IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1671

DEBORAH CHAMES and
HELLER & CHAMES, P.A.,

Petitioners,

vs.

HENRY DeMAYO,

Respondent.

PETITIONERS' INITIAL BRIEF AND AMENDED CERTIFICATE OF SERVICE

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vs. PETITIONERS' INITIAL BRIEF

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I
Preliminary Statement

This proceeding is before this Court on a certificate of great public importance entered by the District Court of Appeal of Florida, Third District. The question certified to the Court is as follows:

> 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, §4 of the Florida Constitution in the general election of November 1884, 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, §4(a) of the Florida Constitution is unenforceable against the claim of a general creditor should be overruled?

Petitioners Deborah Chames and Heller & Chames, P.A., Respondent's former attorneys sought to enforce a charging lien in the circuit court and who was an appellee before the District Court, shall be referred to as "Chames". Jointly,

Petitioners shall be referred to will be referred to as "Attorneys". Respondent, Henry DeMayo, client and appellant below shall be referred to as "DeMayo".

II
Statement of the Case and Facts

On December 30, 2002, DeMayo and the Law Firm entered into a written retainer agreement for legal representation concerning DeMayo's post-dissolution modification and enforcement proceedings (Vol IV, T 23; hereinafter Retainer). In pertinent part, the Retainer provides as follows:

> It is specifically agreed that Heller and Chames, P.A. shall have and is hereby granted all general, possessory and retaining liens and all equitable, special and attorney's charging liens upon the client's interests in any and all real and personal property within the jurisdiction of the court for any balance due, owing and unpaid as well as a lien in any recovery whether by settlement or trial; and such lien or liens shall be superior to any other lien subsequent to the date hereof and that the client hereby knowingly, voluntarily and intelligently waives his rights to assert his homestead exemption in the event a charging lien is obtained to secure the balance of attorney's fees and costs. Heller and Chames, P.A., shall be entitled to file a Notice of Claim and Attorney's Charging Lien and a Notice of Lis Pendens with regard to the client's interest in any real property upon which a lien may be claimed and you consent that the Court shall specifically reserve jurisdiction in the Final Judgment to determine and enforce my attorney's charging lien.
>
> Heller and Chames, P.A.'s lien may be adjudicated, at the attorney's option, in the same action in which the attorney represented the client, and the client hereby consents to the jurisdiction of the court for that purpose. This lien shall be perfected on a timely basis and shall not be affected by dismissal of the client's action absent the attorney's consent and shall survive any such dismissal.

(Vol IV, T 60-61).
(Emphasis Added)

The parties agreed to hourly rates of $300.00 for Attorney Chames and $235.00 for her associate (Vol IV, T 24) and monthly billing.

On October 7, 2003, when the trial court allowed the Law Firm to withdraw its representation, (R. Vol. III, 534-535 & 542), the trial court also entered a charging lien in the amount of $33,207.76 (R. Vol. III, 542-544). The trial court reserved jurisdiction "over Heller and Chames, P.A.'s charging lien to conduct such hearings and proceedings and to enter such orders as may be equitable, appropriate and just in order to enforce same." (R. Vol. III, 542-544).

The trial court's November 5th, 2003 evidentiary hearing on the charging lien lasted in excess of three (3) hours which included the testimony of Attorney Chames, the former client, DeMayo, introduction of voluminous exhibits and legal argument. During the course of the lengthy hearing, DeMayo raised various *ore tenus* motions for dismissal of the charging lien based upon due process violations, lack of notice, violations of Florida Homestead Law - all of which the Court denied (T. 140; R. Vol. III, 612-614).

Following the trial court's oral ruling imposing a charging lien in favor of the Law Firm on November 3, 2003 (T. 140-141), and after DeMayo filed motions for rehearing (R. 560-561), the trial court entered its own three-page written Order

on December 12, 2003. In its Order, the Court made findings as to the reasonable and necessary hours expended by Attorney Chames and her associate and the corresponding hourly rates charged by those attorneys supported by further findings of fact as a result of the evidentiary hearing. The trial court fixed the amount owed to the Law Firm at $33,206.76 by DeMayo and entered Final Judgment accordingly (R. 612-614). The trial court imposed the charging lien on DeMayo's homestead. DeMayo appealed to the District Court of Appeal Third District which reversed the imposition of the charging lien on DeMayo's homestead.

Judge Wells authored the principle opinion of the District Court of Appeal. The opinion relied upon the decision of this Court in *Carter's Adminstrators v. Carter*, 20 Fla. 558 (1884) as accurately defining the policy considerations behind the homestead provision of the Florida Constitution, Article X, §4 and *Sherbill v. Miller Manufacturing Co.*, 89 So.2d 28 (Fla. 1956), for the proposition that homestead provisions could not be waived because a waiver of homestead would be contrary to the public policy of this state. For this reason, the court below determined that the waiver of homestead contained in the retainer agreement between DeMayo and Attorneys was invalid and reversed the charging lien on DeMayo's real property.

Judges Sheppard and Green concurred in the result. While the concurring judges recognized their obligation to follow *Carter* and *Sherbill*, they wrote separately to express their concern that the legal underpinnings of the *Carter* and *Sherbill* decisions had been significantly eroded and were no longer valid. The concurring opinion noted that four of the six jurisdictions upon which this Court relied on *Carter's Administration* to find the waiver of homestead invalid had now concluded that the homestead exemption could be waived. Opinion at 10. The concurring Judges indicated that both *Sherbill* and *Carter* were inconsistent with the "modern view that a person's right to exempt its homestead property from the claims of a creditor is a personal right that may be waived by that person if he or she so desires." Opinion at 6. The concurring opinion concluded that "Citizens of this State should be permitted to order their world as they see fit." Opinion at 16. Also significant in the concurring opinion was its analysis of the 1984 change to Article X, §4 of the Florida Constitution which allowed the exemption from forced sale to apply to any "natural person" as opposed to a "head of a family". The concurring opinion noted that this change had transformed the homestead exemption from one that exists solely for the protection of the family home to an entitlement available to anyone without regard to the presence of a family. Slip Opinion at 13-14. For these reasons, the concurring opinion believed that *Carter's Administrators* and *Sherbill* were no longer good law and should be overruled.

The District Court certified the issue as one of great public interest. Attorneys timely sought this Court's review which has accepted jurisdiction.

III
Point on Appeal

WHETHER THE CONSTITUTIONAL EXEMPTION CONTAINED IN ARTICLE X, §4(a) OF THE FLORIDA CONSTITUTION AGAINST FORCED SALE OF A HOMESTEAD MAY BE EFFECTIVELY WAIVED BY THE PROPERTY OWNER?

IV
Statement of the Standard of Review

In this second tier appellate proceeding, there are no factual disputes. The issue presented to this Court is one of law and concerns the ability of a property owner to waive the homestead exemption against forced sale under Article X, § 4(a), Fla Con. As a question of law, the standard of review is de novo.

V
Summary of the Argument

The 1984 amendment to Article X §4, Fla. Const. changed the homestead exemption from forced sale from a family right to a personal right. This Court's decisions clearly indicate that personal rights may be waived.

The underpinnings of the decisions in *Carter's Adminstrators v. Carter, supra.* and *Sherbill v. Miller Manufacturing Co., supra.*, relied upon by the court below in holding that the homestead exemption may not be waived are suspect since these decisions are predicated the protection of the family then afforded by

the then current version of Art. X §4, Fla. Const. However, the 1984 amendment granted the homestead exemption against forced sale to natural persons rather than to a head of family, converting the homestead exemption into a personal right. For this reason, neither *Carter's Administrators* nor *Sherbill* retain any vitality and should be overruled by this Court.

VI
Argument

THE CONSTITUTIONAL EXEMPTION CONTAINED IN ARTICLE X, §4(a) OF THE FLORIDA CONSTITUTION AGAINST FORCED SALE OF A HOMESTEAD MAY BE EFFECTIVELY WAIVED BY THE PROPERTY OWNER

No matter how fundamental, all constitutional rights are subject to waiver. The Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d. 694 (1966) that the Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel were subject to waiver. In *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d. 854 (1973), the Supreme Court held that Fourth Amendment right against unreasonable search and seizure would be waived. In *Adams v. United States*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942), the high court held that the Sixth Amendment right to jury trial in a criminal proceeding can be waived. This court has noted that a defendant's constitutional right to be present at sentencing can be waived. *Capuzzo v. State*, 596 So.2d 438 (Fla. 1992). In *Kaplan v. Kimball Homes Florida, Inc.*, 915 So.2d

755 (Fla. 2DCA 2005), the district court of appeal recognized that right to access to the court and the right to trial by jury in a civil matter could be waived. *See also: Evans v. State*, ____ So.2d _____ 2006 WL 2818774 (Fla. 4DCA October 4, 2006)(Trial by six jurors can be waived). This Court only recently addressed whether the homestead exemption could be waived in *In Re Amendment to the Rules Regulating the Florida Bar/Rule 4-1.5(f)(4)(b) of the Rules of Professional Conduct*, 2006 WL 2771252 (Fla. September 28, 2006):

> Additionally, Florida's highly valued constitutional homestead protection is subject to waiver. *See Hartwell v. Blasingame*, 564 So.2d 543, 545 (Fla. 2DCA 1990)("Although the constitution and statute do not expressly recognize a person's right to waive [homestead] protection, it has long been recognized that an individual is free to knowingly and intelligently forego a right which is intended to protect only the property rights of the individual who chooses to make the waiver."), *approved* 584 So.2d 6 (Fla. 1991).

Id. at 2.

For the reasons which follow, in considering the present state of the law, and the decisions of the sister states, this Court should hold that the exemption against forced sale can be contractually waived.

The court below, in reaching its decision, relied on two (2) relatively old decisions of this Court, *Carter's Adminstrators v. Carter*, 20 Fla. 558 (1884) and *Sherbill v. Miller Manufacturing Co.*, 89 So.2d 28 (Fla. 1956). In *Carter*, this Court was called upon to determine whether a provision in a promissory note

which waived and relinquished "All benefit of any law exempting such estate and effects or any part thereof from levy and seal", was valid. In answering this question, this Court considered the law of six (6) of its sister states. Of the six (6) jurisdictions surveyed, only Pennsylvania recognized the validity of a waiver of the homestead exemption. *Case v. Dunmore*, 23 Pa. St. 94 (1854). The Pennsylvania Court stated the following:

> Notwithstanding the benevolent provisions of the statute in favor of unfortunate and thoughtless debtors, it was far from the intention of the Legislature to deprive the free citizens of the state of the right, upon due deliberation, to make their own contracts in their own ways, in regards to securing the payment of debts honestly due.

Id. at 2.

The remaining five (5) states, New York, Kentucky, Illinois, North Carolina, and Louisiana all rejected the concept that a homestead can be waived. The common thread running these decisions is that the homestead protection protects not just than the debtor, but also the debtor's family. As the Kentucky Court noted in *Moxley v. Ragan*, 10 Bush, 156, 73 Ky. 156 (1873):

> The law in its wisdom, for the protection of the poor and needy, has said that certain property shall not be liable for debt, not so much to relieve the debtor as to protect his family against such improvident acts on his part as would reduce them to want. Such is the policy of the law; and their contract was made, not only in disregard of this policy, but to annul the law itself, so far as it affected the debt sought to be recovered. If such a contract is upheld, the exemption law of the state would be virtually

> obsolete, and the destitute deprived of all claim they have to its beneficient provisions.

Similar reasoning was found in the Illinois decision in *Recht v. Kelly*, 82 Ill. 147 (1876):

> The exemption created by the statute is as much for the benefit of the family of the debtor as for himself, and for that reason he cannot, by an executory contract, waive the provisions made by the law for their support and maintenance. Such contracts contravene the policy of the law and hence are inoperative and void.

Synthesizing all of these views, this Court in *Carter* concluded:

> In view of the recognized policy of the states in enacting exemption laws and of the practically universal concurrence of the authorities on the identical question, our conclusion is that the "waiver" of the benefit in protection of the exemptions laws contained in the note is not valid to defeat a claim of exemption.

Id. at 570-571.

Carter stands for the proposition that the exemption from forced sale cannot be waived.

In *Sherbill v. Miller Manufacturing*, *supra*., the petitioners had executed a promissory note which specifically waived the homestead exemption. The issue was whether the waiver was valid. This Court relying upon *Carter* held "such a waiver was not an alienation of the homestead and not enforceable and that such a waiver was contrary to policy exemption laws of this state." *Id.* at 31. As will be presently demonstrated, the specific legal underpinning of these cases, Article X,

§4 of the Florida Constitution was substantially amended in 1984. In addition, the weight of authority has shifted on this point and now holds that homestead can be waived. For these reasons, *Sherbill* and the decision upon which it relies, *Carter* are no longer valid and should be overruled.

In 1984, the citizens of the State of Florida amended Article X, §4 of the Florida Constitution. This provision stated in the version in effect prior to the amendment :

> There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, or improvement or repair thereof, or obligations contracted for a house, field or other labor performed on the realty, the following property owned by a *head of a family*.

(Emphasis Added

Under the prior version of Art. X §4, Fla. Const., in order for one to be a "head of a family", there had to be a family. *In re Shorr's Estate*, 409 So.2d 487 (Fla. 4DCA 1981); *Holden v. Estate of Gardner*, 404 So.2d 1169 (Fla. 1DCA), *app.* 420 So.2d 1082 (Fla. 1982). In 1984, the italicized words "head of a family" were changed to "natural person." This change was construed by this Court in *Public Health Trust of Dade County v. Lopez*, 531 So.2d 946, 948 (Fla. 1988):

> Until 1985, the homestead protection was limited to those persons who qualified under the constitutionally designated term "head of a family." *See* Article X, §4

> Florida Constitution (1983). 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.
>
> As an initial matter, we reject Public Health Trust's suggestion that "natural person," when applied to single persons, means only widows and divorced parents. Such an interpretation is contrary to the language, logic and history of the amendment. As Representative Hawkins, who sponsored the amendment in the House of Representatives, explained, the purpose of the revision was "to give protection against forced sale for the homestead of a single person, a divorced person, any person who has a homestead, rather than just a head of a family." House Judiciary Full Committee Meeting, M March 29, 1983.
>
> The 1985 amendment thus made the homestead protection available to *any* natural person. Accordingly, the property and residences in question clearly fit within the definition of "homestead" under section 4(a)(1), as amended.

Id. at 948.

As is reflected by this Court's opinion in *Lopez*, the change to Article X, § 4, Fla. Const. approved in 1984 constitutes a fundamental change in the homestead exemption from forced sale. Previously the exemption had protected the family because it was available only to the head of a family. After the 1984 amendment, the homestead exemption protects the individual without regard to the family. It has become a personal right

This change in the basis of the homestead protection from family to personal in nature negates the reasoning behind *Carter* and its progeny. The former policy behind the homestead exemption to protect the family is what fueled this Court's decision in *Carter*. That public policy is no longer present after the 1984 amendment. This Court has only recently reaffirmed that personal constitutional rights can be waived. In *In Re Amendment to the Rules Regulating the Florida Bar/Rule 4-1.5(f)(4)(b) of the Rules of Professional Conduct, supra.* at 2, this Court held:

> The first contention is that the personal right granted to medical liability claimants by article I, section 26 may never be waived because it embraces certain policies that are beyond the control of the claimants themselves. We note, however, that on its face, article I, section 26 unquestionably creates a personal right, one for the direct benefit of a medical malpractice claimant. It is entitled "Claimant's right to fair compensation" and provides that "the claimant is entitled to receive" the stated percentages of the damages. Art I, §26(a), Fla. Const. Further, the Bar and other commentators point out that the most personal constitutional rights may be waived. *See In re Shambow's Estate*, 153 Fla. 762, 15 So.2d 837, 837 (1943)("It is fundamental that constitutional rights which are personal may be waived."); *see also 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…")…. We also note that nothing in the plain language of article I, section 26 prohibits a waiver of the rights granted.
>
> (Emphasis Added)

Under well settled precedent, the homestead exemption against forced sale provided by the present version of Article X, §4, Fla. Const. is a personal constitutional right which can be waived. To the extent that *Carter's Administrators* and *Sherbill* hold to the contrary, they should be overruled.

Further support for the proposition that the homestead exemption against forced sale can be waived is drawn from the shift in the position of Florida's sister states on this issue. As noted by the concurring opinion below:

> Respectfully, we must point out that today the vast majority of states now permit waivers, some by legislative enactment and others as matter of judicial interpretation of their respective constitutional and statutory provisions. [Citations omitted]. Of these twenty-four jurisdictions which have concluded that the right to exempt one's homestead property is a personal right that may be waived, twenty of them post-date Carter's Adm'rs, sixteen post-date Sherbill, and four of the six jurisdictions on which the Carter's Adm'rs' court rested its decision have subsequently either expressly reversed the decision of that jurisdiction on which the Carter's Adm'rs' court relied, ignored the decision, or significantly limited its scope. See Hawkeye Bank, 373 N.W.2d 127 (Iowa 1985)(recognizing waiver pursuant to a state statute designed to permit it); Knight, 4578 So.2d 1219 (La. App. 1st Cir. 1984)(accord); Cameron, 6 S.E.2d at 499 (N.C. 1940); Weaver, 109 Ill. 225 (Ill. 1883)(ruling that decisions such as Phelps v. Phelps, 72 Ill. 545 (Ill. 1874) "are to be limited by the actual facts in the cases in which they were made.").

As is demonstrated by the foregoing cases, the present trend is to construe the homestead exemption against forced sale as a personal right which can be waived.

In its final order the Trial Court found a knowing waiver on the part of DeMayo with regard to the homestead exemption:

> 7. The court finds that the Former Husband and Heller & Chames, P.A. entered into a valid contract under the terms of which the Former Husband agreed to waive his homestead exemption and to have a charging lien placed on his residence to secure any fees and costs owed to Heller & Chames, P.A. The contract was given to the Former Husband on December 12, 2002 and he did not sign it until December 30, 2002. The court rejects the Former Husband's testimony. The Former Husband was, simply, not credible.

(R. 613)

This finding is supported by substantial evidence and for this reason is impervious to attack on appeal.[1] The language of the retainer agreement is clear and

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[1] While not necessarily germane to the issue before this Court, the Trial Court's reasoning has merit. The following colloquy gives insight into the Trial Court's reasoning:

> The Court: Could he go to the bank and say, "I need to pay my lawyer $50,000 to get my kids back or to go after my ex-wife who ripped money off. I want to sign a home equity loan and I'm going to sign a mortgage to the bank. I know I have a homestead right, but I'm signing it over because it's so important to me to pursue this litigation, and I want a different number"?
>
> Ms. DeMayo: Of course. Well, I don't know.
>
> The Court: He would have trouble doing that. So now he goes to a lawyer and he says, "Look, I can't go to the bank. I have all these other problems. So, he says, "I really want it so badly, I'm willing to make the same concession to you that I would make to a bank, which

unambiguous as to the waiver of the homestead: "[T]he client hereby knowingly, voluntarily and intelligently waives his rights to assert his homestead exemption in the event a charging lien is obtained to secure the balance of attorney's fees and costs" (Vol IV, T 60-61). This Court should hold that after the 1984 constitutional amendment, the homestead exemption against forced sale can be waived. The decision of the District Court of Appeal, Third District should be reversed, and the final order of the Circuit Court of the Eleventh Judicial circuit be reinstated.

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is, I'm going to waive my homestead right, I'm going to guarantee you your fees---

(T. 137)

In other words, if DeMayo borrowed the money to pay Attorneys from a bank, he almost certainly would have had to provide security which could have been in the form of a mortgage against his homestead, thereby waiving the protection against the forced sale. Because Attorneys cut him a break and allowed him to run up a balance in reliance upon the waiver of homestead rather than requiring payment of the bill up front, this Court should not elevate form over substance and protect his homestead from the claim of Attorneys.

VII
Conclusion

Based upon the foregoing cases and arguments, Petitioners Deborah Chames and Heller & Chames, P.A. respectfully request that this Court reverse the decision of the District Court of Appeal, Third District, and reinstate the final order of the Circuit Court which determined that DeMayo "agreed to waive his homestead exemption and to have a charging lien place on his residence to secure any fees and costs owed to Heller & Chames, P.A." The *Carter's Administrators* and *Sherbill* decisions should be overruled.

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BY:_____
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VII
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed to Sophie DeMayo, Esquire, 9100 S.W. 115th Terrace, Miami, Florida 33176; Lynn C. Hearn, Esq., Office of the Attorney General, 400 S. Monroe Street, #PL-01, Tallahassee, Florida 32399; Paul S. Singerman, Esq., Ilyse M. Homer, Esq., Berger Singerman, P.A., 200 S. Biscayne Blvd., Suite 1000, Miami, Florida 33131; Robert W. Goldman, Esq., Goldman Felcoski & Stone, P.A., The 745 Building, 745 12th Avenue South, Suite 101, Naples, Florida 34102; and John W. Little, Esq., Brigham and Moore, LLP, One Clearlake Centre, Suite 1601, 250 South Australian Avenue, West Palm Beach, Florida 33401 this 31st day of October, 2006.

_____
Attorneys for Petitioners

VIII
Certificate of Type Size and Format

Counsel for Respondent hereby certifies that this brief has been prepared in 14 point Times New Roman, Microsoft Word format.

_____
Attorneys for Petitioners