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IN THE SUPREME COURT OF FLORIDA

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,

vs.

MARY RACHEL PUTNAM,

Respondent.

Case No. 83,660

PETITIONER, ROBERT BLACKBURN'S, INITIAL BRIEF

On Discretionary Review from the District Court
of Appeal, Second District
State of Florida
Case No. 93-01780

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PREFACE

Petitioner, Robert Blackburn, as well as Mary Ann Via, Paul David Putnam, Joseph Edgar Putnam, Richard Lee Putnam and Ronald Roy Putnam, the residuary beneficiaries under a joint and mutual Will of Edgar and Joann Putnam, were the Respondents in the trial court and Appellees in the Second District Court of Appeals.

STATEMENT OF THE CASE AND THE FACTS

The facts of this case are not in dispute. The Summary Judgment (R 830-833; A-1) entered by the trial court was entered on a question of law.

The facts, as stated in the Motion For Summary Judgment (R 634-636; A-2) are as follows:

1. Edgar J. Putnam, deceased, resided in Pinellas County, Florida at all times relevant to this action until his death on March 13, 1992.

2. Joann G. Putnam, deceased, resided in Pinellas County, Florida at all times relevant to this action until her death on April 9, 1986.

3. On November 15, 1985, Edgar J. Putnam and Joann G. Putnam executed mutual wills (A-7) containing the following provision:

> I acknowledge that this is a mutual will made at the same time as my wife's (husband'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.

4. The mutual wills of Edgar J. Putnam and Joann G. Putnam constituted a binding contractual agreement of which the Appellees were third party beneficiaries.

5. On April 9, 1986, Joann G. Putnam departed this life without having made any changes or having done anything to defeat the terms of her mutual will.

6. On October 20, 1988, Edgar J. Putnam married Mary Rachel Putnam.

Edgar Putnam and his first wife, Joann, made mutual wills wherein they both agreed not to do anything to defeat the testamentary scheme that they had both agreed to and which was embodied in their mutual wills. After Joann died, Edgar married Rachel without any sort of antenuptial or post nuptial agreement. Edgar also did not take any action with regard to his will.

After Edgar's death, Rachel sought and was granted pretermitted spouse status (R-617; A-3), thus entitling her to a one-half interest of Edgar's estate under the laws of intestacy. She also obtained an order for family allowance (R-584; A-4), exempt property and obtained a life interest in Edgar's homestead (R-658; A-5).

The Petitioners filed claims in the estate based upon the theory that they are third party beneficiaries of the wills executed by Edgar Putnam and his deceased wife, Joann Putnam. Objections were filed (R-083, R-085), and independent actions were filed (R-557-567). The cases were consolidated back into the probate division (R-615). Petitioners moved for summary judgment and were granted same on April 30, 1993 (R-830, A-1). That order provided that Petitioners were entitled to preference in appropriation of assets of the estate by virtue of their status as claimants, and that while the Respondent may be a pretermitted spouse, she takes nothing because the claims of the residuary beneficiaries amount to the entire residuary estate.

On appeal to the Second District, the trial court's order was reversed (A-6). The Second District reasoned that there was a strong public policy in favor of protecting a surviving spouse's right to receive an elective share or a pretermitted share and such rights have priority over rights arising under an antenuptial contract of the deceased spouse. The Second District also recognized that its holding conflicted with the rule applied in Johnson v. Girtman, 542 So.2d 1033 (Fla. 3d DCA 1989).

SUMMARY OF ARGUMENT

The Florida Probate Code 733.707 clearly sets forth the priorities in payments made from an estate. Claims of creditors clearly have priority over the entitlement of beneficiaries and that is exactly how the probate judge ruled. The pretermitted spouse statute, 732.301, allows the pretermitted spouse a share in the estate equal to what that spouse would have received under the laws of intestacy. This statute does not provide for a super priority for a pretermitted spouse and that share must be subject to §733.707 which governs the order of payment of expenses and obligations. The Second District Court of Appeal adopted a public policy argument in reversing the trial court by saying that the surviving pretermitted spouse should not be denied her intestate inheritance and that share has to be awarded regardless of an antenuptial contract by the deceased spouse. The reasoning adopted by the Second District does violence to the concept of "equal protection" as its ruling unreasonably differentiates between valid claims arising under an antenuptial agreement and all other claims.

The Probate Code has adequately provided for spouses in situations such as this when claims in fact exceed the value of the estate. In particular, the Respondent has been awarded a family allowance, has been awarded the exempt property and has been awarded a life interest in the homestead property, all of which have priority over that of claimants. These items which have statutory priority over claims insure that the surviving spouse will not be left destitute. The true "public policy" argument present in this case is the sanctity of the contract entered into between Edgar and Joann Putnam. The trial court's decision was solidly based on the Florida Statutes, case law and public policy and should be reinstated.

ARGUMENT I

DOES THE SHARE OF A PRETERMITTED SPOUSE HAVE PRIORITY OVER THAT OF CREDITORS?

The gravamen of this case revolves around mutual wills executed by Edgar J. Putnam and Joann G. Putnam on November 15, 1985, which contained the following provision:

> I acknowledge that this is a mutual will made at the same time as my husband'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.

The will went on to provide for the surviving spouse and then on the death of the surviving spouse, the assets were to be distributed to specifically named family members in certain percentages.

Five months after Edgar and Joann entered into this agreement, Joann died. Two years later Edgar married Rachel. Edgar has now died and the above mentioned will was admitted to probate. Rachel filed petitions for exempt property, homestead, family allowance and for pretermitted share and orders granting each have been entered. The practical effect of Edgar's marriage to Rachel is that he has breached the agreement he entered into with his first wife, Joann and has defeated the distribution schedule set forth in the mutual will he and Joann made five months before her death.

Robert Blackburn, the son of Joann Putnam, filed a claim in the estate for breach of contract as a third party beneficiary under the mutual will. Other beneficiaries also filed claims and are represented by separate counsel. The claims were litigated and the court found the claims to be valid and thus had priority over distributions to beneficiaries, per Florida Statute

733.707. The practical effect of that order was to allow Rachel Putnam to keep the exempt property, family allowance and homestead property but ruled the claims of the third party beneficiaries had priority over any entitlement Rachel was to receive as a pretermitted spouse just as any other valid claim would also have priority. The Second District Court of Appeal reversed on a public policy basis stating that "We believe this strong public policy requires the surviving spouse's elective share or pretermitted share be given priority over rights arising under an antenuptial contract of the deceased spouse." It is from this decision Petitioner now appeals.

The law clearly recognizes that mutual wills create contractual obligations which can be enforced by third party beneficiaries. See: In re Shepherd's Estate, 130 So.2d 888 (Fla. 2d DCA 1961); Weiss v. Storm, 126 So.2d 295 (Fla. 1st DCA 1961).

The case of Ugent v. Boehmke, 123 So.2d 387 (Fla. 3d DCA 1960) is an often cited case dealing with rights of third party beneficiaries under a mutual will. That case involved an action by a beneficiary to enforce provisions of a joint and mutual will devising to him certain realty. The Circuit Court entered a decree in favor of the beneficiary, and an appeal was taken. The District Court of Appeal held that a joint and mutual will wherein a husband and wife sought to dispose of certain realty held by them as an estate by the entireties, and wherein the property was devised to the survivor and in turn at the death of the survivor was bequeathed to a third party, and wherein the husband and wife agreed with each other to abide by the terms of the will and not make any codicil in conflict therewith without the consent of the other, constituted a contract between the parties to devise their property in the manner provided by the will and was enforceable by the third-party beneficiary. The Court also held that the consideration for the execution would appear to have been sufficiently established by the terms of the will itself where it appears that mutual promises were made by the parties, each to the other.

The Florida Supreme Court has previously dealt with a case factually similar to the one presently under consideration in Tod v.Fuller, 78 So.2d 713 (Fla. 1955). In that case there was an action to determine the effect of a second marriage and will leaving everything to the second wife upon an earlier will made pursuant to an agreement with the first wife to execute mutual and reciprocal wills naming the first wife's daughter sole beneficiary of the survivor's estate. The Circuit Court entered a decree favoring the daughter and the widow appealed. The Supreme Court held that where the widower had remarried, and, in violation of agreement, made a will leaving the entire estate to the second wife, who had no notice of the previous mutual wills, the named beneficiary was entitled to the estate upon the death of the widower, but in view of a lack of notice on part of the second wife, the second wife would be allowed a widow's dower share from the estate since she had notice at the time of her marriage that her part of the widower's estate could be circumscribed to that amount by will.

Tod v. Fuller is relevant except for the fact that we no longer have a "widower's share". Dower was abolished in 1974. Pursuant to 732.111, dower and curtesy was abolished. (History. s. 1, ch.74-106; s. 113, ch. 75-220.) In Tod v. Fuller, the Florida Supreme Court held that the third party beneficiary was entitled to the estate subject to the surviving wife's dower share.

The dower statute prior to 1974 provided as follows:

> **731.34 Dower in realty and personalty.--** Whenever the widow of any decedent shall not be satisfied with the portion of the estate of her husband to which she is entitled under the law of descent and distribution or under the will of her husband, or both, she may elect in the manner provided by law to take dower, which dower shall be one third in fee simple of the real property which was owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one third part absolutely of the personal property owned by her husband at the time of his death, **and in all cases the widow's dower shall be free from liability for all debts of the decedent and all costs, charges and expenses of administration;** provided, however, that nothing herein contained shall be construed as exempting any personal property from liability for any debt secured by written assignment,

pledge, mortgage or other security instrument mortgaging, assigning, or pledging, or otherwise granting, or imposing a lien upon, such personal property, whether or not possession of such property is delivered to such mortgagee, assignee, pledgee, or other security holder, and that nothing herein contained shall be construed as impairing the validity of any mortgage, pledge, assignment, or other lien so imposed or provided for in such security instrument, nor the rights therein created or provided for, and nothing herein contained shall be construed as impairing the validity of the lien of any duly recorded mortgage or the lien of any person in possession of personal property. The homestead shall not be included in the property subject to dower but shall descend otherwise provided by law for the descents of homesteads. In any case where the dower interest of the widow shall have the effect of increasing the estate tax, her dower shall be ratably liable with the remainder of the estate for the estate taxes due by the estate of her deceased husband. Whenever the decedent has died intestate leaving no lineal descendants and the widow has duly elected dower, all property of the decedent not included in the widow's dower shall descend to her subject to the debts of the decedent except that the homestead of the decedent shall descend to her with the exemptions provided by the constitution.

Note that dower is not subject to any "liability for all debts of the decedent and all costs, charges and expenses of administration ." As stated previously, this statute has been abolished.

The third party beneficiaries in the present case filed claims for breach of contract. If they indeed have a valid claim by virtue of Edgar breaching his agreement with his first wife, Joann, then we must look to §733.707 to determine who has priority.

733.707 Order of payment of expenses and obligations.

(1) The personal representative shall pay the expenses of the administration and obligations of the estate in the following order:

(a) Class 1. Costs, expenses of administration, and compensation of personal representatives and their attorneys' fees.

(b) Class 2. Reasonable funeral, interment, and grave-marker expenses, whether paid by a guardian under s. 744.441(16), the personal representative, or any other person, not to exceed the aggregate of $3,000.

(c) Class 3. Debts and taxes with preference under federal law.

(d) Class 4. Reasonable and necessary medical and hospital expenses of the last

60 days of the last illness of the decedent, including compensation of persons attending him.

(e) Class 5. Family allowance.

(f) Class 6. Debts acquired after death by the continuation of the decedent's business, in accordance with s. 733.612(22), but only to the extent of the assets of that business.

(g) Class 7. All other claims, including those founded on judgments or decrees rendered against the decedent during his lifetime, and any excess over the sums allowed in paragraphs (b) and (d) .

(2) After paying any preceding class, if the estate is insufficient to pay all of the next succeeding class, the creditors of the latter class shall be paid ratably in proportion to the irrespective claims.

Clearly, any entitlement that Rachel has for exempt property, homestead and family allowance has priority over the valid claim of Robert Blackburn.

Does Rachel's statutory right to take an elective share have priority over the Petitioners' claims? The answer lies in 732.207, the elective share statute which provides as follows:

The elective share shall consist of an amount equal to 30 percent of the fair market value, on the date of death, of all assets referred to in s. 732.206, computed **after deducting from the total value of the assets:**

(1) All valid claims against the estate paid or payable from the estate; and

(2) All mortgages, liens, or security interests on the assets.

By statute, all valid claims of the Petitioners have priority over Rachel's elective share. Petitioner, Robert Blackburn, should be allowed to inherit that which his mother intended. The Respondent will be adequately provided for by having received the homestead property, exempt property and family allowance.

The case of Johnson v. Girtman, 542 So.2d 1033 (Fla. 3d DCA 1989) is very similar to the present case. In that case the trial court was faced with the enforceability of an agreement to

make a will. That court found that it was indeed enforceable and that the beneficiaries of that agreement could bring an action to enforce it. The Court then went on to hold that the interest the surviving spouse had by virtue of his elective share was subject to valid claims of the beneficiaries who sued on breach of contract (as we have in this case). The net result in the Johnson v. Girtman case is that the surviving spouse's elective share in a substantial portion of the decedent's estate was wiped out by virtue of the priority of the claimants under the agreement to make a will. That case was affirmed on appeal.

The same argument also applies to a pretermitted share. In the case of Solomon v. Dunlap, 372 So.2d 218 (Fla. 1st DCA 1979) that court held that the pretermitted spouse is entitled to one half of the net value of the estate rather than one-half of the gross value of the estate. That court went on to hold that:

> The sole issue presented on appeal is whether Rowena B. Solomon is entitled to one-half of the net, or one-half of the gross value of the estate. If the Legislature intended that a pretermitted spouse would take one-half of the gross value of the intestate estate, we perceive that it would have inserted the word "gross" in the appropriate place in Section 732.102(1)(c). In those instances where it is the legislative intent that property of a decedent be distributed not subject to any burden of administrative cost or taxes, it has specifically referred to such property as "exempt property." For an example, see the provisions of Section 732.402, Florida Statutes (1977), where the legislature carefully designated its intent by using the words "exempt property" and "net value." We find no provision in the applicable statutes to indicate any intent that the pretermitted spouse takes her share free from any liability for payment of any applicable tax, debts, or costs of administration.

From the foregoing, it is clear that the interest of a pretermitted spouse takes subject to valid claims. The Petitioners have valid, enforceable claims by virtue of Edgar's actions and those claims must be satisfied before any beneficiary receives their distribution from this estate.

Had the present case not involved a surviving spouse, the Second District Court of Appeal would have undoubtedly upheld the trial court's decision. In the present case, the Second

District has held the rights of a pretermitted spouse have priority over the contractual rights of third party beneficiaries under a mutual will. Such a ruling is contrary to Florida Statutes and is not supported by the case law of Florida. Rather, the Second District adopts a public policy argument to support its decision.

The Second District Court of Appeal, in its opinion now under review, cited several cases to support its position. Neither case is controlling. In the case of In re Estate of Donner, 364 So. 2d 742 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 457 (Fla. 1979) the court was concerned with the surviving spouse's dower rights. As previously discussed, dower has been abolished. The other case relied upon is the Maryland Supreme Court case of Shimp v. Huff, 315 Md. 624, 556 A.2d 252 (1989). The Shimp decision adopts the minority view in the United States when balancing contractual rights against marital rights. Although not all States have ruled upon this issue, it has indeed become more of an issue in this era of second and third marriages and multiple families.

On one hand you have the marital rights of the surviving spouse. Those rights are manifested through statutory provisions granting the surviving spouse either an elective share or a pretermitted share of the decedent's estate. On the other hand you have the rights of the third party beneficiaries (usually children of one or both of the spouses) of a joint and mutual will previously entered into between the spouses.

Whose rights prevail? Which public policy arguments are the most compelling? Those that recognize and protect the marital rights of the widow or the contractual rights of the decedent? Sanctity of contract or chilling effect on the institution of marriage? There is a split in judicial philosophy as to whose rights prevail. The majority view in the United States appears to support

the contractual rights of the third party beneficiaries as having priority over those rights of the surviving spouse. See: Gregory v. Estate of Gregory, 866 S.W.2d 379 (Ark. 1993).

From a public policy standpoint, the majority view supporting contractual rights is the more compelling in Florida.

It is presumed that the public policy argument in favor of the marital rights of the surviving spouse is bottomed on the premise that a surviving spouse should not be left destitute while third parties, especially those who are the ultimate recipients under a contract to make a will, benefit. As mentioned previously, the Florida Constitution and the Florida Legislature have already created sufficient safeguards for the surviving spouse which include homestead, family allowance and exempt property.

In Shriners Hospitals for Crippled Children v. Zrillic, 563 So.2d 64 (Fla. 1990), the Florida Supreme Court touched on the protections afforded family members who were dependent on the decedent or otherwise in financial need. The Court noted that:

> 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. Const.; 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 a family allowance, § 732.403, Fla.Stat. (1985). The Probate Code also protects against fraud, duress, mistake, and undue influence. § 732.5165, Fla.Stat. (1985).

Clearly, the Florida Supreme Court in Zrillic has recognized that there are adequate safeguards already in place either through the Constitution or statutory provisions. There is no compelling argument to give a surviving spouse a priority position greater than a claim asserted by a third party beneficiary pursuant to a contract previously entered into by the decedent.

Moreover, there is nothing to prohibit one spouse from either over-extending himself in debt or transferring his property by gift which could wipe out any estate the surviving spouse may otherwise be entitled to. In fact in the case of Traub v. Zlatkiss, 559 So.2d 443 (Fla. 5th DCA 1990), it was held:

> Completed inter vivos transfers of assets by a spouse which reduce the transferring spouse's probate estate, even if made with the specific intent to diminish or eliminate a surviving spouse's statutory elective share, do not constitute a legal "fraud" on the surviving spouse and are not subject to being set aside in whole or in part at the behest of the surviving spouse in order to increase the surviving widow's elective share.

Accordingly, the Fifth District Court of Appeal recognized that in some instances, the surviving spouse's statutory elective share could be eliminated by prior transfers of the decedent.

On the other hand, there is a strong constitutional argument supporting the right of Edgar Putnam to contract with his wife to leave their estate to their children without interference by a second spouse.

In Zrillic, the Florida Supreme Court recognized that a "testamentary disposition of property" is a "constitutional property right". Moreover, "Freedom of contract is a fundamental right guaranteed by the Florida Constitution. ... Restricting this constitutionally guaranteed right is a matter more appropriate for the legislature than an appellate court." Desandolo v. F & C Tractor and Equipment Co., 211 So.2d 576 (Fla. 4th DCA 1968). Moreover, as was held in State v. Ives, 167 So. 394 (Fla. 1936), "The right to contract is a most valuable right among those recognized by the law." citing State v. Lehman, 100 Fla. 1313, 131 So. 533 (Fla. 1930). That court went on to recognize "Freedom of contract is the general rule; restraint is the exception, and when it is exercised to place limitations upon the right to contract, the power, when exercised, must not be arbitrary or unreasonable, and it can be justified only by exceptional circumstances." citing Ex parte Messer, 87 Fla. 92, 99 So. 330 (Fla. 1924).

From the foregoing, it is clear that Edgar Putnam had a fundamental constitutional right to contract with Joann Putnam to insure that their estate ultimately passed to their intended beneficiaries. It was improper for the District Court of Appeal to usurp the role of the Legislature by decreeing that the contractual rights previously conferred upon the Petitioners were inferior to the marital rights of the surviving spouse as embodied by the elective share or pretermitted spouse statutes. As pointed out earlier, valid claims have priority over what a surviving spouse is to receive under either statute.

In the case of Estate of Stewart, 444 P.2d 337 (CA 1968), the California Supreme Court was faced with the classic situation where Walter Stewart and his wife, Jennie, entered into a written contract to will their respective interests to the survivor for life and to their respective children on the death of the last survivor. Each made a will at the same time as the contract was entered into and also agreed not to revoke or cancel his or her will without the written consent of the other. After Jennie's death Walter married Viola. Walter subsequently died without making a new will. Viola claimed a one half interest in Walter's estate under the pretermitted spouse provisions of the California Probate Code. The court recognized that the children were the beneficiaries of the contract entered into between Walter and Jennie. The Court further recognized that although Walter's post-testamentary marriage resulted in a partial revocation of his will by operation of law this did not defeat the childrens rights. "(S)uch a partial revocation can no more prejudice their respective rights than could a total revocation in repudiation of the contract." As Walter had full use of the property after Jennie's death he became "estopped from making any other or different disposition of the property. It follows as well that he could not avoid this estoppel by a subsequent marriage". The Court ruled that Viola's rights attached only to property equitably as well as legally owned by the decedent, but not to property that he had

only legal title to and that in equity belongs to the children. In essence, the children owned the equitable interest in the property and as such Viola had no statutory right to that property. The Court concluded that although the California Probate Code reflects an historic policy that looks with "disfavor toward a testator's failure to provide for a surviving spouse ... it gives the spouse no absolute right to share in the testator's separate property." This California opinion expresses the majority view.

The concept of the third party beneficiaries owning the equitable interest in property subject to a contract to make a will is a common thread in other decisions that support the majority view.

In Price v. Aylor, 79 S.W.2d 360 (KY 1935), a Kentucky case where a husband and wife executed joint and mutual wills leaving everything to each other then upon their deaths to their nephews. The wife died and the husband subsequently remarried. After the marriage the husband deeded real property to his new wife. Upon the husband's death a declaratory action was commenced by the nephews. The court ruled that under the joint will, upon the death of the first wife all of the property vested in the nephews subject only to the husband's use for his life and upon the husband's death the property vested in the nephews. Therefore, the deed to the second wife was ineffectual. A similar factual situation dealing with bearer bonds can be found in In re Estate of Chayka, 176 N.W.2d 561 (WI 1970), where the Supreme Court of Wisconsin came to the same result.

The Supreme Court of Arkansas in Gregory v. Estate of Gregory, 866 S.W.2d 379 (Ark. 1993) also dealt with the situation where a husband and wife executed reciprocal wills and a separate contract not to revoke the wills. The wife died and subsequently the husband remarried. Upon his death, his spouse filed for her elective share. The children of Mr. Gregory and his first

wife objected to the surviving spouse's election to take against the will. The Probate Court, in ruling for the children held, inter alia, that "The decedent had no right to revoke or change his Will without the consent of the beneficiaries. To do otherwise would allow the survivor to receive advantages under the contract and then breach it thereby defeating and defrauding the deceased wife and her beneficiaries." On appeal to the Arkansas Supreme Court, the Probate Court's ruling was affirmed and recognized that:

> We are confronted with two competing public policies in this case - the right of a couple to contract to make mutual wills that are irrevocable and that dispose of both estates to third party beneficiaries, and the right of a surviving spouse to take an elective share. The states are divided on this issue although the majority view appears to favor third party beneficiaries. (cites omitted)
> 866 S.W.2d at 382

The Court also held that " the surviving spouse's elective interest in the decedent's estate vests immediately upon the spouse's death, but it can vest only in property which the deceased spouse owned at the time of death". The Arkansas Court went on to adopt the reasoning expressed in Rubenstein v. Mueller, 19 N.Y.2d 228, 278 N.Y.S.2d 845, 225 N.E.2d 540 (1967) which held that "... The survivor's right to full ownership of the collective property is transformed and modified by this joint agreement, effective upon the other's death as stated above, into but an interest during the life of the survivor with power to use the principal."

The Iowa Supreme Court has also ruled on facts similar to the instant case. In Lewis v. Lewis, 178 P. 421 (KA 1919), T.W. Lewis and his wife Betsy entered into a joint and mutual will which ultimately provided for their children and one grandson. Betsy Lewis subsequently died and later on T.W. married Mattie Lewis. On T. W.'s death Mattie asserted her elective share to one half of T. W.'s estate. Mattie argued that the joint and mutual will between T.W. and Betsy was against public policy because the surviving spouse

would be left dependent on those to whom the remainder is given. That court, in addressing the public policy argument stated:

> It is not apparent why such a will, executed by a husband and his wife, making provision for themselves during their lifetime, and the life of the survivor, and giving the property to their children after their death, is against public policy. That policy ought to be favorable to such wills. ... if an arrangement, such as the one now before the court, is voluntarily made, there is no more reason for saying that it is opposed to public policy if the arrangement had been made by deed executed and delivered in the lifetime of the parties thereto. There is not much difference between such an arrangement by deed and the one now under consideration.

The court went on to hold that the husband only held legal title to the property that was originally owned by T.W. and his first wife and the surviving spouse's elective share did not attach to that property because in equity it belonged to the children. The court also noted that "a disposition of property made long prior to contemplation of a marriage and while another marriage relation exists, cannot be in fraud of the rights of the second spouse."

ARGUMENT II

THE HOLDING BY THE SECOND DISTRICT COURT OF APPEAL DENIES PETITIONER OF EQUAL PROTECTION UNDER THE LAW.

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." The Second District has, in effect, changed the statutory scheme dealing with the priority of payment of assets from an estate. Such a ruling has caused claims arising out of a marital agreement to be treated differently than other claims without any rational basis for that distinction.

Florida Statutes, Section 732.207 provides that a spouse's elective share shall be computed after deducting from the total value of all property of the decedent wherever located, except real property not located in Florida, all valid claims against the estate paid or payable from the estate. The Florida Legislature declined to exclude from Sections 732.207 or 733.707 contract claims arising under an antenuptial contract of the deceased spouse. In fact, when abolishing dower and curtesy, the Legislature consciously added to the computation of a spouse's elective share "[a]ll valid claims against the estate," a provision which did not exist in the computation of dower.

The Second District Court of Appeal has exceeded its authority by changing the plain meaning of section 733.707, Florida Statutes, by its holding that claimants under a breached mutual will do not have the same priority as any other claimants. In the case of City of Orlando v. Wilkinson, 624 So.2d 799 (Fla. 1st DCA 1993) it was held that "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 Serv. 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)." In the case of Groth v. Weinstock, 610 So.2d 477, (Fla. 5th DCA 1992) it again was recognized that "Courts are without power to construe an unambiguous statute in a way which would extend or modify its express terms, citing Holly v. Auld, 450 So.2d 217 (Fla. 1984).

By holding that third party claimants under a valid and enforceable mutual will do not have the same priority as other class 7 obligations under section 733.707, Florida Statutes,

the Second District has committed fundamental error. Specifically, by so interpreting section 733.707, Florida Statutes, the Second District has, in effect, rendered that statute unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Section 9 of the Declaration of Rights in the Florida Constitution.

The Fourteenth Amendment to the United States Constitution provides that no State shall "... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The courts have consistently interpreted this clause to mean that no state may enact legislation that does not have a reasonable relationship to the object and purpose intended by such legislation.

In Lalli v. Lalli, 439 U.S. 259, 58 L.Ed 503, 99 S.Ct. 518 (1978), the United States Supreme Court was faced with the constitutionality of a New York Statute which involved some proof requirement on illegitimate children who would inherit from their fathers. The Court found:

> The primary state goal underlying the challenged aspect of sec. 4-1.2 is to provide for the just and orderly disposition of property at death. We long have recognized that this is an area with which the States have an interest of considerable magnitude.

Lalli, 439 U.S. at 268, 99 S.Ct. at 524, 58 L.Ed.2d at 511.

Justice Powell writing for the majority, in recognizing that probate statutes are subject to constitutional scrutiny wrote:

> ... Our inquiry under the Equal Protection Clause does not focus on the abstract 'fairness' of a state law, but on whether the statute's relation to the

> state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment.

Lalli, 439 U.S. at 273, 99 S.Ct. at 527, 58 L.Ed.2d at 514.

As was pointed out in State ex rel Furman v. Searcy, 225 So.2d 431 (Fla. 4th DCA 1969), both the 14th Amendment of the U.S. Constitution and Article I, Section 9 of the Florida Constitution

> ...guarantee the concept of substantive due process to citizens of the State of Florida as a safeguard against state actions. The phrase 'due process of law' when applied to substantive rights as distinguished from procedural rights means that a state or municipality is without right to deprive a person of life, liberty or property by an act having no reasonable relationship to any proper governmental purpose.

Furman, 225 So.2d at 433.

The legislative purpose of Section 733.707 Florida Statutes, is to set forth the priorities in distributing an estate to insure the orderly administration of that estate. The holding of the Second District Court of Appeals changes the priorities created under 733.707 by treating valid claimants under a mutual will which has been breached differently than other claimants.

The question of equal protection is now raised as to whether the two classes created by the Court's ruling bear a rational relationship to the purpose of the underlying statute. This Court has ignored the holding in Johnson v. Girtman, 542 So.2d 1033 (Fla. 3d DCA 1989) and has elected to follow a decision out of Maryland and has predicated its holding on a public policy argument that by somehow giving claimants under a mutual will the same priority as other class 7 claimants is contrary to the public policy of the State of Florida

which is "in favor of protecting a surviving spouse's right to receive an elective share." A decedent could have entered into an obligation with a stranger prior to his death for an amount which exceeds the value of his estate. That claimant would have priority as a class 7 claimant under 733.707 which would have the effect of depriving the surviving spouse of her elective share. There is no rational basis for distinguishing between that type of claimant and a claimant under a mutual will which has been breached by the decedent and as such this Court's ruling violates the Petitioner's right to equal protection. Furthermore, Florida used to have Dower which entitled a surviving spouse to a portion of the deceased spouse's estate and that dower interest had priority over class 7 type claimants. Dower was abolished in 1974. In its place the Legislature provided that a surviving spouse was entitled to an elective share. Elective share, unlike dower, was subject to "[a]ll valid claims against the estate," a provision which did not exist in the computation of dower. Therefore, the Florida Legislature has expressly dealt with the priorities of claimants as they relate to a spouse's elective share and enacted legislation specifically setting forth the priorities afforded to both beneficiaries and claimants in a probate estate. The Second District Court of Appeal's decision abrogates Section 733.707, Florida Statutes and must be reversed.