OA

2-9-95

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.	Case No. 83,660
MARY RACHEL PUTNAM, Respondent.	

PETITIONERS' INITIAL BRIEF

On Review from the District Court
of Appeal, Second District
State of Florida

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STATEMENT OF THE CASE AND FACTS

On November 15, 1985, Edgar Putnam and his wife, Joann Putnam, executed mutual wills, which each contained the following provisions:

> 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.

(R. 564-67, 831.) Each will devised that spouse's entire estate to the survivor. (R. 564-67.) Each will further provided that the survivor devised his or her estate to their children. (R. 564-67.) The six children named in the wills were the couple's five children (Paul D. Putnam, Joseph E. Putnam, Mary Ann Via, Richard L. Putnam, and Ronald L. Putnam) and Joann's son, Robert L. Blackburn. (R. 564-67.) Throughout this brief, these individuals will be referred to collectively as "the children."

In 1986, Joann Putnam died without having made any changes or having done anything to defeat the terms of her mutual will. (R. 831.) In 1988, Edgar married Rachel Putnam. (R. 831.) Edgar and Rachel never made any sort of

antenuptial or postnuptial agreement. (R. 71-72, 240-41.) Edgar never made another will.

Upon Edgar's death, Edgar's mutual will was admitted to probate. (R. 831.) The children filed claims in the estate in which they alleged that Edgar had breached the contract he had made with Joann by marrying Rachel without any sort of marital agreement. (R. 832.) After objections to the claims were filed, the children, as third party beneficiaries of the agreement between Edgar and Joann, filed independent actions based on breach of contract. (R. 476-81, 557-67, 832.) The independent actions were consolidated and transferred back into the probate court. (R. 832.)

In the meantime, Rachel had sought, and was granted, a determination that she was a pretermitted spouse. (R. 617.) Rachel was also awarded a family allowance, (R. 584), and a life interest in the homestead (R. 658).

On April 30, 1993, the trial court entered summary judgment in favor of the children. (R. 830-33.) The trial court found that the mutual wills of Edgar and Joann constituted a binding contractual agreement, and that Edgar had breached his mutual will when he married Rachel without taking appropriate steps to protect the third party beneficiaries of the agreement. (R. 831-32.) Accordingly, the trial court concluded that the children have valid

claims against Edgar's estate based on Edgar's breach of the mutual wills. (R. 832.)

The trial court further ruled that the valid claims of the children constitute class 7 obligations pursuant to section 733.707, Fla. Stat. (1991),[1] and that Rachel's share as a pretermitted spouse is subject to those class 7 obligations. (R. 833.) The trial court then concluded that the nature of the children's claims entitled them to Edgar's estate less the exempt property, family allowance, and homestead property that would pass to Rachel free from claims of creditors. (R. 833.)

Rachel appealed the order entering summary judgment, and the Florida Second District Court of Appeal reversed. Putnam v. Via, 638 So. 2d 981 (Fla. 2d DCA 1994). Both the instant Petitioners, and their stepbrother, Robert Blackburn, filed timely notices to invoke this Court's discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

It is well recognized that husbands and wives may agree to make mutual wills in which each spouse devises his or her entire estate to the other and, upon the death of the survivor, giving the remainder interest to their children.

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[1] Under the current statute, the class is numbered Class 8. § 733.707, Fla. Stat. (1993).

It is also well recognized that, if the surviving spouse breaches the agreement not to revoke the will, the children, as third party beneficiaries, may bring an action to enforce the terms of the agreement.

Florida courts have consistently been willing to enforce such agreements in favor of the third party beneficiaries whenever, as a result of breach by the testator, a non-spouse claims a right to the property devised to the children. In cases in which a widow claims a dower right, however, the courts have held that the dower statute requires the widow to have priority over all other claims. An examination of the former dower statute shows that the statute itself expressly mandated such priority and that that mandate required that result. In fact, in cases after the repeal of dower, the third party beneficiaries are once again accorded priority over claims by either a pretermitted spouse or a spouse who chooses to take the statutory elective share.

This history demonstrates that Florida's public policy in favor of protecting surviving spouses is no longer as strong as it was when the dower statute was viable. Indeed, the weaker public policy is shown by the distribution scheme described in the elective share statutes, which provides that contract claimants such as third party beneficiaries take priority over claims for the elective share.

Similar evidence of the non-dominance of the policy protecting surviving spouses appears in the pretermitted spouse statute, which actually recognizes that, through certain provisions, a testator may disinherit a surviving spouse.

These statutes, along with accepted estate planning devices such as a revocable trust, which defeat the elective share, show that nothing in Florida's contemporary public policy requires a surviving spouse to take priority over third party beneficiaries. To the contrary, since the repeal of dower, courts are free to decide the spousal cases in the same way that courts have consistently decided the non-spousal cases. Accordingly, this Court should rule that the Putnam children's contract claim has priority over Rachel's pretermitted share or elective share.

ARGUMENT

I. THE CLAIMS OF THIRD PARTY BEFEFICIARIES UNDER A VALID AGREEMENT TO MAKE A MUTUAL WILL HAVE PRIORITY OVER THE SURVIVING SPOUSE'S PRETERMITTED SHARE OR ELECTIVE SHARE.

A. Introduction

A good analysis of the issue presented in the present case appears in David Carl Minneman, Annotation, Surviving Spouse's Right to Marital Share as Affected by Valid Contract to Make A Will, 85 ALR 4th 418 (1991). According to the annotation, the issue arises when a husband and wife

attempt to accomplish their estate planning objectives by using the device of a will contract. See id. at 425. The couple agrees how they want their joint estate to be disposed of, and then executes mutual wills giving all their property to the survivor for life and, upon the death of the survivor, giving the remainder interest to their children. See id. When one of the spouses dies, one of two things may occur to bring the rights of the remaindermen under the contract in conflict with the marital rights of a surviving spouse. See id. In some cases, the survivor attempts to repudiate the agreement by claiming his or her marital interest in the deceased spouse's estate. See id. at 426. In other cases, the survivor accepts the life interest granted under the deceased spouse's will, but then remarries and dies, leaving a surviving spouse who asserts his or her marital interest in the remainder interest promised to the children or other relatives under the contract. See id.

The annotation states that, in many[2] of these cases, the courts have held that the rights of the children as contract beneficiaries under the mutual wills executed by the husband and wife disposing of the testator's property pursuant to an estate plan are superior to the right of a

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[2] The Supreme Court of Arkansas has recently remarked that the majority of American jurisdictions favor the third party beneficiaries. See Gregory v. Estate of Gregory, 866 S.W. 2d 379 (Ark. 1993).

surviving spouse to a marital portion of the deceased spouse's estate. See id. The annotation explains that courts have generally reasoned that the surviving spouse's marital rights attach only to property equitably as well as legally owned by a deceased spouse and that the effect of the contractual mutual wills is to place the equitable title to the property in the contract beneficiaries leaving only the legal title in the deceased spouse. See id. A variation on this rationale is that, under the contractual wills, when the surviving testator accepts the benefits thereof, a trust is impressed in favor of the ultimate beneficiaries, and the surviving testator takes an interest during his life with a power to use or otherwise dispose of principal, and the contract beneficiaries take the interest which remains. See id. Yet another rationale is that, when the surviving testator accepts the benefits passed to him under the will contract, he becomes estopped to make any other disposition of the property and cannot avoid the estoppel by a subsequent marriage. See id.

The one case mentioned in the annotation that held in favor of the surviving spouse's right to receive an elective share is the case followed by the Florida Second District Court of Appeal in the case at bar: Shimp v. Huff, 556 A. 2d 252 (Md. 1989). See Minneman, supra, at 426, 451-52. In this brief the Petitioners will show that Florida is no

longer constrained by the extreme public policy that dictated the Maryland decision and that Florida should follow the majority to enforce the contractual rights of the Putnam's children as third party beneficiaries.

B. Enforcement of a Contract to Make a Mutual Will.

Florida courts have long recognized that a person may make a valid contract to bind himself to dispose of his real or personal property in a particular way by will. See McDowell v. Ritter, 153 Fla. 50, 13 So. 2d 612 (1943); Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939). It is also well recognized that, if the promisor breaches the 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. See In re Estate of Algar, 383 So. 2d 676 (Fla. 5th DCA), review denied, 389 So. 2d 1107 (1980); In re Estate of Rosenstein, 326 So. 2d 239 (Fla. 3d DCA 1976); Donner v. Donner, 302 So. 2d 452 (Fla. 3d DCA 1974), cert. denied, 314 So. 2d 151 (Fla. 1975); In re Shepherd's Estate, 130 So. 2d 888 (Fla. 2d DCA 1961); Keith v. Culp, 111 So. 2d 278 (Fla. 1st DCA 1959).

In Keith v. Culp, the court explained the theory underlying the contract action in mutual wills cases. See id. at 281. The court explained that mutual wills, like

other wills, are ambulatory, or revocable. See id. Thus, the court stated that

> it is not the wills, which are made in pursuance of a contract, that are irrevocable, but the contract upon which they are made that stands and may be enforced depending of course upon the attendant circumstances. And this is true even though there is a covenant not to revoke.

Id.

In Shepherd's Estate, the Florida Second District Court of Appeal further examined the underlying legal principles:

> The enforcement of rights under mutual wills is founded upon equitable principles. Where the revocation was wrongful and unauthorized and the testator disposed of the property in a manner inconsistent with the agreement upon which the mutual will was based, a court of equity, having extraordinary power to enforce specific performance of contracts and to prevent frauds, will ordinarily enforce such agreement by decreeing its specific performance or by impressing a trust on the property in favor of the beneficiaries of the revoked will. Also, an action may be maintained for damages for breach of the agreement, in a proper case.

See Shepherd's Estate, 130 So. 2d at 891.

In accordance with these principles, Florida courts readily enforce contractual agreements involving mutual wills. For example, in Ugent v. Boehmke, 123 So. 2d 387 (Fla. 3d DCA 1960), a husband and wife executed a mutual will which provided that certain real property was devised to the survivor and, at the death of the survivor, was

bequeathed to Mr. Boehmke. See id. at 388. The will contained a specific covenant in which both spouses promised not to change the will or to make any will or codicil that would render ineffective the bequest of the property to Mr. Boehmke. See id. After the wife's death, however, the husband executed a codicil contrary to the terms of the mutual will. See id. Mr. Boehmke sued to enforce the provisions of the mutual will, and the appellate court agreed that the mutual will constituted a contract that was enforceable by Mr. Boehmke as a third party beneficiary. See id.

Similarly, in Weiss v. Storm, 126 So. 2d 295 (Fla. 1st DCA 1961), pursuant to a verbal agreement, a husband and wife executed a mutual will leaving to the survivor all property and devising, upon the death of the survivor, all property of the survivor to the four children of the husband. See id. at 296. Following the husband's death, the wife made another will leaving all of her property to Ms. Weiss. See id. The children sued. See id. The appellate court upheld the trial court's determination that the language in the mutual will constituted sufficient evidence to establish a contract and that the property of the wife's estate was held in trust for the use and benefit of the husband's children. See id. at 298.

Hence, the law is clear that, in general, contracts regarding mutual wills are enforceable in Florida by the third party beneficiaries of the contract. Competing with Florida's well-established commitment to enforcing such contracts is Florida's public policy of providing for surviving spouses through Florida's various marital share statutes. In cases decided under the now-abolished rule of dower, the shares of third party beneficiaries were subordinate to the dower rights of the surviving spouse. See, e.g., Tod v. Fuller, 78 So. 2d 713 (Fla. 1955). A more recent case interpreting non-dower statutes, however, holds that the surviving spouse's share is subordinate to the claims of the third party beneficiaries. See Johnson v. Girtman, 542 So. 2d 1033 (Fla. 3d DCA 1989). Therefore, one of the keys to interpreting the difference in these cases is a recognition of the different requirements in the repealed dower statute and requirements in the non-dower marital share statutes. In fact, an analysis of the dower and post-dower cases illustrates that Florida's public policy, as expressed by the legislature in the marital share statutes, has moderated considerably since the repeal of dower.

C. Dower Cases

The strong policy in favor of the surviving spouse is illustrated in two of a series of cases involving the estate

of Donner. In In re Estate of Donner, 364 So. 2d 742 (Fla. 3d DCA 1978) [hereinafter "Donner I"], Sam Donner had been divorced twice before he married his third wife. See id. at 746. As part of a property settlement agreement in his divorce from his second wife, Sam agreed to leave the second wife a one million dollar tax-free bequest in his will and to enter into an antenuptial agreement with any future women he might marry in which his future wife would waive her dower to the extent it might interfere with the bequest to the second wife. See id. Contrary to the provisions of the settlement agreement, however, Sam entered into an antenuptial agreement with the third wife which provided that the third wife did not relinquish any marital rights. See id.

Shortly after marrying the third wife, Sam died. See id. In his will, Sam left the promised one million dollars to the second wife, and made his third wife his sole residual beneficiary. See id. The third wife chose not to take under the will and elected to take dower under the dower statute, which was in effect at the time of Sam's death. See id. at 746-47 & n.10. The second wife sued for breach of the settlement agreement. See id. at 747. She further alleged that Sam and the third wife had fraudulently deprived the second wife of her expectancy under the marital settlement agreement by entering into the antenuptial

agreement that was expressly contrary to the provisions of the settlement agreement. See id.

The Florida Third District Court of Appeal held that the dower rights of the surviving third wife were paramount over the rights of the second wife under the divorce property settlement agreement. See id. at 752. The court discussed at length the nature of dower. See id. at 751-52. According to the court, dower was a personal right which could be exercised only by the widow. See id. at 751. Furthermore, upon vesting at the death of the husband, dower was not subject to, affected by, or altered by the acts of the husband, including contracts which he may have entered into without the actual knowledge or consent of his widow. See id.

The court concluded that the third wife could not 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. See id. at 752. The waiver provision in the settlement agreement was not enforceable since it was an unjustified encroachment upon the third wife's dower right, which could only be taken away or modified by her voluntary consent or by statute.

In a companion case, the court decided the priority of the various claims against the Donner estate. See In re

Estate of Donner, 364 So. 2d 753 (Fla. 3d DCA 1978), cert denied, 373 So. 2d 457 (Fla. 1978), appeal dismissed sub nom. Donner v. Anton, 444 U.S. 958, 100 S. Ct. 442, 62 L. Ed. 2d 371 (1979) [hereinafter "Donner II"]. In addition to the claim of the second wife by virtue of her one million dollar legacy, Sam's first wife and adopted son asserted claims against the estate. See id. at 754-55. The first wife and son had brought a separate suit for specific performance based on a marital settlement agreement in which Sam had contracted to will the first wife and son each one-third of his net estate. See id. at 754. In the separate suit, the court had ruled that these claims were valid and enforceable against the estate. See id. (citing Donner, 302 So. 2d at 452).

In considering the priority of claims, the court held that the first wife and son, as well as the second wife, were not judgment creditors of the estate with priority over the third wife's dower. See id. at 755. Rather than creditors, these claimants were legatees whose claims came after the third wife's dower. See id. The court explained that, for the reasons stated in Donner I, the third wife's dower was prior and paramount to the claims of all the contesting parties. See id. at 755-56.

The decisions of the Donner court to accord the surviving widow absolute priority over all other claims was

dictated by the mandate set forth in the dower statute. (Dower was abolished in 1974. See ch. 74-106, §§ 3, 4, at 319-20, Laws of Fla., as amended, ch. 75-220, § 113, at 577, Laws of Fla.; § 732.111, Fla. Stat. (1993).) The dower statute 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 as otherwise provided by law for the descent 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 the exemptions provided by the constitution.

§ 731.34, Fla. Stat. (1971) (emphasis added). Thus, the statute expressly required that "in all cases the widow's dower shall be free from liability of all debts of the decedent and all costs, charges and expenses of administration." See id. With such a precise legislative directive, the Donner court had no choice but to rule that the first wife, the son, and the second wife were mere legatees whose claims were subordinate to the widow's dower.

The Florida Supreme Court was similarly bound by the dictates of the dower statute in Tod v. Fuller, 78 So. 2d at 713. As set forth in an earlier case, controversy arose as a consequence of an agreement between a husband and his first wife to execute mutual wills and to make the first wife's daughter sole beneficiary of the survivor's estate. See Fuller v. Tod, 63 So. 2d 316 (Fla. 1953). Upon the death of the first wife, the husband received the first wife's entire estate. See id. at 317. Subsequently, the

husband married the second wife and made a will leaving his entire estate to her. See id.

The trial court found that the second wife had no prior knowledge of the agreement regarding the mutual wills. See Tod v. Fuller, 78 So. 2d at 713. Nevertheless, the trial court ruled that it would be unfair to give the second wife the entire estate in the face of her deceased husband's breach of contract. See id. at 714. Therefore, the trial court ruled that the daughter would receive the net estate less the widow's dower as fixed by the dower statute. See id. Without comment, the supreme court affirmed. See id.

Like the Donner cases, the result in Tod v. Fuller was compelled by the specific mandate of the dower statute that dower is "free from liability for all debts of the decedent and all costs, charges and expenses of administration." Tod v. Fuller is especially instructive because it shows that tension between the policy of giving effect to the rights of the third party beneficiaries and the policy of protecting the widow through dower. Despite the widow's innocence of the prior agreement, the court's focus was on the husband's breach of the agreement. The court was clearly concerned that it would be unjust to allow the widow to prevail. Thus, the court effected a compromise in which the third party beneficiary actually prevailed, but in which the widow would receive what was required under the dower statute.

The concern expressed in the opinion about the injustice wrought by the breach suggests that, absent the requirement of dower, the court would have been satisfied to rule entirely in favor of the third party beneficiary. The clear mandate of the dower statute, however, prevented this result.

D. Post-Dower Case

With the repeal of dower, courts are no longer subject to the order of priority required by the dower statute. This is illustrated in Johnson v. Girtman, 542 So. 2d at 1033. Johnson v. Girtman concerned an agreement by brothers and sisters to devise their respective shares of family property only to their children, or, if they were childless, to their siblings. See id. at 1034-35. The dispute arose when one of the siblings, who died childless, named her surviving spouse as the sole beneficiary of her estate. See id. at 1035. The surviving spouse contended that he was entitled to his deceased wife's share of the family property on the ground that his elective share was superior to his deceased wife's agreement with her family. See id. at 1034-35.

The third district court of appeal rejected the surviving spouse's argument. See id. at 1037. The court based its conclusion on the requirement in the elective

share statute that all claims and liens against the estate be deducted prior to calculating an elective share. See id. The court observed that the elective share statues evince a clear intent to limit the elective share to the net probate estate. See id. (citing Kelley v. Hill, 481 So. 2d 1311 (Fla. 2d DCA 1986)). Accordingly, the surviving spouse's elective share was to be based on the assets that remained after deducting all valid claims against the estate. See id.

"Claims" are statutorily defined as "liabilities of the decedent, whether arising in contract, tort, or otherwise, and funeral expenses." See id. (citing § 731.201(4), Fla. Stat. (1987)). The court found that the family agreement gave rise to a valid contractual claim that must be satisfied prior to determining the spouse's elective share. See id. Consequently, the court ruled that the contractual claim effectively eliminated from the deceased wife's estate any interest in the family property, and that the surviving spouse was not entitled to an elective share in that property. See id.

The difference between Johnson v. Girtman and the earlier Florida cases can be explained by the difference between the strict requirements of the now-repealed dower statute and the replacement elective share statutes. Unlike the dower statute, the elective share statutes contain no

mandate that the elective share is "free from liability for all debts of the decedent and all costs, charges and expenses of administration." To the contrary, as recognized by the Johnson v. Girtman court, the elective share statutes specifically state that the elective share is to be 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.

§ 732.207, Fla. Stat. (1993) (emphasis added). Since the statutes identify "claims" as including liabilities of the decedent that arise in contract, see § 731.201(4), Fla. Stat. (1993), it is clear that liabilities arising from a contract to devise property in a particular way must be deducted prior to calculating an elective share.

E. Analysis

Thus, the abolition of dower and the replacement of dower with elective share statutes evidence a change in Florida's legislatively expressed public policy regarding a surviving spouse's marital share. Although Florida still makes some provision for a surviving spouse, providing for the survivor is no longer the paramount consideration. This shift in policy appropriately reflects the changes in modern

life itself. Dower was developed in an age in which wives were entirely dependent upon their husbands legally and economically. Until comparatively recent modern times, few wives worked outside of the home and few women even had the training to earn their own livings. In such circumstances, dower served as a way to prevent women from becoming wards of the state. It thus made sense to make the dower share paramount over all other claims against the estate.

The scenario in which dower reigned no longer exists. Women, married and single, work outside the home and have the same legal rights that men have. Some women even support their husbands. Thus, it is appropriate that the elective share statutes that replaced dower recognized that surviving husbands may now claim the same share of the estate that surviving wives may claim. It is further appropriate that the portion of the share that may be claimed by the surviving spouse is no longer as great as in the era when widows were entirely dependent on their husband's estates.

Unlike dower, Florida's pretermitted spouse statute has long been recognized as independent of the compelling dictates of priority required by dower. This difference was expressly recognized by the Florida Supreme Court in In re Suarez's Estate, 145 Fla. 283, 198 So. 829 (1940). Suarez's Estate concerned a prenuptial will in which the husband

devised his entire estate to his sisters. See id. at , 198 So. at 830. At the husband's death, there were no lineal descendants, and the widow refused dower and petitioned instead for the entire estate pursuant to the governing pretermitted share statute. See id. at , 198 So. 830. Like the current pretermitted spouse statute (§ 732.301, Fla. Stat. (1993)), the operable statute in Suarez's Estate permitted a pretermitted spouse to "a share in the estate...equal in value to that which [she] would have received if the testator had died intestate." See Suarez's Estate, 145 Fla. at , 198 So. at 831. Because the husband had no lineal descendents, this amounted to the entire estate. See id. at , 198 So. at 831.

The Florida Supreme Court held that the widow was indeed entitled to the whole estate. See id, at , 198 So. at 831. Nevertheless, in so ruling, the supreme court specifically distinguished the pretermitted spouse statute from the dower statute. See id. at , 198 So. at 831. The court stated,

> The [pretermitted spouse] statute does not provide that such "share" shall be "free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration," as is the case when she elects to take dower under sections 35 and 36.

Id. at , 198 So. at 831.

Suarez's Estate is pertinent to the present case in two ways. First, it shows that, even under the forerunner of the current pretermitted spouse statute, the spouse was entitled to the entire intestate share less debts, taxes and costs of administration. Second, the supreme court's express reference to the dower statute shows that dower was the only means by which a surviving spouse's share was free from the debts, taxes, and costs that must be assessed against non-dower estates prior to calculating the spousal share. Suarez's Estate demonstrates, therefore, that, like the elective share statutes that have replaced dower, Florida's pretermitted share statute fails to evidence any public policy that would give surviving spouses rights that are superior to the rights of creditors.

Indeed, the current version of the pretermitted spouse statute makes clear that a husband may disinherit his wife from an intestate share if:

> (1) Provision has been made for, or waived by, the spouse by prenuptial or postnuptial agreement;
>
> (2) The spouse is provided for in the will; or
>
> (3) The will discloses an intention not to make provision for the spouse.

§ 732.301, Fla. Stat. (1993). Since the Florida legislature expressly provided that a testator may disinherit his spouse (or his child, See § 732.302, Fla. Stat. (1993)), it can

hardly be said that Florida has as strong a public policy interest in protecting the surviving spouse as Florida had under the dower provision.

Furthermore, an individual in Florida may defeat even the surviving spouse's elective share through the use of a revocable trust instead of a will. See Ronald J. Russo and Peter T. Kirkwood, "The Use of a Revocable Trust to Defeat the Elective Share," 57 Fla. B.J. 110 (1983). If Florida allows persons to use a trust to insulate their estates from a surviving spouse's elective share, then it cannot be said that Florida has an overpowering public policy in favor of the surviving spouse.

Indeed, it would be incongruous and inequitable if this Court were to hold that public policy favors surviving spouses of testators who used mutual wills as estate planning devises over surviving spouses of those who created trusts. That would mean that the Putnam children would fare better if Edgar and Joann had happened to use an attorney who had prepared a revocable trust rather then mutual wills as an estate planning mechanism. Surely, Florida's public policy cannot rest on whether one's attorney has the knowledge or foresight to use one estate planning device over another.

Furthermore, a Florida court has held that a surviving spouse could not claim an elective share in a joint savings

account with rights of survivorship which the husband had established in the names of himself and his daughter. See In re Estate of Solnik, 401 So. 2d 896 (Fla. 4th DCA 1981). Similarly, property passed to a daughter by deed which had reserved a life estate in the decedent was not subject to administration for purposes of elective share. See Kelley v. Hill, 481 So. 2d 1311 (Fla. 2d DCA 1986). In fact, there is no prohibition in Florida against inter vivos transfers of real or personal property, even if such transfers were made with the specific intent to diminish or eliminate the surviving spouse's elective share. See Traub v. Zlatkiss, 559 So. 2d 443 (Fla. 5th DCA 1990). If it is perfectly legal in Florida to deprive a surviving spouse of the statutory elective share by such methods, then Florida's public policy in favor of protecting surviving spouses cannot be all that commanding.

Thus, unlike the strong public policy that was expressed in the dower statute, contemporary public policy represents far less deference to protection of a surviving spouse. The shift in policy after the abolition of dower explains why the cases under the dower statute accorded priority to the surviving spouse and why the non-dower case of Johnson v. Girtman is correctly decided. In accordance with the principles applied in Johnson v. Girtman, this court should rule that the trial court correctly decided

that the Putnam children's claims have priority over either a pretermitted share or an elective share claimed by Rachel.

CONCLUSION

The decision of the Florida Second District Court of Appeal should be quashed and the decision of the circuit court reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Initial Brief has been furnished by United States Mail to **Teresa Cooper Ward, Esquire**, attorney for Respondent Mary Rachel Putnam, 5322 Duhme Road, St. Petersburg, Florida 33708, **Joseph W. Fleece, III**, attorney for Petitioner Robert Blackburn, P. O. Box 330, St. Petersburg, FL 33731-0330 and **Mark I. Shames, Esquire**, Administrator Ad Litem, 535 Central Avenue, Suite 403, St. Petersburg, Florida, 33701, and **James H. Richey, Esq.**, attorney for personal representative, 200 South Harbor City Blvd. Suite 201, Melbourne, Florida 32901, this 2nd day of December, 1994.

Respectfully submitted,

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