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.

MARY RACHEL PUTNAM,

Respondent.

Case No. 83,660

PETITIONERS' REPLY BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

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

Contrary to the Respondent's position, analysis of both spousal and non-spousal mutual will cases shows that Florida's former dower statute was the single consistent determinant that compelled the courts to rule that surviving spouse's dower rights prevail over the rights of the third party beneficiaries to the will contract. In the non-spousal cases, the courts uniformly hold that third party beneficiaries may enforce contractual agreements involving mutual wills. See, e.g., In re Estate of Algar, 383 So. 2d 676 (Fla. 5th DCA), review denied, 389 So. 2d 1107 (Fla. 1980); 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). On the other hand, when faced with a dower claim by a surviving spouse, the courts have been compelled by the express mandate of Florida's former dower statute to hold that the widow has priority over all competing claims. See, e.g., In re Estate of Donner, 364 So. 2d 742 (Fla. 3d DCA 1978). In other words, the strict requirements of the dower statute imposed a

particular exception to the general rule that the third party beneficiaries may enforce the terms of the contract.

The Respondent points to one of the Donner cases to uphold her theory that the Putnam's children are mere legatees rather than creditors and, as such, do not have priority over the claims of the surviving spouse. It is true that the Donner court described Sam Donner's first wife and son, as well as his second wife, as legatees whose claims came after the third wife's dower. 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"]. The result in Donner II, however, does nothing to diminish the argument of the Putnam children that the precise dictates of the dower statute required that result. In fact, the Donner II court specifically explained that, for the reasons stated in Donner I, the third wife's dower took priority. See id. at 755-56. In Donner I, the court had elaborated on the absolute rights conferred by the dower statute. See Donner I, 364 So. 2d at 751-52. Hence, the holding in Donner II is completely consistent with the Putnam children's argument that only statutory mandates interrupt the third party beneficiaries' rights to enforce the contract.

Although the compelling language of the dower statute accounts for the result in the Donner cases, the result is also explained by the fact that Donner was a divorce case. When mutual wills are executed pursuant to divorce or separation agreements, the courts generally find in favor of the surviving spouse as a matter of equity. New York's highest court explained that, in non-divorce cases, upon the death of the first contracting spouse, a trust is impressed in favor of the third party beneficiaries. See Rubenstein v. Mueller, 225 N.E. 2d 540, 543 (N.Y. 1967). In such cases, the surviving contracting spouse has an interest in the property with the power to use the principal, and the named beneficiaries take the remaining interest. See id. Thus, explained the New York court, the surviving contracting spouse has no property interest in these assets against which his widow's right of election could operate. See id. Accordingly, the third party beneficiaries prevail over the widow. See id.

The Rubenstein court went on to explain why a different result occurs in divorce and separation cases. See id. at 544. The court observed,

> Separation agreements are usually attended by a present division of any jointly held property, and any provision for a future legacy is usually but an incident to the over-all settlement to be made with respect to the husband's

> individual property and his obligation of support. In the case of the joint will, however, this instrument typically represents the sole attempt by the signatories to effect a distribution of their collective property in a fashion agreeable to both.

See id.

Furthermore, the court observed that, unlike agreements to make joint wills, the separation agreements contain no irrevocable obligations concerning the collective property. See id. The court concluded that, because "the divorced husband's property after the agreement remains his own individual property, to which he holds beneficial as well as legal title, his widow's right of election may be asserted against such assets." See id.

Thus, the result in the Donner cases, in which the widow prevailed over the claims of the third party contract beneficiaries, is absolutely consistent with the Putnam children's argument that Florida's spousal share statutes determine whether the surviving spouse takes priority over the rights of the third party beneficiaries of a contract to make a mutual will. In Donner, the court made clear that the requirements of the then-applicable dower statute mandated that Sam Donner's widow take priority. Moreover, even if the dower statute were less compelling, the Rubenstein court's explanation of the divorce and separation

cases shows that Donner was correctly decided in accordance with logic and equity.

Another divorce case cited by the Respondent in support of her argument is Barkley v. Barkley, 314 F. 2d 188 (5th Cir. 1963). Like the Donner cases, the result in Barkley was required by the mandatory language of the dower statute (quoted in the opinion) that the "widow's dower shall be free from liability for all debts of the decedent and all costs, charges and expenses of administration...." See id. at 190 n.1. In addition to the mandate of the dower statute, Barkley, like Donner, is correctly decided in accordance with the principles applicable to cases involving divorce and separation agreements. See Rubenstein, 225 N.E. 2d at 544.

Thus, analysis of the cases involving dower consistently reveal that the results were compelled by the then-applicable dower statute. With the repeal of dower, contemporary cases involving third party beneficiaries to mutual will contracts and claims by surviving spouses must be determined by the current statutes which determine priority. In following the current statutory dictates, therefore, Johnson v. Girtman, 542 So. 2d 1033 (Fla. 3d DCA 1989), is correctly decided.

The Respondent attempts to distinguish Johnson by arguing that a crucial fact in that case was that the

disappointed spouse had signed a letter consenting to the Girtman family members' promise not to convey their interests outside the family. This argument must fail, however, because the appellate court made clear that that was not a factor in the decision. It is true that the trial court had held that, by signing the agreement, the spouse had waived any right to a statutory spousal share. See id. at 1037. The appellate court, however, expressly stated that it was not necessary to address the spouse's challenges to the waiver argument. See id. The court stated,

> Even if we accept [the surviving spouse's] view that he did not waive his elective share..., [the surviving spouse's] claim will still fail because the elective share statute requires that all claims and liens against the estate be deducted prior to calculating an elective share.

See id. Thus, the Respondent is wrong in her assertion that the Johnson spouse's consent to the distribution of the property was crucial. What was crucial to the decision was the distribution system set forth in the statutes.

In summary, there are many "red herrings" in the various analyses that have been applied to the issue at bar. Cases have mentioned concepts such as whether the surviving spouse had notice of the prior mutual wills or whether the mutual wills were executed as part of a divorce agreement.

These concerns are actually immaterial because the single consistent determinant, at least in the Florida cases, has been the statutory dictates. As applied in Johnson, Florida's current statutory scheme shows that the children of Edgar and Joann Putnam have a valid contractual claim that must be satisfied prior to determining Rachel's pretermitted share.

Furthermore, a recent case reaffirms that, by placing all assets into a revocable trust, a spouse may deliberately fail to provide for a surviving spouse. See Friedberg v. Sunbank/Miami, N.A., 20 Fla. L. Weekly D2 (Fla. 3d DCA Dec. 21, 1994). The court pointed out that, in fact, the Florida Legislature specifically rejected a provision in the Uniform Probate Code which provided that surviving spouses could not be deprived of a "fair share" of an estate through the use of a "will substitute." See id. at D3. Since it is perfectly legal in Florida to completely eliminate an elective share, it cannot be said that Florida's public policy requires a pretermitted spouse to take precedence over the third party beneficiaries of a valid contract to make mutual wills.

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' Reply 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, 360 Central Avenue, Suite 1500, St. Petersburg, FL 33701-3845 and **Mark I. Shames, Esquire**, Administrator Ad Litem, 535 Central Avenue, Suite 403, St. Petersburg, Florida 33701 this 12th day of January, 1995.

Respectfully submitted,

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