IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1671
L.T. NO. 3D04-117

DEBORAH CHAMES, ET.AL.,
petitioners,

vs.

HENRY DEMAYO,
respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF *AMICUS CURIAE* REAL PROPERTY PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR

GOLDMAN FELCOSKI & STONE, P.A.
Robert W. Goldman, FBN339180
The 745 Building
745 12th Avenue South
Suite 101
Naples, FL 34102
239-436-1988

BRIGHAM AND MOORE, LLP
John W. Little III, FBN 384798
One Clearlake Centre, Suite 1601
250 South Australian Avenue
West Palm Beach, Florida 33401
561-832.7862

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INTRODUCTION

We have no interest in the impact this case has on any of the litigants. Our purpose here is to try and untangle the web of constitutional provisions, statutes and cases that make up our homestead jurisprudence. Through this effort, we hope we can assist the Court in its review of the decision below.

SUMMARY OF ARGUMENT

The question certified to this Court is:

> WHETHER, IN LIGHT OF SUBSEQUENT PRECEDENT IN FLORIDA AND OTHER JURISDICTIONS, AND THE TEXTUAL CHANGES MADE BY THE PEOPLE OF THE STATE OF FLORIDA IN ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION IN THE GENERAL ELECTION OF NOVEMBER 1984, THE HOLDING IN *CARTER'S ADM'RS v. CARTER*, 20 Fla. 558 (1884), FOLLOWED IN *SHERBILL v. MILLER MFG. CO.*, 89 So.2d 28 (Fla.1956), THAT A WAIVER OF THE BENEFIT AND PROTECTION OF THE EXEMPTION FOUND IN ARTICLE X, SECTION 4(A) OF THE FLORIDA CONSTITUTION IS UNENFORECEABLE AGAINST THE CLAIM OF A GENERAL CREDITOR, SHOULD BE OVERRULED?"

Over the years since this Court decided *Carter's Adm'rs V. Carter,* 20 Fla. 558 (1884) and *Sherbill v. Miller Mfg. Co.,* 89 So. 2d 28 (Fla.1956), amendments to the Florida Constitution and Florida case law have broadened homestead protections. Nothing in those amendments or in the decisions of this Court would suggest a weakening of the homestead

protections or an emasculation of *Sherbill*. Further, Florida's homestead protection policies appear to be somewhat unique to this jurisdiction. That other jurisdictions were always, or have become, less protective is not determinative of our law.

Homestead protections within Florida, however, vary greatly. The policy reasons behind protecting Floridians from general creditors, as set forth in *Carter's Adm'rs* and *Sherbill* do not pertain to adult family members voluntarily choosing to give up an interest in homestead property as part of an intra-family transaction.

The decision of the court of appeal should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The question certified to this Court requires that it construe article X, section 4, Florida Constitution. To our knowledge as an *amicus*, there are no issues of fact presented on appeal. Therefore, the Court will apply the *de novo* standard of review to the decision below. *See State v. Glatzmayer*, 789 So. 2d 297, 301-02, n.7 (Fla. 2001) (setting out standards of appellate review); *Gordon v. Regier*, 839 So. 2d 715, 718 (Fla. 2d DCA 2003)In reviewing the statutory construction of the Act, we apply the de novo standard.").

II. IN THE CONTEXT OF A GENERAL CREDITOR-DEBTOR RELATIONSHIP, HOMESTEAD CANNOT BE WAIVED

This case involves the "legal chameleon," also known as homestead.[1] Homestead protections are found in articles 7 and 10 of the Florida Constitution and in Florida law. Not only are there multiple forms of

[1] The "legal chameleon" moniker appears to stem from a thoughtful study by Harold B. Crosby and George John Miller entitled "Homestead exemption, a legal chameleon in Florida," which may be found beginning at 2 U.Fla.L.Rev. 12 (1949). *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997).

homestead protection located in the Florida Constitution and Florida Statutes, but even within article 10, section 4, which is at issue in this case, the protections vary greatly. For example, sections (4) (a) and (b) protect Floridians from general creditors. Section 4 (c), on the other hand, protects the surviving spouse and minor children from having the homestead transferred out from under them without the consent of both spouses.

Section 4 (c) has nothing to do with protection from general creditors and is manifestly a pure, personal right that is subject to waiver. Similarly, waiver of homestead in agreements between spouses is permissible in the context of nuptial agreements and divorce settlements. *See Hartwell v. Blasingame,* 584 So. 2d 6 (Fla.1991); §732.702, Fla. Stat.; *Myers v. Lehrer,* 671 So. 2d 864, 866 (Fla. 4th DCA 1996)

Sections 4 (a) and (b), on the other hand, when applied to general creditors are mandatory and have precisely expressed exceptions, precluding all others. *See Sherbill v. Miller Mfg. Co.,* 89 So. 2d 28, 31 (Fla.1956); *see also In re Clements,* 194 B.R. 923, 925 (M.D.Fla.1996) (confirming that under the *expressio unius est exclusio alterius* rule, homestead, in Florida, may not be used to satisfy debts other than those expressly permitted by article X, section 4). To be sure, the purpose of sections 4 (a) and (b) in the context of a general creditor-debtor relationship is to protect each of us from

being destitute and, in that regard, might be considered a personal right and waivable. *See City of Treasure Island v. Strong*, 215 So. 2d 473, 479 (Fla. 1968) ("[I]t is firmly established that such constitutional rights designed solely for the protection of the individual concerned may be lost through waiver."). But, this homestead protection is also designed to promote the stability and welfare of the state, which would otherwise be burdened as the caregiver for its destitute citizens. *See McKean v. Warburton*, 919 So. 2d 341, 344 (Fla. 2005); *Public Health Trust v. Lopez*, 531 So. 2d 946, 948 (Fla.1988). Because of the state's interest in protecting debtors in the general creditor-debtor relationship, the homestead protection cannot be lost through waiver. *See Sherbill v. Miller Mfg. Co.*, 89 So.2d at 31.

This difference between constitutional homestead protections for general creditor-debtor relationships, found in article 10, sections 4 (a) and (b), versus the homestead protections involving intra-family transactions was recognized and highlighted in *Myers v. Lehrer*, 671 So. 2d 864, 866 (Fla. 4th DCA 1996)

In *Myers*, the issue was "whether the constitutional homestead exemption can be waived by a provision in a settlement agreement adopted by a divorce final judgment." *Id*. at 865. Relying on *Sherbill v. Miller Manufacturing Co.*, 89 So. 2d 28 (Fla. 1956) and *Carter's Administrator v.*

Carter, 20 Fla. 558 (1884), the appellant argued that the homestead protection from forced sale could not be waived. 671 So. 2d at 866. The district court of appeal, however, distinguished *Sherbill* and *Carter*, because those cases involved general creditor-debtor transactions. Pointing to *Sherbill* specifically, the court noted that, unlike an agreement between spouses, *Sherbill* involved a loan in which the debtor signed a commercial note waiving "benefit of the homestead exemption." *Id*. The court held:

> Unlike the impermissible waiver in *Sherbill*, the provisions of the settlement agreement in this case did not arise as part of a transaction with a creditor. The public policy values implemented by *Sherbill* and *Carter's Administrator* were not offended by appellant's agreement with his wife to satisfy judgments from his share of the proceeds from the sale of the marital home. In negotiating the agreements, appellant was represented by counsel. The husband's promise was given not to benefit a "hard creditor," but to appellant's wife, a person entitled to the protection of the homestead provision as to the marital home.

Id.

Subsequently, in *Bakst, Cloyd & Bakst, P.A. v. Cole*, 750 So. 2d 676 (Fla. 4th DCA 1999), the district court of appeal addressed a law firm's failed attempt to enforce a charging lien against a homestead as a result of defending a spouse's right to the home in a dissolution proceeding. There, because the issue of an implied waiver involved a "hard creditor" (law firm) and debtor (and was not a waiver between spouses), the Court followed

Sherbill and affirmed the lower court in accordance with the public policy behind homestead. *Id*. at 677-78.

The district court of appeal below seemed troubled by the impact changes to article 10, section 4 might have had to the efficacy of this Court's decision in *Sherbill*. Take it all around, we must conclude that the court's concern was misplaced. Homestead protections have been broadened in Florida, not weakened. *Public Health Trust v. Lopez*, 531 So. 2d at 948 ("In 1984, however, the people of Florida approved an amendment changing the term "head of a family" to "a natural person." The amendment thus expanded the class of persons who can take advantage of the homestead provision and its protections."). The liberal reading of the homestead provisions of our constitution in favor of those protected by them has been regularly addressed by this Court and confirmed. *McKean v. Warburton*, 919 So.2d at 344; *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997) (broadening the definition of "heirs" protected by homestead beyond the statutory definition of "heir"). Concomitantly, the strict reading of exceptions to the homestead protection has been confirmed of late by this Court. *See Havoco of America v. Hill,* 790 So. 2d 1018, 1021 (Fla. 2001). Therefore, all that made *Sherbill* an appropriate, well-reasoned decision in 1957 remains extant. The question posed by the court below should be answered in the

negative and the decision should be affirmed.

Further, our homestead jurisdiction is unique. That other jurisdictions have a less protective homestead is not determinative of this case. Indeed, in *Snyder v. Davis*, this Court held:

> Homestead law in the United States has evolved over time and it is strictly an American innovation. In Florida, moreover, our case law surrounding the homestead provision has its own contours and legal principles. As a result, it is not susceptible to comparisons with similar provisions in other jurisdictions.

699 So. 2d at 1002.

III. IF THE COURT DETERMINES THAT HOMESTEAD MAY BE WAIVED IN FAVOR OF A GENERAL CREDITOR, THEN THE COURT SHOULD REQUIRE SAFEGUARDS TO AVOID BOILER-PLATE WAIVERS

The Section strongly believes that the certified question should be answered in the negative. But, as your *amicus*, we have to consider the possibility that the court might shift public policy away from the traditional homestead protection enjoyed in Florida. If this Court answers the certified question in the affirmative, then the Court should limit waiver to those instances where Floridians can have some substantial level of confidence that the waiver was made knowingly and voluntarily.

In our review of *In re Amendment to the Rules Regulating the Florida Bar-Rule 4-1.5(f)*, 939 So. 2d 1032 (Fla. 2006), it appears this Court was similarly concerned over a "boiler-plate" waiver of the constitutional protection pertaining to contingency fees in medical malpractice cases. With respect to lawyers including homestead waivers in fee agreements, as we have in this case, it seems to us that a similar version of the rule adopted by this Court would be warranted. If requested, our Section will assist in that rulemaking process.

With respect to waivers outside the attorney-client relationship,[2] we believe they should be presumptively unenforceable. The presumption should be rebuttable only by the creditor establishing that the waiver was made after the homestead protection and impact of the waiver were fully explained to the waiving party (other than in the boilerplate of a commercial document). That this disclosure occurred should be confirmed in a writing signed by the waiving Floridian. Further, a reasonable opportunity should be given the waiving party (5 days) to seek and obtain independent legal advice regarding homestead and the waiver of it and the same time period to cancel the waiver. Cases like *Red River State Bank v. Reierson*, 533 N. W.2d 683 (N.D. 1995) may assist the Court in developing a commercially viable waiver, but, we caution that homestead in most other states does not seem to enjoy the broad protection that is the hallmark of Florida homestead law.

[2] We make this distinction between lawyers and creditors simply because this Court governs lawyers in all facets of their work and many of the rules established by the Court regarding malpractice fees involve court involvement. Further, the lawyers have discrete public and fiduciary responsibilities that do not necessarily exist in a typical, commercial setting.

CONCLUSION

For these reasons, the question certified by the lower appellate court should be answered in the negative and the decision should be reversed. If not, this Court should adopt strict rules limiting the waiver of homestead.

Respectfully submitted,

GOLDMAN FELCOSKI & STONE, P.A.
Robert W. Goldman, FBN339180
The 745 Building
745 12th Avenue South
Suite 101
Naples, FL 34102
239-436-1988

and

BRIGHAM AND MOORE, LLP
John W. Little III, FBN 384798
One Clearlake Centre, Suite 1601
250 South Australian Avenue
West Palm Beach, Florida 33401
561-832.7862

_____
Robert W. Goldman, FBN339180

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was furnished by U.S. Mail to Ms. Sophie DeMayo, for respondent, 9100 S.W. 115 Terrace, Miami, Florida 33176; Jonathan Heller, Heller and Chames, for petitioner, 261 N.E. First Street, Sixth Floor, Miami, Florida 33132; Jay M. Levy, P.A., co-counsel for petitioner, 9130 South Dadeland Boulevard, Two Datran Center, Suite 1510, Miami, FL 33156; Lynn C. Hearn, Office of the Attorney General, 400 S. Monroe Street, #PL-01, Tallahassee, FL 32399; and Paul S. Singerman and Ilyse M. Homer, Berger Singerman, P.A., counsel to Business Law Section, 200 S. Biscayne Blvd., Suite 1000, Miami, FL. 33131 this ____ day of January, 2007.

_____
Robert W. Goldman, FBN339180

CERTIFICATE OF FONT COMPLIANCE

I CERTIFY this response complies with the font requirements of rule 9.210(a) (2), Florida Rules of Appellate Procedure.

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Robert W. Goldman, FBN 33980