

SUPREME COURT OF FLORIDA

Case No. SC07-_____

Lower Tribunal Case No. 3D05-620
consolidated with Case No. 3D05-619

PEGGY ANN PHILLIPS and
JOSEPH ALAN LEVINE,

Appellants,

v.

JANICE HIRSHON,

Appellee.

JURISDICTIONAL BRIEF
(limited to certified direct conflict of decisions)

On Review of a Decision of the Third District Court of Appeal

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STATEMENT OF THE FACTS

Robert M. Levine died testate on April 1, 2003. He was survived by two children, Joseph Levine and David Levine (a minor). At the time of his death, Robert resided in a cooperative apartment ("the Co-op"). In his will, Robert devised the Co-op to a third party.

Joseph and David brought petitions to determine homestead, arguing that the Co-op was homestead property and was not subject to devise pursuant to Article X, Section 4(c) of the Florida Constitution, which declares that "homestead shall not be subject to devise if the owner is survived by the spouse or a minor child." Thus, Joseph and David argued that the Co-op passed to them outside the estate as a matter of law, and the bequest to the third party failed.

The trial court denied the petitions, and Joseph and David appealed. Adhering to this Court's decision in *In Re: Estate of Wartels v. Wartels*, 357 So. 2d 708 (Fla. 1978), the district court affirmed, but certified express and direct conflict between its decision and *Wartels* on the one hand, and *Southern Walls, Inc. v. Stilwell Corp.*, 810 So. 2d 566 (Fla. 5th DCA), *rev. denied*, 829 So. 2d 919 (Fla. 2002), on the other hand. In addition, the district court certified the following two questions as questions of great public importance:

DOES THE FLORIDA SUPREME COURT'S DECISION IN *IN RE ESTATE OF WARTELS V. WARTELS*, 357 So. 2d 708 (Fla. 1978), HAVE CONTINUING VITALITY IN LIGHT OF THE ADOPTION BY THE FLORIDA LEGISLATURE OF THE COOPERATIVE ACT, CHAPTER 76-222, LAWS OF FLORIDA?

IF THE ANSWER IS YES, IS IT LEGALLY PERMISSIBLE TO INTERPRET ARTICLE X, SECTION 4(a)(1) OF THE FLORIDA CONSTITUTION DIFFERENTLY FOR FORCED SALE PURPOSES THAN DEVISE AND DESCENT PURPOSES UNDER ARTICLE X, SECTION 4 OF THE CONSTITUTION?

Pursuant to Florida Rule of Appellate Procedure 9.120(d), this jurisdictional brief is limited to the certification of direct conflict of decisions, but the petitioners also seek jurisdiction predicated upon the certified questions of great public importance.

SUMMARY OF ARGUMENT

The district court in this case, as in *Wartels*, read the Art. X, § 4(a)(1), Fla. Const. definition of homestead to exclude cooperative apartments, while the Fifth District in *Southern Walls* read the same definition to include cooperative apartments. This is an express and direct conflict. This Court should accept jurisdiction to settle for all owners of cooperatives whether or not the Legislature was correct in telling them that they own a form of real property.

ARGUMENT

THE DECISIONS OF THE DISTRICT COURT BELOW AND WARTELS ARE IN CONFLICT WITH *SOUTHERN WALLS*.

This case involves an interaction between the second and third species of homestead described by this Court in *Snyder v. Davis*, 699 So. 2d 999, 1001, 1002 (Fla. 1997). These are the homestead protection against forced sales by creditors, at issue in *Southern Walls, Inc. v. Stilwell Corp.*, 810 So. 2d 566 (Fla. 5th DCA), *rev. denied*, 829 So. 2d 919 (Fla. 2002), and the restrictions placed on a homestead owner attempting to alienate or devise the homestead property, at issue in this case and in *In Re: Estate of Wartels v. Wartels*, 357 So. 2d 708 (Fla. 1978). These two provisions are closely related because they are both found in Art. X, § 4, Fla. Const. In particular, they share the definition of homestead contained in Art X, section 4(a)(1). Thus, it follows that if a particular type of property qualifies as homestead for exemption from forced sale, then it must also qualify as homestead for restrictions on devise, because the same definition is applied for both purposes. Because the court in *Southern Walls* concluded that a cooperative apartment can be homestead for the purposes of exemption from forced sale, while the district court and this Court in *Wartels* held that the same cooperative apartment cannot be homestead for purposes of restrictions on devise, the cases are in conflict.

In *Southern Walls*, the Fifth District considered whether a cooperative apartment should be treated as homestead for the purpose of exemption from forced sale. 810 So. 2d at 568. Writing after this Court wrote in *Wartels*, and also after the effective date of the Cooperative Act, Chapter 719, Florida Statutes, the *Southern Walls* court quoted numerous sections of the Cooperative Act culminating "with the stated purpose of the Act, which 'is to give statutory recognition to the cooperative form of ownership of real property.'" *Id.* at 571, 572 (emphasis by court, citing § 719.102, Fla. Stat.) This sentence led the court "to conclude that an owner of a co-op may qualify as an 'owner' of a 'residence' under article X, Section 4(a)(1) of the Florida Constitution." *Id.* at 572.

It is appropriate for this Court to accept jurisdiction to resolve this conflict. The lower court in this case, and presumably other cases, have continued to apply the result in *Wartels* notwithstanding the changes wrought by the Cooperative Act in the nature of the interest that a cooperative unit owner owns. The result is uncertainty, instability and inconsistency. Owners of cooperative apartments in Florida should not be required to speculate about the nature of what it is that they own.

The petitioners note that the Florida Condominium Act, Chapter 718, Florida Statutes, permits a condominium to be declared on property that is merely leased, and not owned in fee simple. § 718.104(1); § 718.401. If this Court's

conclusion in *Wartels*, that a lease of a cooperative unit is not "an interest in realty," 357 So. 2d at 710 remains good law, then the extent of homestead protections to such condominium units for protection against forced sale or restrictions on devise may be called into question. This presents an even further justification for accepting jurisdiction to resolve this conflict.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should accept jurisdiction based upon the certified conflict of decisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to counsel of record as noted below, by U. S. Mail, on June 8, 2007.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that TIMES NEW ROMAN, 14 pt., is used in this brief.

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