam:

> **"Beatrice and Edward Donner must be treated the same as legatees of the estate just as if the decedent made the legacies to them in his will as he had previously contracted to do in the 1959 separation agreement with Beatrice Donner. Surely, these two should not stand in a better position as creditors of the estate when, as here, the decedent failed to do that which he contracted to do. He contracted to make them legatees of the estate and when he failed to do so, both Beatrice and Edward Donner sued for specific performance on the contract. They prevailed in their suit; the judgment was affirmed on appeal. They are accordingly entitled to specific performance on the contract to make a will which in effect puts them in the same category as legatees of the estate. Erwin v. Mark, 105 Mont. 361, 78 P.2d 537 (1937); In re Hoyt's Estate, 174 Misc. 512, 21 N.Y.S.2d 107 (Sur.Ct. 1940). As such, their claims must be treated as having equal priority with the one million dollar legacy of Ruth Donner, but of subordinate priority to Larna Donner's dower and Ruth Donner's $452,210.74 claim [predicated upon unpaid support pursuant to divorce]. The trial court therefore erred in treating the subject claims as judgment claims against the decedent's estate."** In re Estate of Donner, 364 So.2d 742 (Fla. 3d DCA

1978), cert. denied, 373 So.2d 457 (Fla. 1978), appeal dismissed sub nom. 444 U.S. 958, 100 S.Ct. 442, 62 L.Ed 371 (1979).

Precisely the same scenario has occurred in the instant case. The Petitioners have, by filing their claims and bringing their independent causes of action, established themselves as legatees, subject to the interests of the pretermitted spouse under Sec. 733.805 Fla. Stat. (1991), and nothing more. Therefore, the cases cited by Petitioners for the proposition that mutual wills or contracts to make wills are enforceable may be interesting and even binding on this court. They are not relevant. They do not transform Petitioners into judgment creditors. Petitioners were already legatees before they even began.

Second, the argument that claimants are equivalent to creditors fails because the cases cited are readily distinguishable. Johnson v. Girtman, 542 So.2d 1033 (Fla. 3rd DCA 1989), is immediately distinguishable by its acknowledgement that the disappointed spouse was a party to the contract to make a will.[1] The spouse's consent to the transaction is a crucial fact not to be overlooked. See Sec. 732.702 Fla. Stat. (1991). There is no written consent in this case, nor is the present dispute limited to a particular parcel of real estate, as in Johnson, but rather this dispute involves the entire residue, another vital fact distinguishing the instant case.

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[1]Page 1034 of that opinion states:
"Lee Johnson, the beneficiary of an interest in real property devised to him by his wife, appeals from a final judgment enforcing an agreement entered into between his wife and members of her family, the Girtmans, which required the Girtman siblings to devise their interests in the property only to their children or to each other." "Katherine had not yet married Lee Johnson when she signed the Agreement to Keep Will in Force. In 1957, after Katherine and Lee married, the grantees and their spouses wrote a 'letter'. . .promising [not to convey their interests outside the family]. **Lee Johnson signed the letter.**"[Emphasis added]

Solomon v. Dunlap, 372 So.2d 218, (Fla. 1st DCA 1979) merely correctly recognizes the priority of legally recognized costs of administration and taxes, and properly holds that a pretermitted spouse shall pay her share of "any applicable tax, debts, or costs of administration." Beneficiaries of whatever character must defer to costs of administration and taxes.

Weiss v. Storm, 126 So.2d 295 (Fla. 1st DCA 1961), cited for the proposition that mutual wills are enforceable, does not involve a surviving pretermitted spouse, and therefore, is inappropriate authority for the argument here. Nor is In re Shepherd's Estate, 130 So.2d 888 (Fla. 2d DCA 1961), quoted to buttress the argument that mutual wills are enforceable. In fact, the court denies probate to the mutual will in that case, stating:

> **"Whether or not revocation [of the mutual will by execution of a later will] constitutes a breach of contract for which relief may be had, however, is a matter to be dealt with in the proper forum. We may observe that the county judge himself has recognized that the probate court would have no authority to exercise equitable jurisdiction in determining the validity of the contract."** The holding in the case actually denies probate to the mutual will and directs that the later will revoking it be admitted, recognizing that the long held rationale is that, **"[I]t is the contract and not the will that is irrevocable."** Id. at page 891.

In re Estate of Solnik, 401 So.2d 896 (Fla. 4th DCA 1981); Kelley v. Hill (481 So.2d 1311 (Fla. 2d DCA 1986); and Traub v. Zlatkiss, 559 So.2d 443 (Fla. 5th DCA 1990) involve intervivos transfers to which a surviving spouse attempted to attach an elective share after the death of the transferor spouse. Again, no such factual analogy exists in this case. In this case, the decedent took no more affirmative action regarding his estate plan than to marry again.

There were no affirmative actions by the decedent to circumvent the wills in any manner, as is the situation with the cases cited by the Petitioners.

The cases cited by Petitioners are markedly different because they involve the enforceability of mutual/contract wills and the theory of law usually presupposes two sets of beneficiaries under different documents, one of which is not admitted to probate. Further, the cases cited by Petitioners do not use the theory that disappointed beneficiaries can become judgment creditors of the deceased. It is true that in Arkansas, the court directly compared the rights of the surviving spouse to those of the disappointed beneficiaries, and applied a constructive trust theory. Gregory v. Estate of Gregory,, 866 SW2d. 379 (Ark. 1993). However, it is not conceded by Respondent that a breach of any agreement occurred here. In Florida, to make certain that contract for testamentary disposition is binding, it must be a separate document:

> "This court has held that "unlike a will which clearly is ambulatory in nature and therefore may readily be revoked by a competent testator, a contract to make a will may be irrevocable and therefore subject to specific enforcement by the courts." Donner v. Donner, 302 So.2d 452, 455 (Fla. 3d DCA 1974), cert. denied, 314 So.2d 151 (Fla.1975) (emphasis added; citations omitted). Therefore, "[I]f the promisor breaches his agreement to make a devise or not to revoke a will, the beneficiary of the promise or the improperly revoked will may bring an action to enforce the terms of the agreement." Johnson v. Girtman, 542 So.2d 1033, 1035 (Fla. 3d DCA 1989) (citations omitted). See also Sharps v. Sharps, 219 So.2d 735 (Fla. 3d DCA 1969) ("In a contract to make a will, the promisor has the right to change his will, and . . . the right being enforced against the promisor is the contract right, and not the will. . . ."), cert. denied, 225 So.2d 920 (Fla. 1969); In re Shepherd's Estate, 130 So.2d 888 (Fla. 2d DCA 1961) (mutual wills are ambulatory in nature and may be revoked; contract upon which mutual wills are made may be enforced depending upon circumstances); Keith v. Culp, 111 So.2d 278 (Fla. 1st DCA 1959) (same), cert. denied, 114 So.2d 5 (Fla.1959). " Boyle v. Schmitt, 602 So.2d 665 (Fla 3d DCA 1992).

Further Gregory is readily distinguishable because not only were there two wills, but there was a separate agreement. Again, clearly Florida law would support a stronger case for Petitioners had that been the case with Joann and Edgar Putnam. Keith. Also, the probate court in Gregory found it was "probable' the second wife knew of the arrangement. Again, under Florida law, notice is material. Barkley, infra. Annot., Surviving Spouse's Right to Marital Share as Affected by Valid Contract to Make A Will, 85 ALR 4th 418 (1991).

The third reason the arguments of Petitioners fail is because the essence of the status of the pretermitted spouse is the absence of provision for the spouse. Fla. Stat. 732.301 (1992). The will of Edgar Putnam does double duty to create beneficiary status for Petitioners and pretermitted spouse status for Respondent. The filing of claims does no more. Florida law is in agreement. In re Suarez' Estate, 145 Fla. 183, 198 So. 829 (1940); Fla. Stat. 732.507 (1992); In re Estate of Donner, 364 So.2d 742 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 457 (Fla. 1978), appeal dismissed sub nom. 444 U.S. 958, 100 S.Ct. 442, 62 L.Ed 371 (1979); In re Estate of Churchwell, 354 So.2d 970 (Fla. 1st DCA 1978); Keith v. Culp, 111 So.2d 278 (Fla 1st DCA 1959).

III. FLORIDA STATUTES SET FORTH THE DESIGN THAT ENTITLES THE PRETERMITTED SPOUSE AN INTESTATE SHARE OF THE ESTATE

Respondent Rachel Putnam was determined by the lower court to be a pretermitted spouse, having met all of the elements required under the statute, and none of the exceptions having found to apply (A-5). It must follow that the

pretermitted spouse, **"shall receive a share in the estate of the testator equal in value to that which the surviving spouse would have received if the testator had died intestate. . ."**[Sec. 732.301 Fla. Stat. (1991)], which **"share . . .is. . . one-half of the intestate estate."** Sec. 732.102 Fla. Stat. (1991).

To identify the source of the funds from which this share is to be paid, the statute clearly points out that, **"The share of the estate that is assigned to the pretermitted spouse shall be obtained in accordance with s. 733.805."** Sec. 732.301 Fla. Stat. (1991).

To raise the "shares of a pretermitted spouse and children [funds are appropriated] in the following order:

(a) Property not disposed of by the will.

(b) **Property devised to the residuary devisee or devisees.. ."** Sec. 733.805 (2) Fla. Stat. (1991).

"Devises to the decedent's surviving spouse, given in satisfaction of, or instead of the surviving spouse's statutory rights in the estate, shall not abate until other devises of the same class are exhausted." Fla. Stat. 733.805 (2).

Therefore, the plan for payment of the pretermitted spouse's share as set forth by the Florida Legislature is to pay one half of the estate, after valid expenses of administration, from the devises to residuary beneficiaries.

Lengthy analyses of dower avail nothing toward the settlement of this argument for the priority is clear when residuary beneficiary is pitted against pretermitted spouse. Clearly, the statutory scheme presumes that residuary devisees will defer to the interests of the surviving spouse, not the contrary.

IV. THE PRETERMITTED SPOUSE IS ENTITLED TO ONE HALF OF THE ESTATE REGARDLESS OF THE PRIOR WILL

Florida Statute 732.507 provides that, "(1) Neither subsequent marriage nor subsequent marriage and birth or adoption of lineal descendants shall revoke the prior will of any person, but **the pretermitted child or spouse shall inherit as set forth in ss. 732.301 and 732.302, regardless of the prior will.** " [Emphasis added].

Respondent is entitled to one half of the residuary estate of Edgar Putnam regardless of the terms of his will executed prior to marriage or any purported covenants therein. The will is not revoked, and the statute so states. But as to the omitted spouse, a share is created and imposed on the residue. Keith v. Culp, infra.

The status and share of the pretermitted spouse are created by the same Sec. 732.301 Fla. Stat. (1991). The clear unambiguous terms of the statute are the law. As Petitioner Blackburn stated in his brief, "Where words of a statute are clear and unambiguous, a court has no authority to change the plain meaning of the statute or the clear legislative intent." State v. Barnes, 595 So.2d 22 (Fla. 1992). Citizens of the State of Florida v. Public Service Comm'n, 435 So.2d 784 (Fla. 1983). The courts are bound to give effect to clear words the Legislature has chosen to use in a statute. Holmes v. Blazer Financial Servs. Inc., 369 So.2d 987 (Fla. 4th DCA 1979)." City of Orlando v. Wilkinson, 624 So.2d 799 (Fla. 1st DCA 1993).

V. FLORIDA LAW RECOGNIZES THE PRINCIPLE IN EQUITY THAT ONE IS NOT BOUND TO CONTRACTS TO WHICH ONE IS NOT A PARTY

It is manifestly unfair to hold Respondent to an agreement to which she was not a party in order to frustrate proper distribution according to Florida Law. Florida law recognizes ". . .the very general principle that liability without wrongdoing or consent would seriously infringe personal freedom and autonomy." DOBBS, LAW OF REMEDIES, Sec. 12.7(7) (2d ed. 1993). Historically, Florida courts, when confronted in the context of prior existing contracts versus the surviving spouse's share have favored the widow, reasoning that the interest cannot be altered by the decedent spouse's prior unilateral commitments:

> **"Dower is a right of the wife granted to her by law and vests on the death of the husband. Bowler v. Bowler, 159 Fla. 447, 31 So.2d 751 (1947). The inchoate right of dower is purely a prerogative of the legislature which may modify or abolish it at will. It is a personal right which may be exercised only by the widow. In Re Estate of Pearson, 192 So.2d 89 (Fla. 2d DCA 1966), 1966 Fla.2DCA 4631. Upon vesting at the death of the spouse, dower is not subject to, affected by, or altered by the acts of the husband, including, but not limited to, contracts which he may have entered into without the wife's actual knowledge or consent. Our own Supreme Court has discussed dower in these words:**
>
> **'It arises upon marriage, as an institution of the law. The inchoate right of dower has some of the incidents of property. It partakes of the nature of a lien or encumbrance. It is not a right which is originated by or is derived from the husband; nor is it a personal obligation to be met or fulfilled by him, but it is a creature of the law, is born at the marriage altar, cradled in the bosom of the marital status as an integral and component part thereof, survives during the life of the wife as such and finds its sepulcher in divorce.' Pawley v. Pawley, 46 So.2d 464, 1950 Fla.Sct 304, 472-73 n.2 (Fla. 1950), cert. den. 340 U.S. 866, 71 S.Ct. 90, 95 L.Ed. 632 (1950).**
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> **"Applying these principles sub judice, we conclude that [the widow] cannot be deprived of any portion of her dower as a result of the unilateral action of her husband in contracting away that right in a property settlement agreement with another. Her dower right is**

> **paramount over the restrictions contained in the settlement agreement. It cannot be contracted away without her consent. That provision of the settlement agreement requiring [the widow] to waive dower was not enforceable since it was an unjustified encroachment upon her dower right. That right may only be taken away or modified by her voluntary consent, by her own act or by statute. In Re Estate of Cardini, 305 So.2d 71 (Fla. 3d DCA 1974), 1974 Fla.3DCA 5934."** In re Estate of Donner, 364 So.2d 742 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 457 (Fla. 1978) appeal dismissed sub nom. 444 U.S. 958, 100 S.Ct. 442, 62 L.Ed 371 (1979).

Following Florida law, the Fifth Circuit in Barkley v. Barkley, 314 F.2d 188 (5th Cir. 1963), held that where the husband's will left his entire estate to the second wife, the contract with the first wife was without effect for lack of notice. The court said:

> **"Although it has not been clearly decided by the Florida Courts that actual or constructive notice on the part of the widow would bar her dower rights in the face of an agreement to make a will and the actual execution of a will, it is clear that the court has held that where there is no notice of the existence of such a contract, or a will executed the promisee of the contract, who is the beneficiary of such will, may have his rights restricted where the widow claims her dower right."**

The same principles apply to the pretermitted spouse's interests.

The spouse's share cannot be defeated by the unilateral acts of her husband. It is immaterial to delve into the subtleties of dower versus elective share and their relative positions in respect to creditors of the estate, for the reasoning in the Donner and other cases herein cited, articulate no reasoning whatsoever that indicates the decisions were based upon dower being free from claims of creditors. The decisions rest upon other grounds, lack of notice to the succeeding spouse, [Barkley], a necessity that waiver of spousal rights be in writing [Sec. 732.702 Fla. Stat. (1991)], and the status of legatees as such, [Donner], rather than as creditors.

The Florida Probate Code recognizes that it is axiomatic that a spouse cannot be bound by a prenuptial agreement to which she was not a party. Donner, supra; Tod v. Fuller, 78 So.2d 713 (Fla. 1955). It recognizes that there will always be a complete, 100% disposition provided under the will against which these elections are taken, and that the share must be superimposed on that formerly complete testamentary plan. The Uniform Probate Code contains essentially the same provisions, and has been cited for the premise that the omitted spouse provisions of Section 2-301 of the Uniform Probate Code, which treat a spouse omitted from a will in the same manner as a pretermitted child and grants an intestate share, is intended to preserve the remainder of the will while still providing for the surviving spouse. Matter of Beaman's Estate, 119 Ariz. 614; 583 P.2d 270 (1978).

The Code also recognizes that the surviving spouse cannot be deemed to essentially have waived her spousal rights by any means other than her through her own voluntary consent.[2] The contract of her husband alone is insufficient to avoid her share as a surviving spouse. Florida law is in accord. Tod, Donner.

VI. THE PRETERMITTED SPOUSE IS ENTITLED TO ONE HALF OF THE ESTATE REGARDLESS OF THE PRIOR WILL AND SUCH SHARE IS OBTAINED FROM THE RESIDUARY DEVISEES

[2]Florida Statute 732.702 expressly provides for the execution of a written contract or waiver of the rights of a pretermitted spouse. See, for example Johnson v. Girtman, 542 So.2d 1033, (Fla. 3rd DCA 1989), where the spouse was deemed to have participated in avoiding the contract for a devise and therefore was unable to assert his rights as a spouse in denial of said waiver.

"The share of the estate that is assigned to the pretermitted spouse shall be obtained in accordance with s. 733.805." Fla. Stat. 732.301.

To raise the "shares of a pretermitted spouse and children [funds are appropriated] in the following order:

(a) Property not disposed of by the will.

(b) **Property devised to the residuary devisee or devisees.. .**" Fla. Stat. 733.805.

"Devises to the decedent's surviving spouse, given in satisfaction of, or instead of the surviving spouse's statutory rights in the estate, shall not abate until other devises of the same class are exhausted." Fla. Stat. 733.805 (2).

The holding of the trial court that the surviving spouse's share shall be satisfied after those of the residuary devisees amounts to an abatement of the statutory devise, in violation of Fla. Stat. 733.805. In contrast, Florida courts have long recognized that the residuary beneficiaries still retain their proportionate interests after satisfaction of the statutory entitlements due the surviving spouse. Keith v. Culp, 111 So.2d 278 (Fla 1st DCA 1959); In re Estate of Churchwell, 354 So.2d 970 (Fla. 1st DCA 1978), citing Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936).

The pretermitted spouse issue arises **only** when there is a will. Accordingly, the law recognizes that the pretermitted spouse's share must be carved from an existing testamentary plan which accounts for all of the estate. Therefore, the legislature has long recognized that, "marriage of the decedent after an agreement to make will does not revoke the will." Fla. Stat. 732.507. The will is "still valid although his spouse had certain rights attach to his

property by virtue of the marriage." Keith v. Culp, 111 So.2d 278 (Fla 1st DCA 1959). "The election by a widow to take dower does not affect the provisions of the will as to the portions of the estate left after the widow's dower has been set apart. The order of priority among the beneficiaries will remain as though the widow did not elect to take dower." In re Estate of Churchwell, 354 So.2d 970 (Fla. 1st DCA 1978), citing Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936).

> **"[T]he widow, having elected to take dower, the dower of the widow in her husband's estate has priority over any specific or general bequests contained in her husband's will;....[and] [T]he order of priority among the other beneficiaries in the will remain as though the widow had not elected to take dower..."[3] Murphy v. Murphy, 170 So. 856 (Fla. 1936).**
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> **"A testator's marriage did not revoke his will, and the statute so states; but his devisees cannot legally claim against express provisions of the statute that at his death the widow takes the entire estate if the husband leaves no lineal descendants and made no provision for her that is satisfactory to her and there was no marriage settlement and she does not claim dower but the whole estate under the statute, there being no waiver of her statutory rights in her husband's estate." In re Suarez' Estate, 145 Fla. 283, 198 So. 829 (1940).[4]**

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[3]It is acknowledged by the Respondent that dower has been abolished by statute and that dower, by statute, when in effect, established the right of the widow to take the dower share free and clear of 'debts of the decedent.' The cases here cited establish the longstanding favored treatment afforded widows in Florida when confronted with contract claims, which have not uniformly been treated as 'debts' of the decedent anyway. In sum, Petitioners' 'claimant' status does not affect the validity of these precedents, since it will be shown that the theory of law that catapults Petitioners from beneficiary status to favored creditor status fails when confronted with a spouse's rights, according to the majority view in the United States.

[4]In Suarez, the decedent left everything to his three sisters in a prenuptial will. The court interpreted Acts 1933, c. 16103 sec. 11, which was the precursor to Fla. Stat. 731.10, which co-existed with the old dower statute, and was the precursor verbatim of the current pretermitted spouse statute. The court held that, there being no lineal descendants, the widow received the entire estate.

The rights of the second wife prevail over those of the beneficiary of a mutual will in Tod v. Fuller, 78 So.2d 713 (Fla. 1955). The cases are not decided upon whether the dower share is taken free from 'debts of the decedent.' The cases are decided upon the basic principle that one must provide for one's spouse. Florida law is consistent: the omitted spouse prevails over residuary beneficiaries.

VII. THE PRETERMITTED SPOUSE, ONCE DETERMINED, TAKES THE STATUTORY SHARE, HAVING PRIORITY OVER RESIDUARY DEVISEES

The acts or omissions of her deceased husband cannot void that right, once determined.

> **". . .[T]he question of priorities between a surviving spouse and beneficiaries under a contract to make a will should be resolved based upon the public policy which surrounds the marriage relationship and which underlies the elective share statute." Shimp v. Huff, 556 A.2d 252 (Md. App. 1989). " '[T]he right of a person to transfer property upon his death to others. . .is not a natural right but a privilege granted by the State.' [Citation omitted]. Furthermore, '[t]he right to make a will is a purely statutory right,' which the State may limit by statute. [Citation omitted] The [Maryland] legislature on several occasions has limited this right by enacting restrictions such as those contained in sec. 3-203, which grants a surviving spouse the right to receive an elective share of a decedent's estate, regardless of the provisions contained in the decedent's will. In addition, sec. 3-204 suggests that the right to receive the elective share is a personal right which cannot be waived by the unilateral acts of others, including the ACTIONS OF THE DECEASED SPOUSE. These statutes and principles of law suggest that there is a strong public policy in favor of protecting the surviving spouse's elective share from the unilateral acts of a deceased spouse."** [Emphasis added] Shimp v. Huff, at page 63.

The "pretermitted spouse shall inherit as set forth in 732.301 .... REGARDLESS OF THE PRIOR WILL."[Emphasis added]. Fla. Stat. 732.507.

Respondent does not seek to reinstate the concept of dower, and she need not. The pretermitted spouse and dower statutes coexisted. The principles of priority articulated above apply to both claims, as evidenced by the holding in Suarez, which clearly involved a pretermitted spouse under the previous version of the present statute.[5] In re Estate of Ganier, infra, at footnote 6 acknowledges that the old Florida Statute 731.10 is exactly the same as the present pretermitted spouse statute. Therefore, the interpretation of the law set forth in Suarez is binding. The law is the same law. The situation is the same. The surviving spouse is entitled to the share she would have been entitled to if the decedent had died intestate--one half of the estate. Respondent will receive one-half the estate, the beneficiaries will receive the other half. Petitioners would argue Respondent should take nothing but exempt property - a certain unjust result.

VIII. FAVORING THE SUPERIORITY OF THE SURVIVING SPOUSE'S INTEREST IS SOUND PUBLIC POLICY

Public policy favors marriage and its incumbent responsibilities. Maszewski v. Piskadlo, 318 So.2d 226 (Fla. 2d DCA 1975). The implication of the

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[5]The precise wording of the 1933 version of the pretermitted spouse statute as set forth at page 830-831 of Suarez, is "When a person marries after making a will, and the spouse survives the testator, such surviving spouse shall receive a share in the estate of the testator equal in value to that which such surviving spouse would have received if the testator had died intestate, unless provision has been made for such spouse or unless such spouse is provided for in the will, or unless the will discloses an intention not to make such provision. The share of the estate which is assigned to such pretermitted spouse shall be raised in accordance with the order of appropriation of assets set forth in this law." "Neither subsequent marriage not subsequent marriage and birth of issue shall revoke the prior will of any person; but the pretermitted child or spouse shall inherit as set forth in this law regardless of such prior will."

Petitioners' argument is that decedent Edgar Putnam should have avoided marriage in order to avoid breach to the alleged contract. This implication amounts to a contract not to marry, which would be void as against public policy. See Shimp, supra. See also Donner, supra; Owens v. McNally, 113 Cal. 444, 45 P. 710 (1896); Gall v. Gall, 19 N.Y.S. 332 (N.Y. Sup. Ct. 1892); Patecky v. Friend, 220 Or. 612, 350 P.2d 170 (1960), stating generally that such agreements must contemplate the future remarriage of the surviving spouse, lest the entire agreement be held void as an impermissible restraint on marriage.

To include an implicit term in the will that the surviving spouse would not remarry in order to preserve the terms of his will flies in the face of the expressed public policy of Florida which favors marriage as the most important type of contract. "The institution of marriage has been a cornerstone of western civilization for thousands of years and is the most important type of contract ever formed." In re Estate of Yohn, 238 So.2d 290 (Fla. 1970). This court has therefore recognized that marriage is the most important contract, and must therefore consider the consequence of such a holding : that marital obligations take precedence over mutual wills.

> ". . .[T]he public policy surrounding the marriage relationship . . .suggests that the surviving spouse's claim to an elective share should be afforded priority over the claims of beneficiaries of a contract to make a will. Like the majority of other courts, we have recognized the well settled principle that contracts which discourage or restrain the right to marry are void as against public policy. [Citation omitted] In executing a will, a testator is presumed to know that a spouse might renounce the will, thus extinguishing or reducing the legacies contained in the will, and if the testator does not provide for this contingency then the beneficiaries under the will might lose the property left them [Citation omitted]. **Thus, we find that the respondents' rights under the contract were limited by the possibility that the survivor might remarry and that the subsequent spouse might elect against the will. Consequently we conclude that their claims under the contract are**

subordinate to [the surviving spouse's] superior right to receive her elective share."[6] Shimp v. Huff, 556 A.2d 252 (Md. 1989). [Emphasis added].

Valid administrative expenses have priority over the surviving spouse's share, as would be reasonable. Residuary devisees, though they may claim creditor status, do not. Beneficiaries are beneficiaries, not contract claimants entitled to preference as estate expenses. Donner.

The language of Florida Statute 732.301 providing for the pretermitted spouse is not a mere presumption, but the entitlement contained therein is absolute. "That statute does not raise a mere presumption, it is absolute; not subject to rebuttal, and no exception should be extended to include a class not clearly comprehended by the statute. See Estate of Gainer, 402 So.2d 418 (Fla. 5th DCA 1981)." Dumas v. Sanford, 413 So.2d 58 (Fla. 5th DCA 1982). Therefore, once the elements of the statute have been met, and the lower court has already determined that the elements have been met, the pretermitted spouse is entitled to the statutory intestate share.

IX. THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN PUTNAM V. VIA IS NOT IN CONFLICT WITH JOHNSON V. GIRTMAN

In Johnson, the disputed property was one parcel of land, in which the

[6]Elective share and pretermitted spouse's share are equivalent in terms of the priorities to be established in this case. Appellees will assert that their claims are superior to both the elective share and the pretermitted spouse share on the basis that they are valid claimants entitled be treated as expenses of administration, with the spouse being entitled to a share of the 'net' estate (which happens, of course to amount to -0- once the entire residuary is paid as a priority expense).

surviving spouse had waived his interest in writing. The elective share was not defeated by creditors, since the entire estate was in fact, devised to the spouse and the spouse was not even electing against the will. The surviving spouse was arguing to void the contract. In this case, Respondent is asserting the rights of a spouse against the will, regardless of the terms of that will, as she is entitled to do by statute. Sec. 732.507 Fla. Stat. (1991), Sec. 732.301 Fla. Stat. (1991).

In contrast, the Petitioners, though already undisputed residuary beneficiaries, maintain that they are third party contract beneficiaries of the following paragraph in the will of Edgar Putnam:

> I acknowledge that this is a mutual will made at the same time as my [spouse's] will and each of us have executed this Will with the understanding and agreement that the survivor will not change the manner in which the residuary estate is to be distributed and that neither of us as survivors will do anything to defeat the distribution schedule set forth herein, such as disposing of assets prior to death by way of trust bank accounts, trust agreements, or in any other manner.

Under the terms of the will in this case, Petitioners are entitled to the residue of the estate. Respondent would agree. Edgar Putnam did nothing to change the distribution of the residue. Edgar Putnam did not, by marrying Respondent, 'change the manner in which the residuary estate is to be distributed,' nor did he 'defeat the distribution schedule set forth' in the will. He did not change the terms of the mutual will, because marriage does not revoke the previous will. Fla. Stat. 732.507; In re: Suarez's Estate, 198 So.2d 829, 145 Fla. 183 (1940). The will remains valid though the spouse has certain rights that attach to it prior to the interests of the residuary beneficiaries. Keith v. Culp, 111 So.2d 278 (Fla. 5th DCA 1959). See also In re Estate of Churchwell,

354 So.2d 970 (Fla. 1st DCA 1978); Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936). Further, the majority view is that contracts which discourage or restrain the right to marry are void as against public policy. Shimp v. Huff. Therefore, the trial court erred when it determined that by entering into marriage, Edgar Putnam breached the mutual will.

In contrast, Mrs. Johnson breached the Agreement to Keep Will in Force because she died after making a new will leaving everything to her spouse. Thus, there was a clear breach of the separate contract executed by the decedent. She made a new will in disregard of the contract.

But in the instant case, Mr. Putnam did nothing affirmative, but in fact, left the testamentary disposition intact as agreed. Remarkably similar is Barkley v. Barkley, 314 F.2d 188 (5th Cir. 1963), which, following Florida law noted:

> "If for instance, Mr. Barkley here, contrary to his promise contained in the South Carolina agreement, had executed a will leaving his entire estate to his widow, such a will would not be recognized in Florida under the principle announced in the Tod case. Since, however, Mr. Barkley carried out his agreement to the letter, no authority has been cited to us to warrant our determining that he had any obligation other than that which he had agreed to, leaving it to the law of the state in which he was domiciled at the time of death to determine what rights, if any, others might have against his executors and administrators by way of homestead, dower, community property, to other rights. . . ."

Precisely the same situation occurred here. Edgar Putnam did nothing but let the chips fall where they may, according to the laws of the state where he died. He did not, however, breach the terms of his mutual will with Joann Putnam nor change the schedule of distribution as set forth therein.

Mr. Johnson was the sole beneficiary of his wife's estate. Claims were filed by the Girtmans to assert their interest in the property. Petitioners here were

already residuary beneficiaries before they filed claims. It is the Respondent spouse who would not be recognized but for her intervention in the estate. The Girtman claims requested benefit of the contract to receive their land. In contrast, Petitioners here argue for more than that to which they are entitled. They argue that they are creditors, but in fact are only legatees who have perfected their residuary interests. They remain **residuary** beneficiaries only. Donner, supra. Petitioners are therefore entitled to the residue AFTER the pretermitted spouse share. Sec. 733.805 Fla. Stat.(1991).

There is no conflict with Johnson regarding the preference of the pretermitted spouse. Florida's long standing public policy supports the preference of the pretermitted spouse as a real, and not illusory benefit. The pretermitted share is not a presumption which may be rebutted. Dumas v. Sanford, 413 So.2d 58 (Fla. 5th DCA 1982), review denied, 422 So.2d 843 (Fla. 1982), appeal dismissed, 460 U.S. 1076, 103 S.Ct. 1761, 76 L.Ed.2d 337 (1983). Even apparently harsh results have occurred in Florida because of the courts' adherence to the law's clear terms. In re Estate of Gaspelin, 542 So.2d 1023, (Fla. 2d DCA 1989), review denied, 547 So.2d 1209 (Fla. 1989); Dumas v. Sanford, supra; Hoffman v. Kohns, 385 So.2d 1064 (Fla. 2d DCA 1980); and In re: Suarez's, Estate, infra; the surviving spouse received the entire estate, to the disappointment of other family members named in the will because there were no lineal descendants, so plain is the law and so strong is the public policy surrounding this area of the law in Florida. See. Sec. 732.102 (1)(a) Fla. Stat. (1991).

But even if a conflict in reasoning is found to exist in Johnson as opposed

to Putnam, the statutory scheme in Florida directs preference of the share of the pretermitted spouse over the share of any residuary beneficiary. Florida Statute 732.507 provides:

> "(1) Neither subsequent marriage nor subsequent marriage and birth or adoption of lineal descendants shall revoke the prior will of any person, but **"the pretermitted child or spouse shall inherit as set forth in ss. 732.301 and 732.302, regardless of the prior will. "** [Emphasis added].

The pretermitted spouse, "shall receive a share in the estate of the testator equal in value to that which the surviving spouse would have received if the testator had died intestate. . ."[Emphasis added] [Fla. Stat. 732.301], which "share . . .is. . .one-half of the intestate estate." Fla. Stat. 732.102. The statute clearly points out that, "The share of the estate that is assigned to the pretermitted spouse shall be obtained in accordance with s. 733.805." Fla. Stat. 732.301. Under Florida Statute 733.805, the shares of a pretermitted spouse are appropriated from "Property devised to the residuary devisee or devisees.. ." Since the Petitioners have only established themselves as residuary devisees, the share of the Respondent pretermitted spouse comes from the residue first.

Johnson v. Girtman did not involve nor address these clear statutory provisions regarding the pretermitted spouse, but rather dealt with an elective share argument when the surviving spouse was not even electing against the will. In light of the cases and statutes in Florida, it is evident that the court in Johnson arrived at its decision to achieve a fair result on the narrow facts of that case alone, and that the argument regarding the elective share of the spouse was simply one of four unsuccessful arguments made by the surviving spouse to

marshall an interest he had already waived. Therefore, any express and direct conflict among district courts of appeal in Florida on this issue does not exist.

X. THE HOLDING OF THE SECOND DISTRICT COURT OF APPEAL DOES NOT DENY EQUAL PROTECTION UNDER THE LAW

Petitioner argues that, "in Putnam the Second District totally ignored Florida Statute 732.207 and the Johnson holding and announced its own rule of law that the surviving spouse's elective share or pretermitted share be given priority over rights arising under an antenuptial contract of the deceased spouse."

In fact, Florida Statute 732.207 provides that the elective share is computed after deducting ". . .all valid claims against the estate. . ." Again, Florida law regarding mutual wills is relatively unsettled where the "contract", which would be irrevocable, is a part of the will, which is inherently revocable. Boyle. In re Shepherd's Estate. See also Fla. Stat. 732.701:

> (1) No agreement to make a will, to give a devise, not to revoke a will, not to revoke a devise, not to make a will, or not to make a device shall be binding or enforceable unless the agreement is in writing and signed by the agreeing party in the presence of two attesting witnesses.
>
> (2) The execution of a joint will or mutual wills neither creates a presumption of a contract to make a will nor creates a presumption of a contract not to revoke the will or wills.

Therefore, the very assertion that an enforceable contract existed is questionable, but even if it did, the specific performance Petitioners seek places them in the posture of residuary beneficiaries, taking their share after the pretermitted spouse. Donner, Sec. 733.805 Fla. Stat. (1991). It does not create

for them superior 'valid' claims.

As a result, the order of priorities set forth in Fla. Stat 733.707 is unaffected by the Putnam decision. All the parties involved take their interests after the priorities set forth in that statute. Priority is afforded the pretermitted spouse under Fla. Stat. 733.805, which provides that the share of the pretermitted spouse shall be raised from "property devised to the residuary devisee."

Petitioner Blackburn claims that the court's ruling "violates the Petitioner's right to equal protection," stating that there is no rational basis for distinguishing between a contract claim and a claim under a mutual will. Florida Statute 733.707 distinguishes between all kinds of creditors, and with a preference for some over others. Further, there is a rational basis for the law to prefer dependents of a decedent. Florida recognized in Shriners Hospitals v. Zrillic, 563 So.2d 64 (Fla. 1990) that though there is a Constitutional right to make a testamentary disposition of property,

> "Florida law is replete with protections for surviving family members who may have been dependent on the testator. For example, the Florida Constitution expressly provides protection in the form of homestead exemptions for real and personal property, art. X, 4, Fla. Const.; see also 732.401-.4015, Fla. Stat. (1985), and a coverture restriction, art X, 5, Fla. Coast.; see also 732.111, Fla. Stat (1985). The Probate Code provides for an elective share, 732.201-.215, Fla. Stat. (1985), personal property exemptions, 732.402 Fla. Stat. (1985), and Family allowance, 732.403, Fla. Stat. (1985). The Probate Code also protects against fraud, duress, mistake, and undue influence. 732.5165, Fla. Stat. (1985).

XI. CONCLUSION

The Florida Legislature has expressly dealt with the priorities of interests in an estate in Florida. The Supreme Court has often recognized the protections afforded spouses in estates. The spouse's share, elective and pretermitted, has priority over the shares of residuary beneficiaries. The Putnam decision reflects consistent Florida law and should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing has been furnished by United States Mail to Joseph W. Fleece, III, Attorney for Petitioner Robert Blackburn, P. O. Box 330, St. Petersburg, FL 33731-0330; Maureen M. Matheson, Attorney for Petitioners Ronald Roy Putnam, Joseph Edgar Putnam, Paul David Putnam, Richard Lee Putnam and Mary Ann Via, 1825 S. Riverview Drive, Melbourne, FL 32901; and Mark I. Shames, Esq. Administrator Ad Litem, 535 Central Avenue, Suite 403, St. Petersburg, FL 33701 this 23rd day of December, 1994.

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