SUPREME COURT
STATE OF FLORIDA

DOUGLAS K. RABORN, as beneficiary of Raborn Farm Trust Agreement dated January 25, 1991; RICHARD B. RABORN, as Trustee of Raborn Farm Trust Agreement dated January 25, 1991, and as beneficiary of Raborn Farm Trust Agreement dated January 25, 1991; and ROBIN RABORN, a/k/a ROBIN RABORN PALLANTE, individually and as beneficiary of Raborn Farm Trust Agreement dated January 25, 1991, jointly and severally,

Appellants,

v.

DEBORAH C. MENOTTE, Trustee in Bankruptcy for DOUGLAS K. RABORN,

Appellee.
_____/

FLORIDA CASE NO.: SC06-2461
Eleventh Circuit Case No. 05-16260-DD

REPLY BRIEF OF APPELLANTS ON CERTIFIED QUESTIONS FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

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I. WHETHER, UNDER FLORIDA STATUTES SECTION 689.07(1) AS IT EXISTED BEFORE ITS 2004 AMENDMENT, THIS DEED -- WHICH IS A RECORDED REAL ESTATE CONVEYANCE DEED TO A NAMED TRUSTEE OF A PRIVATE EXPRESS TRUST IDENTIFIED IN THE DEED BY NAME AND DATE, AND CONTAINS OTHER LANGUAGE REFERRING TO THE UNRECORDED TRUST AGREEMENT, THE SETTLORS, AND THE BENEFICIARIES -- CONVEYS ONLY LEGAL TITLE TO THE PROPERTY IN TRUST TO THE GRANTEE AS TRUSTEE.

Introduction

This is the Reply Brief by the Raborn family directed to the Answer Brief by the Bankruptcy Trustee (the Trustee).[1] Certified questions from the Eleventh Circuit Court of Appeals concerning § 689.07(1), Florida Statutes, are before the Court. The lower court ruling was that § 689.07(1) transformed the Raborn conveyance deed into a fee simple conveyance to the grantee designated in the deed as the trustee of the specifically named "private express trust." Thus the family farm was held to have been conveyed in fee simple instead of in trust and the Raborn beneficiaries lost the property their parents attempted to convey to them in trust. The bankruptcy

[1] The opinion of November 28, 2006, certifying questions was filed directly with this Court. The opinion has now been reported at In re: Raborn, 470 F.3d 1319 (11th Cir. 2006). The parties have agreed to the filing of the Record Excerpts from the Eleventh Circuit (designated herein as R.E.) as a convenient compilation of the important documents and orders. The Raborn I decision is at (R.E. Tab 6) and Raborn II is at (R.E. Tab 14). The Raborn CONVEYANCE DEED TO TRUSTEE UNDER TRUST AGREEMENT is at (R.E. Tab 15). The November 28, 2006, decision is referred to as Raborn III.

petition by Douglas Raborn had nothing to do with the property and Douglas Raborn had resigned as the trustee several months before filing for bankruptcy.

The Trustee's Answer Brief disregards two obvious and directly applicable rules of Florida law. The first such rule is to simply read the deed and to give meaning to the entire deed. Anyone who read this deed at (R.E. Tab 15) would know: "that the Deed might have conveyed the Raborn Farm in trust to Douglas Raborn as Trustee."[2] The second obvious rule is to read the entire statute, which contains the words "unless a contrary intention shall appear in the deed."

Both the deed and the statute must be fully read to give meaning and effect to everything the grantors stated in their deed in accordance with the statute and general Florida law on deeds and trusts. Florida law does not permit a court to cut the deed or the statute into small pieces and to then analyze each piece separately to reach a harsh and absurd result. This is precisely what the court below did.

The Bankruptcy/Appellate System

Under federal law, the bankruptcy court functions as the trial court, the district court as the intermediate appellate court and the Circuit Court of Appeals as the final decision maker. Review by the Circuit Court is a matter of right rather than discretionary review. 28 U.S.C. § 158(a),(d).

[2] These are the words of the Eleventh Circuit in its certification opinion at p.1324. This deed certainly showed the farm might have been conveyed in trust. (R.E. Tab 15).

The Trustee sued the three beneficiaries of the "Raborn Farm Trust" asserting that despite the deed's stated intent to convey in trust, various trust identifiers and the multiple references to the trust document, a default fee simple conveyance was created. Initially, the bankruptcy court dismissed the Trustee's suit with prejudice holding the statute completely inapplicable. (Raborn III p.1322).

The Trustee appealed to district judge Hurley, who ruled in Raborn I that a fee simple was the only possible result because the deed used the word "trustee" and did not state the name of a beneficiary or the nature and purpose of the trust which was unrecorded. Judge Hurley also expressly ruled that the intent of the grantors stated on the face of the deed was "entirely irrelevant."[3] (R.E. Tab 6, p.4). This remarkable legal conclusion was at the core of the rulings now on appeal, yet the Trustee's Answer Brief fails to even address it.

The Raborn beneficiaries attempted to appeal the Raborn I decision, but the Eleventh Circuit dismissed for lack of jurisdiction, explaining it was necessary for the bankruptcy court to first enter a final order. (Raborn III p.1322). Thereafter, before the bankruptcy court entered a final order,

[3] The Eleventh Circuit specifically noted Judge Hurley's ruling that the intent of the grantors was irrelevant. In the Initial Brief the Raborns gave the actual quotation from the Raborn I opinion which was: "As a threshold matter, the intent of the grantors' is entirely irrelevant to the statutory analysis and application." (R.E. Tab 6, p.4). This ruling was reaffirmed in Raborn II.

the Florida Legislature reacted to Raborn I by enacting a retroactive clarification amendment to § 689.07(1). The Legislature strongly disagreed with the Raborn I ruling concluding it was a totally erroneous construction of existing Florida law.[4] On remand the bankruptcy court refused to apply the 2004 retroactive statute and instead granted summary judgment imposing a fee simple conveyance based solely on Raborn I.

The Raborns again appealed and Judge Hurley issued Raborn II, which was a reaffirmance of Raborn I plus a rejection of the application of the new statute. The Raborns then appealed to the Eleventh Circuit for the second time. The Trustee has repeatedly objected to Certification to this Court and to the amicus briefs of the Florida Bar Real Property Probate and Trust Law Section. The Trustee now disagrees with almost everything the Eleventh Circuit said in its opinion certifying questions to this Court.

General Florida Law

As previously stated, the general rule of Florida law governing any deed is to read the entire deed. Thrasher v. Arida, 858 So. 2d 1173, 1175 (Fla. 2d DCA 2003), holds:

> "The most basic rule in a court's interpretation of a deed is for the court to consider 'the language of the entire instrument in order to determine the intent

[4] The history of the 2004 amendment also noted the Legislature's strong disagreement with Schiavone v. Dye, 209 B.R. 751 (S.D. Fla. 1997), which was a nonpublished ruling by a bankruptcy judge which Judge Hurley based all of his rulings upon.

> of the grantor, both as to the character of estate and the property conveyed and to so construe the instrument as if legally possible to effectuate such intent'." (emphasis supplied).

This is in keeping with Florida common law and overwhelming case law. The grantor's intent as stated in the deed is crucial to the construction of any deed. Pierson v. Bill, 182 So. 2d 631 (Fla. 1938); Knauer v. Barnett, 360 So. 2d 399, 405 (Fla. 1978) and L'Argent v. Barnett Bank, N.A., 730 So. 2d 395, 397 (Fla. 2d DCA 1999). Even if a deed is not artfully drawn, the Florida courts interpret it in an attempt to find and carry out the intent of the grantor. Merriam v. First Nat. Bank of Akron, Ohio, 587 So. 2d 584, 587 (Fla. 1st DCA 1991) (an ambiguous deed allows for admission of extrinsic evidence). Construction of a deed is not a game of technicalities.

The Florida rule on the construction of a statute is quite similar. The entire statute must be read and a court is not to construe a statute to lead to an absurd or harsh result. City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950) (en banc). The court must interpret a statute by giving meaning to all phrases in the statute and without construing words in isolation. Here, the entire statute, including the contrary intent proviso, must be given effect. Hechtman v. Nations Title Insurance of New York, 840 So. 2d 993, 996 (Fla. 2003) and Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 914 (Fla. 2001).

In defense of her position, the Trustee now argues to this Court that prospective purchasers of real estate should not be

required to read the entire deed by which a seller holds title. The Trustee argues at p.15 of her brief:

> It would be impossible for a third party to make that determination [of a contrary intent] if in each instance the entire instrument had to be reviewed to determine if the requisite "contrary intent" existed.

The Trustee actually suggests that it would be too much trouble for anyone to read "the entire instrument" when they buy property. This position is directly contrary to Florida law and the law of every other state but is in keeping with Judge Hurley's announced view that the intent of the grantors was "entirely irrelevant."

Certain corrections to the Trustee's brief are necessary. The Eleventh Circuit did not rule that the Trustee had a vested interest in the property. Instead, the Court certified the question of whether the Trustee could be a bona fide purchaser in the face of the recorded Conveyance Deed. (Raborn III p.1323). The Court specifically found that the Trustee was only a "hypothetical BFP" and that the Trustee may be on "constructive notice" of the beneficiaries' equitable interest. The opinion holds:

> If, under state law, the recorded deed evidenced the intent of the grantors to convey the property in trust, the Bankruptcy Trustee can have no rights as a BFP; and the equitable interest of the Beneficiaries prevails. (Raborn III p.1324).

The Court went on to state the central issue: "Thus, the central issue is whether such intent was apparent from the

recorded deed." The Court even went so far as to state that it was unable to determine "whether a party conducting a search of the Palm Beach County Real Estate Records would have no notice that the deed might have conveyed the Raborn Farm in Trust to Douglas Raborn as Trustee." (Raborn III p.1324). The Court noted that it was "especially" concerned with the district court's determination that the deed failed to express a "contrary intention."

Clearly the Eleventh Circuit has already expressed its own view as to how this case should turn out and what Florida law should be. The deed should be found to be a conveyance in trust and the Trustee should be found to be on constructive notice after simply reading the entire deed which she certainly had a duty to do.

Last Antecedent Rule

This is a completely new argument never before made by the Trustee before the bankruptcy court, the district court, or the Eleventh Circuit. The Trustee is grasping at straws and the doctrine has absolutely no application. The "contrary intent" proviso modifies the portion of the statute that a fee simple conveyance will occur if merely the word "trustee" is attached to the grantee's name and none of the other exceptions within the statute apply. One of the exceptions in this statute is a statement of "contrary intent." The Trustee argues that the "contrary intent" proviso applies only to the description of the full powers of the trustee under the deed. This makes no sense.

If the deed contained language showing a "contrary intent" to the grant of full powers to the trustee, then the result would be a conveyance in trust and certainly not a conveyance in fee simple.

The Trustee's brief fails to cite directly applicable authority from this Court. In Milam v. Davis, 123 So. 668 (Fla. 1929), the Court specifically discussed the last antecedent doctrine and held that a court can transpose the position of words or phrases in a statute in accordance with apparent legislative intent, particularly when necessary to avoid an absurdity. It would be absurd to hold that an intent stated in a deed which is contrary to a conveyance in fee simple must be disregarded because of the last antecedent doctrine. The Milam decision also holds that the last antecedent rule should give way to a court applying statutory phrases "distributively" to the subject matter "where they are the most applicable." Clearly, the Eleventh Circuit believes that the "contrary intent" proviso in the statute was important and essential to review of Judge Hurley's ruling. The Court mentioned the "contrary intent" proviso as the most important aspect of the case.

At p.18 the Trustee obliquely tries to justify the "entirely irrelevant" ruling based on language from Raborn II striking the affidavits filed on the Motion for Summary Judgment after dismissal of the first appeal. It is certainly true that the Raborns filed affidavits concerning their intention to convey in trust rather than in fee simple but those affidavits

were not even in the court file when Judge Hurley entered his Raborn I order declaring the intent of the grantors to be "entirely irrelevant." This "entirely irrelevant" ruling had nothing to do with the later filed affidavits. The Raborns have always contended that the face of the deed showed a contrary intent and the affidavits, which were wrongly stricken, were merely additional evidence in support of the words in the deed.

Case Law on § 689.07

The Trustee cites Arundel Debenture Corp. v. Le Blond, 190 So. 765 (Fla. 1939) and hotly disputes the Raborns' comment that the case dealt with the old Florida practice of designating a grantee as a "trustee" in a situation where no trust actually existed. We frankly can not understand the Trustee's dispute on this obvious fact. Instead of actually addressing the Arundel case, the Trustee argues that the Raborns are trying to encourage secret trusts in violation of Arundel. Nothing could be further from the truth.

The Trustee also disputes the common practice of not recording confidential trust documents. This is a matter of obvious Florida practice and well supported by case-law, statutes and Florida Bar Continuing Legal Education writers as cited in the Initial Brief. The Trustee now disregards all of these authorities from the Initial Brief and contends that the Raborns are trying to promote secret trusts. She fails to recognize that almost every case cited in her brief was a situation where the trust was not recorded and it is obvious

that trusts are often not recorded. The October 1, 2006, amendment to the Florida Land Trust statute in § 689.071 makes it absolutely clear that the trust document in such an Illinois Land Trust is not to be recorded. Not recording a trust is common practice. Again, read the deed -- no one could possibly believe the Raborns were trying to keep this Raborn Farm Trust a secret.

The Trustee is again grasping at straws by improperly citing to what is apparently a criminal case where a county commissioner violated § 286.23 by not disclosing a beneficial interest in property being sold to the state of Florida. This case, United States v. Masilotti has never been in the record anywhere in this case and is totally irrelevant. Instead of a motion to strike, the Raborns suggest that this Court disregard this highly improper "scare tactic" by the Trustee.

As Judge Hurley did, the Trustee relies heavily on In re: Schiavone. The Initial Brief thoroughly distinguished Schiavone and in any event the case is simply an erroneous view of Florida law. The Schiavone decision does not address in any way the contrary intent proviso in the statute. It was apparently not argued. This is the proviso which the Eleventh Circuit Court found to be the most important aspect of the case. It is noteworthy that in 2004 the Florida legislative staff analysis expressed disagreement with both Raborn I and Schiavone. (R.E. Tab 11, p.3).

The Trustee cites One Harbour Financial Ltd. Co. v. Hynes Properties, LLC, 884 So. 2d 1039 (Fla. 5th DCA 2004), and argues

that this case "in fact was decided by reference to the version of the statute after it was amended in 2004..." (Appellee's Br. at p.11, emphasis in original). This is a significant misstatement. One Harbour concerned a deed issued in 1986 and the trial court was applying the 1959 version of § 689.07. The Fifth District Court quoted the statute and in doing so stated at p.1043: "In reaching its decision, the trial court applied § 689.07, Florida Statutes (1959). [FN 5]" The Court's footnote 5 explicitly stated that the trial court was reviewing the 1959 version of § 689.07. The One Harbour decision also does discuss the "contrary intent" provision of the statute contrary to the argument at p.15 of the Trustee's brief.

The Trustee argues Grammer v. Roman, 174 So. 2d 443 (Fla. 2d DCA 1965) and Resnick v. Goldman, 133 So. 2d 770 (Fla. 3d DCA 1961), and again we are not sure why. In both Grammer and Resnick, the deed conveyed property to a grantee designated as a trustee and that trustee was granted full power to convey the land freely without joinder of the beneficiaries. This same broad power provision was contained in the Raborn Conveyance Deed and the Trustee neglects the fact that in both Grammer and Resnick the deeds were held to be outside § 689.07 and the grantee designated as the trustee was held to own the property in trust and not in fee simple.

These cases also refute the Trustee's argument that the full power provision in the Raborn Conveyance Deed was inconsistent with a conveyance in trust. The cases which the Trustee herself relies upon are directly contrary. The full

power provision in the Resnick deed and the Grammer deed were held to be statements of the nature and purpose of the trust which was of course an unrecorded trust.[5] In any event, the full power provisions of the Resnick and Grammer deeds were not held to produce a fee simple conveyance.

The Illinois Land Trust concept has now been reenacted as the Florida Land Trust Act of 2006 in a new version of § 689.071. This statute has always been intended as an aid to developing Florida real estate and allows a trustee to sell the property without joinder of the beneficiaries. This broad power in the hands of the trustee does not mean that a trust is not created. See Redfield v. Continental Casualty Corp., 818 F.2d 596, 607 (7th Cir. 1987) (where the Illinois Supreme Court was cited for the holding that the trustee has legal and equitable title but the beneficiaries are still the real owners with the right to control the trustee); In re: Anslie and Belle Plaine Ltd. Partnership, 145 B.R. 950 (Bankr. N.D. Ill. 1992) (the bankruptcy court is to look through the form of the Illinois Land Trust to the substance of the transaction holding that the beneficiaries are the real owners of the property) and Taylor v. Richmond's New Approach Association, Inc., 351 So. 2d 1094 (Fla. 2d DCA 1977) (an Illinois Land Trust is distinguishable from the classic ordinary trust containing real property). Broad powers

[5] The Trustee contends there was no evidence about trust documents being routinely unrecorded in Florida. This is a hard argument to take seriously since almost every case the Trustee relies upon is a situation where the trust instrument was not recorded. See e.g. Schiavone, Resnick, and Grammer.

of sale in the trustee in an unrecorded trust arrangement does not place the deed within the default provision of § 689.07. As the Raborn appellants have always contended, the present deed should have been an Illinois Land Trust and Judge Hurley refused to even consider this statute at the suggestion of the Trustee.

Whether Anyone Relied on the Deed

The Trustee argues she becomes a hypothetical bona fide purchaser and no one had to rely on the deed. However, the Eleventh Circuit held that the Trustee was on "constructive notice" as to the content of the deed and if she could have recognized the contrary intent in the deed, she had absolutely no rights as a BFP. The Eleventh Circuit stated that the issue was whether a person reading the deed "would have had no notice that the Deed might have conveyed the Raborn Farm in trust to Douglas Raborn as Trustee." (Raborn III at p.1324). Thus, pursuant to the Eleventh Circuit's opinion the issue is a total absence of notice that the deed "might have conveyed" in trust. In addition to all of the above, the words "Raborn Farm Trust" describe both the nature and purpose of the trust.

II. WHETHER, AS A MATTER OF FLORIDA LAW, THE 2004 STATUTORY AMENDMENT TO FLORIDA STATUTES SECTION 689.07(1) APPLIES RETROACTIVELY TO THE DEED IN THIS PARTICULAR CASE AND CAUSES THE DEED -- IN LIGHT OF THE AMENDMENT -- TO CONVEY ONLY LEGAL TITLE TO THE GRANTEE IN TRUST?

In the alternative, the Eleventh Circuit has asked this Court for an answer to whether Florida would apply the

clarifying amendment retroactively. Contrary to the Trustee's arguments, the Eleventh Circuit has not decided this issue in her favor.

When the first bankruptcy judge dismissed the Trustee's complaint with prejudice, she certainly had no vested rights to the property. The ruling was that the deed stating the intent of the grantors did not create a fee simple conveyance. Due to the intricacies of federal appellate practice, the Raborn I order which reversed the initial ruling by the bankruptcy judge was found to be not a final and appealable order. The Eleventh Circuit dismissed the first appeal and remanded to the bankruptcy judge, holding that the bankruptcy judge had to enter a final order. It was not until November 22, 2004, that the bankruptcy judge entered his summary judgment against the Raborns refusing to apply the 2004 statute. The statute became effective April 24, 2004, and thus the statute became effective well before the final order by the bankruptcy court and Raborn I was not a final order. Thus the first adverse final order the Raborns could appeal was the November 22, 2004 order.

Certainly the Florida Legislature has the power to enact a constitutional statute that applies to future final judgments in ongoing litigation concerning Florida real estate. This is what occurred here, the Legislature acted and only subsequent to that action was a final order entered by the bankruptcy court. Now the Trustee argues that the new statute applies to every other conveyance deed in the state of Florida but not to this one Raborn deed. (Appellee's Br. p.22).

The Raborns recognize this Court's State Farm Mutual Automobile Ins. Co. v. Laforet, 658 So. 2d 55 (Fla. 1995), decision, but this case does not control the retroactive application of this clarifying statute under the particular facts of this case. Indeed we have been unable to find any Florida case which comes even close to holding that the Florida Legislature cannot enact a statute which will control results in future litigation. The Initial Brief fully addressed the retroactive aspects of this clarifying amendment and this Court should follow the clear dictates of the Florida Legislature. The Grammer v. Roman case specifically holds that amendments to § 689.071 were remedial and could be applied retroactively when the Legislature expressly so states.

In closing we note that the Trustee still attempts to rely upon a statement in one Staff Analysis that the new enactment would not overrule the Raborn decision while at the same time refusing to address the fact noted by the Eleventh Circuit that another Senate Staff Analysis expressly stated the opposite -- that the statute would control the Raborn ruling.

CONCLUSION

This Court should issue a decision holding that § 689.07 did not apply to this deed. In the alternative, this Court should hold that the new 2004 enactment should have been applied to this Raborn deed.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Courier New 12 point, a font which is not proportionately spaced.

CERTIFICATE OF SERVICE

I hereby certify that a true copy has been furnished by mail to the following this 2nd day of March, 2007:

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