SUPREME COURT OF FLORIDA

Case No. SC07-1079

PEGGY ANN PHILLIPS and
JOSEPH ALAN LEVINE,

Appellants,

v.

JANICE HIRSHON, Personal Representative
and KAREN J. ORLIN,

Appellees.

BRIEF ON THE MERITS

On Questions and Conflict of Decisions
Certified by the Third District Court of Appeal

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PREFACE

This appeal is on questions and conflict of decisions certified by the Third District Court of Appeal. The matter in the district court was a consolidated appeal from two final orders of the Probate Court dismissing Petitions to Determine Homestead Status of Real Property.

The Appellant in Adversary Proceeding Case No. 04-0429 CP 02, PEGGY ANN PHILLIPS, will be referred to herein as "Phillips."

The Appellant in Adversary Proceeding Case No. 04-0430 CP 02, JOSEPH ALAN LEVINE, will be referred to herein as "Levine."

The Appellee in both appeals, JANICE HIRSHON, Personal Representative, will be referred to herein as "Hirshon" or the "Personal Representative."

The Appellee in both appeals, KAREN J. ORLIN, will be referred to herein as "Orlin."

The Record of Case No. 04-0429, 3D05-620, will be referred to as "R1, p.__."

The Record of Case No. 04-0430, 3D05-619, will be referred to as "R2, p.__."

The transcript of the January 19, 2005 hearing will be referred to herein as "T.__."

STATEMENT OF THE FACTS AND THE CASE

This case was decided on a motion to dismiss, so the facts stated are as in the Appellants' petitions.

Robert M. Levine ("decedent") died testate on April 1, 2003 while domiciled in Miami-Dade County, Florida. R1, p.1; R2, p.1. He was survived by one adult son, Joseph A. Levine ("Levine"), and one minor son, David J. Levine. R1, p.1-2. David J. Levine, as a minor, is represented by his mother, Peggy Ann Phillips ("Phillips").

The decedent owned and resided at Island House Apartment, Inc. Co-Op, Apt. PA-3, located at 200 Ocean Lane, Apt. PA3, in Key Biscayne, Florida, 33149 ("the Property"). R1, p.1. Prior to his death and at the time of his death, the Property was established as decedent's homestead. R1, p.1.

The Probate Order admitted the decedent's last will, which devised the Property, as follows:

> I give to my lifetime friend, KAREN J. ORLIN, a life estate in my co-op located at 200 Ocean Lane Drive, Apartment PA3, Key Biscayne, Florida.

R1, p.1.

Levine and Phillips filed separate petitions to determine homestead status of real property ("Petitions") with the Probate Court. Orlin filed motions to dismiss the petitions. R1, p.16; R2, p.6, 9. A hearing was held on January 19, 2004, on

Orlin's motions to dismiss. T.1. The issue was whether a cooperative can be homestead property for the purpose of descent and devise. T.5.

On February 22, 2005, the Probate Court entered Orders that granted Orlin's motions to dismiss the petitions, R1, p.43-44; R2, p.32-33, and timely notices of appeal were filed. R.39-42.

The Third District Court of Appeal affirmed, deeming itself bound by this Court's decision in *In re Estate of Wartels v. Wartels*, 357 So. 2d 708 (Fla. 1978) (*"Wartels"*). However, the Third District certified that its decision is in conflict with the decision of the Fifth District Court of Appeal in *Southern Walls, Inc. v. Stillwell Corp.*, 810 So. 2d 566 (Fla. 5th DCA), *rev. denied*, 829 So. 2d 919 (Fla. 2002). The Third District also certified two questions as questions of great public importance, as follows:

> 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?

This Court accepted jurisdiction.

SUMMARY OF ARGUMENT

Although *Wartels* holds that a cooperative apartment is not real property and therefore cannot be a homestead for the purposes of protection against devise, this case is distinguishable because it was decided based on a death that occurred prior to the effective date of the Cooperative Act. Pursuant to the Cooperative Act, a cooperative is now an interest in real property, and not a mere contract right or interest in a corporation. Therefore, *Wartels* has been legislatively abrogated and a cooperative can now constitute a homestead. This Court should answer the first certified question in the negative. This will make it unnecessary to answer the second question.

If the Cooperative Act had no effect on the rationale in *Wartels,* this Court should take this opportunity to overrule *Wartels* in order to fulfill the social policies that underlie Florida's homestead protection against devise. The protection that homestead provides to Florida families should not depend on an arcane and technical legal fiction that would be perfectly obscure to the family. Thus, this Court should answer the second question in the negative, overrule *Wartels,* and thus harmonize the certified conflict.

STANDARD OF REVIEW

The appropriate standard of review on appeal from an order granting a motion to dismiss is *de novo. See K.W. Brown and Co. v. McCutchen,* 819 So. 2d 977 (Fla. 4th DCA 2002). The issues presented are questions of law subject to *de novo* review. *Southern Baptist Hosp. of Fla., Inc. v. Welker,* 908 So. 2d 317 (Fla. 2005).

ARGUMENT

I. THE HOLDING OF *WARTELS* HAS BEEN ABROGATED BY THE COOPERATIVE ACT.

The analysis of this case must start with *Wartels.* Pursuant to the Florida Constitution, Art. X, § 4(c), a decedent may not devise a homestead if the decedent has a minor child. If the apartment is homestead, the devise fails, the property passes outside the estate, and the brothers take per stirpes. *Cutler v. Cutler,* __ So. 2d __, 32 Fla. L. Weekly D583 (Fla. 3d DCA February 28, 2007); §§ 732.101(1), 732.103(1), 732.104, Fla. Stat. *Wartels* holds that a cooperative apartment cannot be homestead for purposes of the homestead protection from devise because a cooperative is not "an interest in realty." 357 So. 2d at 710.

The decedent in *Wartels* died sometime prior to January 2, 1975. 357 So. 2d at 709. The Cooperative Act, Ch. 719, Fla. Stat., Ch. 76-222, Laws of Florida § 2,

was not effective until two years later, on January 1, 1977. Ch. 76-222, § 6, Laws of Florida.

Prior to the effective date of the Cooperative Act, when the decedent in *Wartels* passed away, cooperatives existed as an amalgam of the law of leases and corporate law. *See generally*, 357 So. 2d at 709. As a result, *Wartels* concluded that a cooperative is not "an interest in realty." 357 So. 2d at 710. However, under § 719.102, "the purpose of [the Cooperative Act] is to give statutory recognition to the cooperative form of ownership of real property." There is no similar provision in the former statute governing cooperatives, Chapter 711, Part 2, Florida Statutes (1975), even though the same chapter expressly provided such statutory recognition of the condominium form of ownership of real property, § 711.02, Florida Statute (1975). This distinction between Part 1 and Part 2 of Chapter 711, Florida Statute (1975) had a real meaning that was important to this Court in *Wartels.*

Similarly, § 719.103(a) defines "cooperative" as "that form of ownership of improved <u>real</u> property in which there are units subject to ownership by one or more owners, and the ownership is evidenced by an ownership interest in the association in a lease or other muniment of title or possession granted by the association as the owner of all of the cooperative property." (emphasis added.) Thus, while the cooperative concept retains its structure as a corporation granting

proprietary leases in apartments to its members or shareholders, this structure is now statutorily defined as a "form of ownership of improved real property." *Id.* (emphasis added.) This legislative pronouncement, by fiat, changed cooperatives from their prior status of mere incorporeal corporate and contract rights into interests in real property.

Also noteworthy is that the Condominium Act, previously Ch. 711, Fla. Stat., was completely restated as Ch. 718 in § 1 of Ch. 76-222, Laws of Florida, the same enactment which created the Cooperative Act. Section 718.102 provides, with remarkable parallelism that the purpose of the Condominium Act is to "give statutory recognition to the condominium form of ownership of real property." It is well recognized that a condominium is realty that is subject to homestead protection under Florida Constitution, Art. X, § 4(c). *See, e.g., Braswell v. Braswell,* 890 So. 2d 379 (Fla. 3d DCA 2004).

The Legislature has the authority to define the term "real property" for the purpose of the application of statutory provisions. *Ammerman v. Markham,* 222 So. 2d 423 (Fla. 1969). *See also,* Op. Atty. Gen. 071-19 (February 9, 1971). In *Ammerman,* this Court announced the now-unremarkable proposition that the Legislature may define a condominium unit as real property for the purpose of applying the constitutional provisions regarding homestead exemption from ad

valorem property taxation. As this Court noted in *Ammerman*, the Legislature has adopted various definitions of "real property" for various purposes.

> The meaning and application of the term 'real property' are generally declared by statute, and the term may be defined in different statutes or for different purposes. See 73 C.J.S. Property s 2, p. 152. For example, Fla. Stat., s 421.03(12), F.S.A. defines 'real property' for the purposes of the housing authorities law; Fla.Stat., s 475.01(11), F.S.A. defines 'real property' for the purposes of the real estate license law; Fla.Stat., s 713.01(14), F.S.A. defines 'real property' for the purposes of the mechanics lien law.

The Legislature has exercised its prerogative in the Cooperative Act to define a cooperative as real property. By doing so, it abrogated the reasoning on which *Wartels* relies. Stripped of this rationale, *Wartels* has no continuing vitality. This Court should answer the first certified question in the negative.

II. THIS COURT SHOULD REVERSE *WARTELS* BASED ON FLORIDA'S PUBLIC POLICY OF HOMESTEAD PROTECTION, AND THUS ELIMINATE ANY CONFLICT WITH *SOUTHERN WALLS.*

The law of homestead began as an "American innovation" that was incorporated into Florida's jurisprudence where it evolved, relative to the homestead laws of other jurisdictions, into a rather unique body of rules and principles. *Snyder v. Davis*, 699 So. 2d 999, 1002 (Fla. 1997). Homestead exemption under Florida law and its attendant protections derive from public policy and is designed "to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law." *Snyder*, 699 So. 2d at 1002 (quoting *Public Health Trust v. Lopez*, 531 So. 2d 946, 948 (Fla.1988)). The public policy purpose of all forms of homestead is the same: "preserving the family home for its owner and heirs." *Cutler v. Cutler*, __ So. 2d __, 32 Fla. L. Weekly D583 (Fla. 3d DCA February 28, 2007), *citing Snyder*, 699 So. 2d at 1001, 1002. The court in *Snyder* noted that in order to promote the declared purpose of homestead exemption, the homestead provision in Florida's Constitution "is to be liberally construed in favor of maintaining the homestead property." *Id.* at 1002, 1005.

The public policy supporting homestead protection from devise applies with equal force to a dwelling that is owned under a cooperative form of ownership of real estate. The decision in *Wartels* was based upon a stilted and formalistic approach to the cooperative form of ownership. The differentiation between an apartment in the condominium form of ownership, and the same apartment held in the cooperative form of ownership, is a classic example of form over substance. The difference exists only in the legal ether, and documents buried in courthouse records. Certainly this paper distinction, despite its interest to legal scholars, means nothing to the families who should be protected from a devise of an apartment that would be homestead but for its status as a cooperative unit. It should mean no less to a family in probate than one whose property is threatened by creditors.

In the past, Florida courts have used certified questions to obtain reversal of outmoded rules or decisions. For example, in *Stephen Bodzo Realty, Inc. v. Willits International Corp.*, 405 So. 2d 269 (Fla. 4th DCA 1981), as in this case, there was prior binding precedent from this Court that was based on archaic principles. Also as in this case, the Florida Legislature had spoken, expressing its policy decision to abandon the archaic principles. In *Bodzo*, the issue involved the release of a single joint tort feasor, which, under the law at the time it was executed, would have released all joint tort feasors. The Legislature had passed a law which would have

ameliorated this harsh result, but that statute was not applicable to the particular release. The Fourth District, recognizing this anomaly and the historic anachronism of the rule, followed the precedent but certified the question to the Supreme Court as a question of great public importance, just as the Third District did in this case. This Court accepted the certification, and reversed its prior, outdated decision. *Stephen F. Bodzo Realty, Inc. v. Willits International Corp.,* 428 So. 2d 225 (Fla. 1983).

This Court should take advantage of the same opportunity to revisit its outdated decision in *Wartels,* recognize the legislative declaration that cooperatives are a form of ownership of real property, and declare that cooperatives which are homestead property are protected from devise under the Florida Constitution. Not only will this update Florida law consistent with the strong policies favoring protection of homesteads, it will also eliminate a conflict with *Wartels* and *Southern Walls, Inc. v. Stillwell Corp.,* 810 So. 2d 566 (Fla. 5th DCA), *rev. denied,* 829 So. 2d 919 (Fla. 2002).

Southern Walls held that a cooperative apartment could be homestead for the purpose of protection against forced sales. The *Southern Walls* court cited the decision of this Court in *Snyder v. Davis,* 699 So. 2d 999 (Fla. 1997), which noted that the Florida Constitution "protects Florida homestead in three distinct ways." *Id.* at 1001. However, there are only two definitions of homestead in the Florida

Constitution. The definition of homestead for ad valorem tax purposes and the protections flowing therefrom are not pertinent to this case. The other two protections both stem from the same definition contained in Art. X § 4(a). A plain language reading of Art. X, § 4 shows that the homestead protection for devise included in § 4(c) uses the same definition of homestead as the protection from forced sale contained in § 4(a). There is a single definition with two separate protections flowing from it. Because *Wartels* and *Southern Walls* apply the same definition of homestead to the same form of ownership, but reach contrary results, they are in conflict.

Discussing that definition, the *Southern Walls* court, citing *Snyder v. Davis,* observed that "[T]he purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune . . ." *Id.* at 569. Further, "[the definition] does not designate how title to the property is to be held and it does not limit the estate that must be owned, i.e., fee simple, life estate, or some lesser interest." *Id.* This explanation of § 4(a)(1) necessarily applies to all protections that flow from the definition.

Under *Wartels,* a cooperative is not homestead for purposes of protection from devise. However, under *Southern Walls* the same cooperative can be homestead for the purposes of protection against forced sale. Since there is but a

single definition in a single section for homestead for both purposes, these holdings conflict. If this Court does not find that *Wartels* has been legislatively abrogated, it should resolve this conflict by reversing *Wartels.*

As the law has evolved, the archaic reasons behind the decision in *Wartels* have ceased to have effect. For this reason, this Court should answer the second certified question in the negative, reversing *Wartels,* and thus eliminate conflict with *Southern Walls.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should answer the first certified question in the negative; alternatively, that this Court should answer the second certified question in the negative, and reverse *Wartels;* in either alternative, reversing the decision of the trial court which granted the Motions to Dismiss Petitions to Determine Homestead Status of Real Property of Joseph Alan Levine and Peggy Ann Phillips on behalf of David J. Levine.

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 October 10, 2007.

CERTIFICATE OF COMPLIANCE

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

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