IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1079

DAVID J. LEVINE and
JOSEPH ALAN LEVINE,

Petitioners,

vs.

JANICE HIRSHON, et al.,

Respondents.

RESPONDENT KAREN J. ORLIN'S BRIEF ON MERITS

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IN THE SUPREME COURT OF FLORIDA

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DAVID J. LEVINE, and
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vs.

RESPONDENT'S ANSWER BRIEF

JANICE HIRSHON, et. al.,

Respondents.

I

Preliminary Statement

The instant appeal seeks review of a decision of the District Court of Appeal, Third District, in *Phillips v. Hirshon*, 958 So.2d 425 (Fla. 3DCA 2007). By its decision, the Third District Court of Appeal affirmed a final order of the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, which held that a cooperative apartment was not an interest in realty for purposes of devise and decent under Article X, §4, Florida Constitution. In so holding, the lower courts relied upon *In re Estate of Wartels*, 357 So.2d 708 (Fla. 1978) (hereinafter referred to as "*Wartels*"). The district court below certified direct conflict pursuant to Article V, §4(b)4, Florida Constitution between its decision in the instant case and the decision of the Fifth District Court of Appeal in *Southern Walls, Inc. v. Stilwell Corporation*, 810 So.2d 566 (Fla. 5DCA), *rev. den.* 829 So.2d 919

(Fla. 2002) (hereinafter referred to as "*Southern Walls*"). The district court below also certified the following questions to be 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, §4(a)(1) of the Florida Constitution differently for forced sale purposes than devise and decent purposes under Article X, §4 of the Constitution?

(R. 56)[1]

This Court has accepted jurisdiction.

II
Statement of the Case and Facts

Petitioners each filed a Petition to Determine Homestead Status of real property (1R. 1-12, 2R. 1-5). These petitions alleged that, at the time of his death, De-

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[1] The following designations will be used in this brief: Petitioner, David J. Levine, shall be referred to as "David." Petitioner Joseph Alan Levine, shall be referred to as "Joseph." Jointly, Petitioners shall be referred to as "Petitioners." The decedent, Robert M. Levine, shall be referred to as "Decedent." Respondent Karen J. Orlin, who was granted a life estate in Decedent's interest in the cooperative apartment pursuant to Decedent's Last Will and Testament, shall be referred to as "Orlin." The Record on Appeal for Case no. 3D05-620 shall be referred to as "1R." The Record on Appeal for Case No. 3D05-619, shall be referred to as "2R." The number following the letter "R" shall refer to the page in the Record in which the reference appears. The transcript of hearing on Orlin's Motion to Dismiss shall be referred to by the letters "Tr." The probate court, the Honorable Arthur Rothenberg presiding, shall be referred to as the "Trial Court."

cedent was the owner of Apartment PA3 located at The Island House Apartments, Inc., Key Biscayne, Florida (1R. 1, 2R. 1). Both Petitioners contended in their petition that Decedent's devise of a life estate to Orlin in the cooperative apartment was contrary to the provisions of Article X of the Florida Constitution because the cooperative apartment was homestead property (1R. 1-2, 2R. 1-2). Orlin moved to dismiss both petitions because a cooperative apartment does not constitute homestead property for purposes of devise and descent under Article X, §4(c), Fla. Const. (1R. 19, 2R. 6).

Before the Trial Court, Orlin relied upon this Court's decision in *In re Estate of Wartels*, 357 So.2d 708 (Fla. 1978), in which this Court held that a cooperative apartment is not considered homestead property for purposes of devise and descent (Tr. 4-10). In response, Petitioners contended that *Wartels* was no longer good law after 1976 as a result of the promulgation of the Cooperative Act, Chapter 719, Fla.Stat. The Trial Court granted Orlin's motions and dismissed the Petitions to Determine Homestead Status with prejudice (1R. 43-44, 2R. 32-33).

Petitioners filed separate appeals to the District Court of Appeal, Third District. Those appeals were consolidated by that court, which affirmed the Trial Court's ruling:

> Applying the principle of stare decisis, we affirm the decision of the trial court on authority of *In re Estate of Wartels v. Wartels*, 357 So.2d 708 (Fla. 1978), which expressly holds "that a cooperative apartment may not be

> considered homestead property for the purpose of subjecting it to Florida Statutes regulating the decent of homestead property." *Id*. at 711 (construing Article X, section 4(a)(1), Fla. Const. At the same time, we certify to the Florida Supreme Court as a question of great public importance under Article V, section 3(b)(4) of the Florida Constitution, whether its decision in *Wartels* has continuing vitality in light of subsequent legislative action. We also find certifiable, direct conflict between our decision today and the decision of the Fourth District Court of Appeal in *S. Walls, Inc. v. Stilwell Corp*., 810 So.2d 566 (Fla. 5th DCA 2002) which construed the same section of Article X, section 4 of the Florida Constitution upon which the *Wartels* court relied to **deny** the benefit of homestead to an heir in the devise and decent context of Article X, section 4(c) to nevertheless **afford the benefit** of homestead protection from a forced sale under Article X, sections 4(a) and 4(b) of the same constitutional provision.
>
> (R. 46-47).
> (Emphasis Supplied)

Petitioners have invoked this Court's jurisdiction pursuant to the certified questions and certification of express and direct conflict of decision, and this Court has accepted the case.

III
Points Involved on Appeal

Point I

WHETHER THE ENACTMENT IN 1976 OF THE CO-OPERATIVE STATUTE DOES NOT INVALIDATE THE LEGAL FOUNDATION OF *IN RE ESTATE OF WARTELS* NOR RENDER *WARTELS* INVALID?

Point II

WHETHER RECONSIDERATION OF THE HOLDING OF *IN RE ESTATE OF WARTELS* THAT A COOPERATIVE IS NOT AN INTEREST IN REALTY FOR PURPOSES OF THE FLORIDA CONSTITUTION'S RESTRICTION UPON DEVISE AND DESCENT OF HOMESTEAD IS NOT A MATTER OF GREAT PUBLIC IMPORTANCE?

Point III

WHETHER THERE DOES NOT EXIST ANY CONFLICT BETWEEN THE INSTANT CASE AND *SOUTHERN WALLS, INC. v. STILWELL CORPORATION?*

Point IV

WHETHER, IN THE EVENT THIS COURT DETERMINES THAT *IN RE ESTATE OF WARTELS* IS INVALID, THE DECISION OF THIS COURT SHOULD BE EFFECTIVE PROSPECTIVELY ONLY?

IV
Statement of Standard of Review

An appellate court reviews the granting of a motion to dismiss de novo. *Scott v. Busch*, 907 So.2d 662 (Fla. 5DCA 2005); *Lander v. Smith*, 906 So.2d 1130 (Fla. 4DCA 2005), *rev. dism.* 934 So.2d 450 (Fla. 2006). The issue raised in this proceeding, whether *In re Estate of Wartels, supra*, is still valid after the 1976 enactment of the Cooperative Act, Chapter 719, Fla. Stat. is a question of law. The standard of review of a question of law is de novo. *Bakerman v. The Bombay Company,* 961 So.2d 259 (Fla. 2007).

V
Summary of the Argument

I

The changes brought about by Chapter 76-222, Laws of Florida, which created the Cooperative Act, Chapter 719, Florida Statutes, and repealed the prior statutory regulation of cooperatives contained in Chapter 711, Part II, Florida Statutes, has no effect on the legal foundation upon which this Court decided *Wartels.* This Court's determination in *Wartels* that a decedent's interest in a cooperative apartment unit was not an "interest in realty" and does not constitute homestead for purposes of restrictions on devise and descent under Article X, §4(c) was predicated upon the fact that the cooperative apartment unit purchaser received shares in a corporation, that the corporation held title to the land on which the building was

constructed, and that the shareholder received a lease for the individual cooperative apartment unit. The Cooperative Act, promulgated by Chapter 76-222, carries forth each of these factors. For this reason, this Court's holding in *Wartels* remains good law.

II

The instant appeal does not present a question of great public importance. The number of cooperative housing units in this state is insignificant when compared to the total number of housing units and when compared to the total number of condominium units. This is simply not a burning legal question which must be decided by this Court.

III

There is no conflict between *Wartels* and the decision of the Fifth District Court of Appeals in *Southern Walls. Southern Walls* was concerned with the protection against forced sale provided by Article X, §§ 4(a) and 4(b). The instant case is concerned with the devise and descent provision of Article X, §4(c). Each section of the Florida Constitution regarding homestead is considered separate, distinct, and independent from the others.

IV

Any potential reversal of *Wartels* should be prospective only. At the time Decedent purchased his interest in the cooperative apartment unit and at the time

Decedent devised a life estate in his intrest to Orlin, *Wartels* was binding authority and indicated that an interest in a cooperative apartment unit did not pass as homestead under Article X, §4(c). Under these circumstances, if this Court invalidated *Wartels* and the devise of the life estate in the Decedent's interest in the cooperative apartment unit to Orlin, that action would frustrate the express intent of the Decedent, which was accomplished in accordance with the law in effect at the time he purchased his interest in the cooperative apartment unit and at the time he devised a life estate of interest to Orlin. For this reason, any potential invalidation of *Wartels* should be prospective only.

VI
Argument

Point I

THE ENACTMENT IN 1976 OF THE COOPERATIVE STATUTE DOES NOT INVALIDATE THE LEGAL FOUNDATION OF *IN RE ESTATE OF WARTELS* NOR RENDER *WARTELS* INVALID

Petitioners, the children of the decedent, contend that the decedent's interest in a cooperative constitutes an interest in realty and is not subject to devise and descent but passes in accordance with the provisions of Article X, Section 4(c), Fla. Const. This provision states:

> Homestead; exemptions. –
>
> (c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the

> homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead *real estate*, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation shall be as provided by law.
>
> (Emphasis Supplied)

As this court noted in *Wartels* at 710, neither the Florida Constitution nor the Florida Statutes define a homestead for purposes of devise and descent. The wording of Article X, Sec. 4(a)(1), Fla. Const., which states that a homestead is "one hundred sixty acres of contiguous land and improvements" if located outside a municipality, and "one-half acre of contiguous land" if located within a municipality, has been construed to mean that homestead property must consist of an interest in realty. *See Pasco v. Harley,* 73 Fla. 819, 75 So. 30 (1917), *Milton v. Milton,* 63 Fla. 533, 58 So. 718 (1912). Thus, unless an interest in a cooperative apartment unit is considered an interest in "realty" for purposes of Article X, §4(c), such interest is not subject to the constitutional restriction upon devise and descent.

The requirement that homestead consist of an interest in realty for purpose of devise and descent brings into sharp focus the issue with which the instant appeal is concerned. In the case at bar, both the trial court and the district court of appeal followed this Court's decision in *Wartels* and held Decedent's cooperative

leasehold in the apartment was not an interest in realty because the apartment was part of a cooperative. The cooperative concept has been explained as follows:

> When a cooperative housing corporation is set up, the corporation, as an entity, owns the apartment building. Shares of the corporation are then sold, their value determined by the value of each apartment. In return for the purchase of shares, each purchaser is entitled to a proprietary lease to a particular apartment unit. This lease may be a long term lease, or a shorter term lease that can be renewed. The purchaser is responsible for payment of a monthly maintenance charge which proportionally contributes to the building's maintenance, mortgage payments and taxes. Purchasers may participate in building management by voting their shares.
>
> 2 Patrick Rohan, *Real Estate Transactions, Cooperative Housing Law and Practice – Forms,* §1.01(1) (Matthew Bender 1997)

In *Wartels*, this Court similarly explained the nature of cooperative apartment unit ownership:

> Unlike a condominium purchaser, a cooperative apartment unit purchaser does not receive title to the cooperative apartment unit, nor does he become entitled to ownership of any portion of the building or the land upon which the cooperative apartment unit is situated. Rather, a cooperative apartment unit purchaser only receives shares in the corporation which holds title to the land on which the cooperative apartment building is constructed. In conjunction with the purchase of the shares in the cooperative corporation, the stockholder receives a lease for his individual cooperative apartment unit. <u>In short, the purchaser of a cooperative apartment unit does not hold any type of proprietary interest in either the apartment itself or the apartment building containing the apartment unit, or the land upon which the building is situated.</u>

Id. at 709.
(Emphasis Supplied)

As defined by this Court in *Wartels,* the elements of a cooperative are that (1) the cooperative association or corporation holds title to the land on which the building is constructed, (2) the cooperative apartment unit purchaser holds shares in that association or corporation, and (3) the cooperative apartment unit purchaser receives a lease for that individual cooperative apartment unit.[2]

The cooperative form of ownership has long been recognized by the law of Florida. Prior to the passage of Chapter 76-222, Laws of Florida, cooperatives were regulated by Part II, of Chapter 711, Fla. Stat. (1975), titled "Cooperative Apartments," which was passed as part of Chapter 74-104, Laws of Florida. §711.42(8), Fla.Stat. (1975), created by Chapter 74-104 defined a cooperative as:

> [T]hat form of ownership of improved property under which units are subject to ownership by one or more owners, which ownership is evidenced by a lease or other muniment of title or possession granted by *the association as the owner of the cooperative property*.
>
> (Emphasis Supplied)

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[2] This Court in its later decision in *State Department of Revenue v. Swinscoe*, 376 So.2d 1, 2-3 (Fla. 1979), reaffirmed its holding in *Wartels* and noted that it had specifically held in *Wartels* that ownership in a cooperative apartment did not grant a proprietary interest in the apartment itself and was not an interest in land for purposes of descent and distribution under Florida's homestead laws. This Court further noted that its *Wartels* decision was consistent with other jurisdictions which had ruled that stockholders of a cooperative housing corporation did not acquire an interest in property held by the corporation.

Under the scheme of Part II, Chapter 711, Fla. Stat., enacted in 1974, the cooperative property was realty but the owner of the cooperative property was the cooperative association. The purchaser of a cooperative apartment unit became a member of the cooperative association, received stock in that association, and received a lease for that specific apartment unit. In short, under Florida law prior to the enactment of Chapter 76-222, Laws of Florida, the nature of a cooperative was exactly as this Court described a cooperative in *Wartels*.

As noted above, the Florida Legislature enacted the current statute regulating cooperatives in 1976, Chapter 76-222, Laws of Florida. Contrary to the argument of Petitioners, the changes contained in the 1976 version of the cooperative statute have no effect upon the legal foundation on which *Wartels* is constructed. §719.103(12), Fla.Stat. (1976), which made minor changes to §711.42(8), Fla.Stat. (1975), defines a cooperative as follows:

> Cooperative means that form of *ownership of real property wherein legal title is vested in a corporation* or other entity and the beneficial use is evidenced by *an ownership interest in the association and a lease* or other muniment of title or possession granted by *the association as the owner of all the cooperative property*.
>
> (Emphasis Supplied)[3]

[3] It is important to note that the language "the association as the owner of all the cooperative property" is essentially unchanged from former statute §711.42(8), Fla. Stat.

The changes only clarify that the cooperative association member has an ownership interest in the association and that it is the cooperative association which owns the real property. This is made clear by §719.103(15), Fla. Stat. which defines "cooperative property" as "the lands, leaseholds, and personal property owned by a cooperative association." Consequently, the 1976 Cooperative Act effects no change in the ownership structure of a cooperative or the relationship between the tenant/shareholder and the cooperative association. A "cooperative" remains an interest in real property that is *owned by a cooperative association* (i) in which each member owns stock and (ii) that issues to the member a lease for a specific cooperative apartment unit.[4] The foundation of this Court's decision in *Wartels* remains unchanged by the 1976 enactment and *Wartels* remains good law even after the Cooperative Act was promulgated by Chapter 76-222, Laws of Florida.[5]

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[4] The majority rule in the United States appears to be that the relationship between the operator of a cooperative apartment building and the tenant-shareholder is one of landlord and tenant. *Village Green v. Randolph*, 361 Md. 179, 760 A.2d 716 (2000); *California Coastal Comm'n. v. Quanta Inv. Corp.*, 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (2nd Dist. 1980); *Jordan v. Placer Holding Co.*, 213 Ga.App. 218, 444 S.E.2d 112 (1994). *See generally*, 15A Am Jur.2d *Condominiums*, §78 (2000). A landlord and tenant relationship in a cooperative apartment unit creates no interest in real property because the tenant has no ownership interest in real property but a mere right of beneficial use.

[5] *Wartels* has been continually recognized as authoritative even after the promulgation of Chapter 76-222, Laws of Florida. *See Southern Walls, Inc. v. Stilwell Corporation*, *supra*, *State Department of Revenue v. Swinscoe*, 376 So.2d 1 (Fla. 1979); *Pell v. Estate of Gummere*, 717 So.2d 127 (Fla. 4DCA 1998); *Downey v. Surf Club Apartments, Inc.*, 667 So.2d 414 (Fla. 3DCA 1996); *In re Dean*, 177

As noted above, under the definition contained in §719.103(12), Fla.Stat., currently in effect in Florida, the owner of a cooperative's real property is the co-operative association in which the lessee of the apartment holds stock. *See Downey v. Surf Club Apartments, Inc.*, 667 So.2d 414 (Fla. 3DCA 1996)(A person can have no ownership interest in a cooperative apartment aside from his ownership of stock in the corporation). Based upon the essence of a cooperative as being a stock interest in a corporation, the Third District Court of Appeals in *Wartels*, 339 So.2d 48 (Fla. 3DCA 1976), *aff.* 357 So.2d 708 (Fla. 1978) held:

> As the owner of a cooperative apartment has only a stock interest in the corporation and not in the realty, the property is not subject to the law controlling descent of homesteads. Shares of stock in the cooperative apartment corporation would be subject to devise or devolution under general law and would not be within the general provisions of Art. X, Sec. 4, of the Florida Constitution, restricting devise of a homestead under stated conditions.

Id. at 49-50[6]

B.R. 727 (Bankr.S.D.Fla. 1995). All of these cases were decided after the effective date of Chapter 76-222. Each recognizes the continuing vitality of *Wartels*. If *Wartels* had been legislatively abrogated, then each of these cases would not have relied upon *Wartels*. Certainly, if the promulgation of Chapter 719, Fla.Stat. had changed the fundamental nature of a cooperative, this court in *Swinscoe*, a case decided three (3) years after the enactment of Chapter 719, would not have cited *Wartels* as authoritative because the underlying facts in *Swinscoe* occurred in 1977, after the effective date of Chapter 719, Fla.Stat.

[6] The New York Court of Appeals reached the same conclusion in *State Tax Commission v. Shor*, 43 N.Y.2d 151, 371 N.E.2d 523 (1977). There the court held:

This Court affirmed the decision of the Third District: "The District Court of Appeal was correct in holding that a cooperative apartment may not be considered homestead property for the purpose of subjecting it to Florida Statutes regulating the descent of homestead property." *Wartels, supra* at 711. In so holding, this Court acknowledged that the owner of a cooperative apartment unit merely holds stock in a corporation, which is an interest in personalty and not realty. The holding is absolutely consistent with the definition of a cooperative contained in §719.103(12), Fla. Stat. The decision below should be affirmed.

Point II

RECONSIDERATION OF THE HOLDING OF *IN RE ESTATE OF WARTELS* THAT A COOPERATIVE IS NOT AN INTEREST IN REALTY FOR PURPOSES OF THE FLORIDA CONSTITUTION'S RESTRICTION UPON DEVISE AND DESCENT OF HOMESTEAD IS NOT A MATTER OF GREAT PUBLIC IMPORTANCE

The issue of whether a cooperative is an interest in real property for purposes of decent and distribution under the homestead provision of the Constitution is not a burning issue which is of great public importance that requires the consideration of this august body. While there was no evidentiary hearing below as to

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"The ownership interest of a tenant-shareholder in a co-operative apartment…reflects only an ownership of a proprietary lease, and therefore arguably an interest in a chattel real, conditioned however upon his shareholder interest in the co-operative corporation, an interest always treated as personal property." 43 N.Y. 2d at 155, 371 NE.2d at 525. The same court has also held that a contract to sell a cooperative apartment is a sale of securities governed by the Uniform Commercial Code. *Weiss v. Karch*, 62 N.Y.2d 849, 466 N.E.2d 155 (1984).

the number of cooperative apartment units in the State of Florida, information that Respondent Orlin has gathered suggests that there are relatively few cooperative apartment units within the State of Florida. Copies of this information is contained in the Appendix to this Brief. For example, in each of the Miami/Ft. Lauderdale and Tampa/St. Petersburg areas, cooperative apartment units amounted to less than 1% of the total housing units and less than 10% of the total cooperative and condominium housing units. This is to be compared, for example, with condominiums, which accounted for approximately 25% of the total housing units in the Miami/Ft. Lauderdale area and 11% of the total housing units in the Tampa/St. Petersburg area. In short, cooperative ownership is not prevalent in the State of Florida and the issues raised by certified questions by the Third District Court of Appeal are not matters of great public importance worthy of review by this high Court. This Court should refuse the questions certified to be of great public importance.

Point III

THERE DOES NOT EXIST ANY CONFLICT BETWEEN THE INSTANT CASE AND *SOUTHERN WALLS, INC. v. STILWELL CORPORATION*

Southern Walls is not in conflict with *Wartels*. There are three (3) different homestead provisions in the Florida Constitution: a provision relating to forced sale; a provision relating to taxation; and a provision relating to devise and distri-

bution. *See Ammerman v. Markham*, 222 So.2d 423 (Fla. 1969)(exemption for taxation); *In re Estate of Wartels, supra* (restriction upon descent and distribution); *Southern Walls, Inc. v. Stillwell Corporation, supra* (exemption from forced sale). That each of these homestead provisions is controlled by separate and distinct rules is made clear by the court in *Wartels*. There, this Court distinguished its prior decision in *Ammerman v. Markham, supra*, which had allowed a homestead exemption as to taxation to owners of cooperative apartment units:

> The Court did not clothe cooperative apartments with homestead status; it merely sustained the statutory implementation of Article VII, Section 6, Florida Constitution, governing tax exemption for homesteads.

Wartels, supra at 710.

This Court held that *Ammerman* only recognized a homestead exemption in cooperative apartments for purposes of taxation.[7] Thus, under this Court's decision in

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[7] Petitioners rely on *Ammerman* for the proposition that "[T]he Legislature had the authority to define the term 'real property' for the purpose of the application of statutory provisions." Initial Brief at 6. Petitioners overlook that *Ammerman* was concerned with Article VII, §6, Fla. Const., the language of which is separate and distinct from that of Article X, §4(c), the subject of the instant appeal. Article VII, §6, specifically indicates that

> [E]very person who has the legal *or equitable* title to real estate… regardless whether the real estate may be held by legal or equitable title….or indirectly by *stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee*…

Wartels, each aspect of homestead is to be considered separately in determining whether a cooperative apartment unit is within that particular homestead provision of the Florida Constitution.

Southern Walls is consistent with *Wartels* in the recognition of three entirely different constitutional provisions relating to homestead. In *Southern Walls*, the Fifth District Court of Appeal recognized:

> We begin our analysis by noting that the concept of homestead will be given different meanings depending on the context in which it is used. Homestead has significance in the law relating to devise and descent, taxation, and exemption from forced sale. *See Snyder v. Davis*, 699 So.2d 999, 1001 (Fla. 1997) ("Our constitution protects Florida homesteads in three distinct ways.)….In *In Re Estate of Wartels*, 357 So.2d 708 (Fla. 1978), the court held that a co-op is not homestead for purposes of the laws relating to devise and descent. However in *Ammerman v. Markham*, 222 So.2d 423 (Fla. 1969), the court held that a co-op may qualify as homestead for purposes of taxation. This dichotomy reveals that there is no definition of homestead that may be used with precision in all cases and that *Wartels* and *Ammerman* are not necessarily controlling regarding the issue of

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(emphasis supplied)

is entitled to the exemption. On its face, this definition includes the owner of a cooperative apartment unit. This section of the Florida Constitution specifically vests the Legislature with certain limited powers with regard to the exemption only with respect to real property taxes. *Compare* Article X, §5, Fla. Const. (1885), *with* Article VII, §6, Fla. Const. (1968). Article X, §4 contains no such language and no grant of authority to the Legislature to define the nature of the homestead interest under Article X, §4. For these reasons, Petitioners' blanket statement that the Legislature has the authority to define the term "real property" is incorrect in the context of Article X, §4, Fla. Const.

> whether a co-op qualifies as homestead for purposes of exemption from forced sale under article X, section 4(a)(1). *See, e.g, In re Dean*, 177 B.R. 727 (Bankr. S.D.Fla. 1995) (holding that *Wartels* is limited to cases involving devise and descent and that it is clearly distinguishable from cases involving homestead exemption from forced sale).

Id. at 568-569
(Emphasis Supplied)

It is readily apparent that *Southern Walls* is not in conflict with but distinguishable from *Wartels* because *Southern Walls* involves a different aspect of homestead, the exemption from forced sale. As noted above, *Southern Walls* recognizes that the analysis is different for each aspect of homestead law. Since *Southern Walls* is concerned with an entirely separate aspect of homestead than what was considered by this Court in *Wartels*, it cannot be and is not in conflict with *Wartels*.

There is no conflict between *Wartels* and *Southern Walls* based upon each of them arising under Article X, §4 of the Florida Constitution, because each is predicated upon a separate subjection of Article X, §4. In *Snyder v. Davis*, 699 So.2d 999 (Fla. 1997), a case involving the homestead protection against forced sale by creditors, this Court noted:

> The homestead provision has been characterized as "our legal chameleon." Our constitution protects Florida homesteads in three distinct ways. First, a clause, separate and apart from the homestead provision applicable in this case, provides homesteads with an exemption from taxes. [Article VII, Section 6, Florida Constitution]. Second, the homestead provision protects the homestead from

> forced sale by creditors. [Article X, Sections 4(a) and 4(b), Florida Constitution]. Third, the homestead provision delineates the restrictions a homestead owner faces when attempting to alienate or devise the homestead property. [Article X, Section 4(c), Florida Constitution].

Id. at 1001-1002.
(Emphasis Supplied).

As is clearly established by this Court in *Snydes*, each of the three homestead provisions in the Florida Constitution is separate and distinct. For this reason, there is no conflict between *Wartels* and *Southern Walls.* The order dismissing Petitioners' petitions and the opinion of the Third District Court of Appeal affirming that dismissal both should be affirmed.

Point IV[8]

> IN THE EVENT THIS COURT DETERMINES THAT *IN RE ESTATE OF WARTELS* IS INVALID, THE DECISION OF THIS COURT SHOULD BE EFFECTIVE PROSPECTIVELY ONLY

In the event this Court determines that *Wartels* is no longer good law, this Court's decision should be given prospective effect only. At the time Decedent purchased his interest in the cooperative apartment unit and at the time he devised a life estate of that interest to Orlin in his last will and testament, it is presumed that he knew the law with regard to devise and descent of a cooperative apartment

[8] Orlin raises this point only in an overabundance of appellate caution. Orlin does not mean to imply in any manner that there is any validity to the Petitioners' position that *Wartels* is no longer good law.

unit and that, pursuant to *Wartels*, which had been continuously cited with approval, his interest in the cooperative apartment unit was considered personalty rather than realty for the purposes of, and therefore was not subject to, the Florida Constitution's restriction on devise. *See In re Will of Martel*, 457 So.2d 1064 (Fla. 2DCA 1984)(Each person is presumed to know the law); *Hart v. Hart*, 377 So.2d 51 (Fla. 2DCA 1979)(All citizens are presumed to know the law). To invalidate *Wartels* retroactively would frustrate the intent of the Decedent, which intent was valid under the existing law defining the relationship between a cooperative owner and the cooperative association at the time he executed his last will and testament and at the time of his death. Analogizing to criminal law, we believe that the change would be an "evolutionary refinement," one which refines a statute which is not to be applied retroactively. *See generally as to discussion of retroactivity of decisions, Bunkley v. State*, 833 So.2d 739 (Fla. 2002), *rev. on other grounds* 538 U.S. 835, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (2003). Any potential invalidation of *Wartels* should be on a prospective basis only.

VII
Conclusion

Based upon the foregoing cases, arguments and authorities, Respondent Karen J. Orlin respectfully requests that this Court affirm the decision of the Third District Court of Appeal and determine that for purposes of Article X, §4(c), Fla. Const., the law established by *In re Estate of Wartels*, to the effect that an interest

in a cooperative apartment unit is not an interest in realty and does not constitute homestead for purposes of the restrictions on devise and descent under Article X, §4(c), remains valid. In the event this Court disagrees and determines that *In re Estate of Wartels* is no longer good law, Respondent requests that the effect of any such decision be prospective only and not have retroactive effect.

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BY:_____
JAY M. LEVY, ESQUIRE
FLORIDA BAR NO: 219754

VIII

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed to John H. Pelzer, Esquire, RUDEN, McCLOSKY, et.al, PO Box 1900, Ft. Lauderdale, Florida, 33302, Norman S. Segall, Esquire, RUDEN, McCLOSKY,

et.al, 701 Brickell, Avenue, Suite 1900, Miami, Florida, 33131, Kenneth G. Lancaster, Esquire, King & Lancaster, P.A., 5975 Sunset Drive, Suite 703, South Miami, Florida, 33143, Mary E. Clarke, Esquire Holland & Knight, LLP, 701 Brickell Avenue, Suite 3000, Miami, Florida 33131, and to Bette E. Quiat, Esquire, 8525 SW 92nd Street, Suite B-5, Miami, Florida 33156, this 16th day of November, 2007.

_____
Attorneys for Respondent

IX
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.

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Attorneys for Respondent