02-5-95

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

PETITIONER, ROBERT BLACKBURN'S, REPLY BRIEF

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

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REPLY TO RESPONDENT'S ANSWER BRIEF

The Second District Court of Appeal in Putnam v. Via, 19 FLW 1280 (Fla. 2d DCA 1994) predicated its decision on a public policy argument. That Court held, inter alia:

> 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.

By so ruling, the Second District has engaged in legislating a change in the statutory scheme of distribution as set forth in the Florida Probate Code. In the case of Groth v. Weinstock, 610 So.2d 477 (Fla. 5th DCA 1992) it was held 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). The decision of the Second District Court of Appeal to invoke a public policy argument to change the express terms of the Florida Probate Code was improper. Other Courts, in facing public policy issues have shown judicial restraint by holding such changes should come from the

legislature and not the Courts. A recent example of this can be found in the Third District Court of Appeal in the case of Friedberg v. SunBank/Miami N.A., 1994 WL 706233 (December 21, 1994). In that case the Court was faced with a husband depriving his long term wife of her elective share on account of his placing all his assets in a revocable, inter vivos trust. That Court noted that "We find it strange that a divorced spouse is entitled, under Section 61.075, Florida Statutes, to reach assets held in a revocable, inter vivos trust but a loving devoted spouse is not. ... Although we believe this to be a manifestly unfair result and poor public policy, we recognize that we are not the appropriate forum to correct the same. We encourage the legislature to revisit the issue."

The Second District Court of Appeal has at times shown judicial restraint in not changing statutory provisions on grounds of public policy. In the case of Estate of Benson, 548 So.2d 775 (Fla. 2d DCA 1989), the appellants argued that "there exists a public policy in Florida that would extend Florida's Slayer Statute so as to disinherit the natural and/or statutory heirs of a killer who except for his murderous act would have been a beneficiary of his victim's estate". The Second District stated: "We find the statutory language clear and unambiguous. If there is to be declared in Florida such a public policy as appellant urges, it must be accomplished by a legislative amendment to the Slayer Statute and not by a pronouncement of this Court."

The Respondent incorrectly states that Petitioners argue that Edgar Putnam should have avoided marriage in order to avoid breaching his mutual will with Joann and that this constitutes a contract not to marry which is void as being contrary to public policy. The Petitioners have never taken such a position. There are steps that Edgar Putnam could have taken to insure that the terms of the mutual will would not be violated. One option would have been to enter into an antenuptial agreement. Another option, as was done in the Friedberg case cited above, would have been to transfer his assets into a revocable inter vivos trust having the same dispositive provisions as contained in his mutual will.

The Respondent has also made the statement that "The spouse's share cannot be defeated by the unilateral acts of her husband." (page 18 of Respondent's answer brief) Friedberg has shown that proposition to be false by the use of an inter vivos trust. Moreover, if the husband had more debts than assets in his estate, this would work as a unilateral encroachment on the wife's share.

Respondent also seems to place great significance on the argument that the Petitioners are mere claimants rather than creditors. This is a distinction without a difference. The priority statute, Florida Statute §733.707(1)(h), which sets forth the order of payment of expenses and obligations specifically refers to "all other claims" rather than all other "creditors".

The Second District Court of Appeal and the Respondent have placed great significance on the case of Estate of Donner, 364 So.2d 742 (Fla. 3d DCA 1978). Donner involved a situation wherein Ruth Donner and Samuel Donner obtained a divorce. As part of the divorce settlement agreement, Samuel Donner promised to leave Ruth a one million dollar, tax free bequest in his will and obligated him to enter into an antenuptial agreement with any future woman he might marry in which his future wife would waive her dower to the extent it might interfere with Ruth's bequest. Subsequently, Sam remarried and then died 34 days later. At the time of his death, his codicil left everything to his new wife, Larna. Larna had signed an antenuptial agreement but it failed to waive any dower rights. Larna subsequently sought her dower share.

Ruth Donner subsequently brought an action seeking equitable relief claiming that Sam and Larna conspired to fraudulently deprive her of her expectancy. Her complaint also claimed that Sam's marriage to Larna was a nullity.

The Trial Court found in favor of Ruth, ruled that she was entitled to her one million, tax free bequest from the estate and that to the extent that Ruth would not receive the full amount, then the Court imposed an equitable lien on Larna's dower claim to the extent of any deficiency.

On appeal, the Third District Court of Appeal reversed holding there was no fraud and that Larna would 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 the property settlement agreement with his previous wife.

Samuel Donner also had another previous wife, Beatrice. Pursuant to a divorce settlement agreement with her, Sam had agreed to make a will leaving her one-third of his net estate and their son, Edward, one third of his net estate. Beatrice and Edward sued for specific performance on a contract to make a will. Beatrice and Edward were successful in establishing their entitlement as a claimant.

Despite the fact that the Court ruled that Beatrice, Edward and Ruth were all legatees by virtue of the agreements Samuel had made with them to make a will leaving them specific portions of his estate, all three tried to assert that they were creditors; Ruth arguing she was a creditor and therefore, her interest was superior to Beatrice's and Edward's, while Beatrice and Edward argued that they were creditors having priority over Ruth's claim. The Appellate Court ruled that had Sam fulfilled his promise to make a will as previously promised, each would have been regarded as a legatee and therefore, the claims of Beatrice, Edward and Ruth would have equal priority.

The first thing to keep in mind when comparing Donner with Putnam is that Donner involved dower rights while Putnam dealt with either the elective share or pretermitted spouse status. Ruth Donner pursued an action based upon fraud. Beatrice and Edward Donner sued for specific performance. The heirs in Putnam pursued a breach of contract theory and sought damages for

that breach. Donner dealt with agreements Samuel had made with prior wives as part of a divorce settlement, while in Putnam Edgar had entered into an agreement with his wife who subsequently died. In Donner it was the ex-wives who sued for specific performance of an agreement to make a will while in Putnam it was the third party beneficiaries of a joint and mutual will previously entered into who filed a claim for breach of that agreement seeking damages in an amount equal to what they would have received if Edgar had taken proper steps to protect their interests.

The facts in Donner are quite convoluted and it was rather difficult for that Court to address all the problems raised in that case by a simple pronouncement of the law. Rulings were made in that case which resulted in an equitable result. The legislature has changed the law since Donner was decided and by now trying to apply some of the statements of law cited in Donner to the Putnam case without a thorough understanding of the facts in Donner could and has lead to the misapplication of the law in the present case.

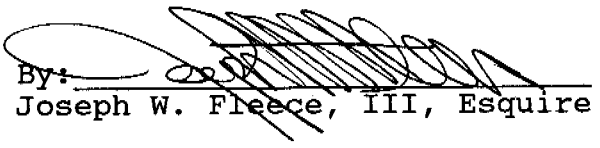
The Respondent has cited the case of Barkley v. Barkley, 314 F.2d 188 (5th Cir. 1963) extensively for the proposition that contract rights cannot defeat dower rights. Barkley, citing the Tod v. Fuller, 78 So.2d 713 (Fla. 1955), case implies that possibly dower could be defeated if the second spouse had actual knowledge of the contract to make a will. Petitioner does not take issue with this statement of the law but

it is inapplicable to the present case for the simple reason that dower has been abolished and has been replaced by the elective share. As pointed out in the initial brief dower was not subject to claims of creditors while the elective share and the pretermitted share is subject to claims. Therefore in Donner and Barkley, those cases never addressed the issue of priority of claims over the dower share because dower took free from claims and therefore those cases held that contractual rights could not defeat dower.

CONCLUSION

Petitioners, who are the children of decedent or his deceased prior wife, are recognized by case law as contractual claimants or as beneficiaries of a trust created by the contractual testamentary documents. These rights are protected by Florida Statute and the Constitution of the United States and Florida. The will of the decedent and his intentions therein expressed will be followed by reversal of the opinion below.

Respectfully Submitted,



By: _____
Joseph W. Fleece, III, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished by U.S. Mail to Teresa Cooper Ward, Esquire of 5322 Duhme Road, St. Petersburg, Florida 33708; Michael R. Riemenschneider, Esquire of 1825 S. Riverview Drive, Melbourne, Florida 32901; and to Mark I. Shames, Esquire of 535 Central Avenue, Suite 403, St. Petersburg, Florida 33701, this 9th day of January, 1995.

JOSEPH W. FLEECE, III, ESQUIRE