SUPREME COURT OF FLORIDA

Case No. SC07-1079

DAVID J. LEVINE, et al,

Appellants,

v.

JANICE HIRSHON, etc., et al,

Appellees.

REPLY BRIEF ON THE MERITS

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

John H. Pelzer, Esq.
Norman S. Segall, Esq.
RUDEN, McCLOSKY, SMITH,
SCHUSTER & RUSSELL, P.A.
200 East Broward Boulevard, 15th floor
P.O. Box 1900
Fort Lauderdale, Florida 33302
(954) 527-2469

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Other Authorities

SUMMARY

Orlin's brief overlooks that it is the unit that a cooperative owner owns pursuant to the Cooperative Act, not just shares and a leasehold. This is defined as an interest in real property, which it is in all practical effect for hundreds of thousands, if not millions, of cooperative unit owners.

The public policy in favor of homestead protection is virtually conceded by Orlin. Orlin's attempted avoidance of the direct conflict falls flat when it is considered that there is but one constitutional definition of homestead for both forced sale and devise protection. Applying this result to Orlin in this case is consistent with the constitutionally mandated limitation of the power of testators.

ARGUMENT

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

Orlin's response on this point emphasizes that cooperatives retain their structure of legal title vested in a corporation with proprietary leases to the corporation's shareholders or members. This observation is correct but irrelevant, and has never been disputed. The question is whether, by Ch. 76-222, Laws of Florida, the Florida Legislature recognizes this structure as a form of ownership of real property, thus abrogating *In re Estate of Wartels v. Wartels,* 357 So. 2d 708 (Fla. 1978). The answer is found in the language of the statute itself, which states that the very "purpose of [the Cooperative Act] is to give statutory recognition to the cooperative form of ownership of real property." § 719.102, Fla. Stat. This language is an addition to the language that had been contained in the prior legislation, Ch. 711 Part II, Fla. Stat. (1975). The Cooperative Act goes on to define "cooperative" as "that form of ownership of improved real 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." § 719.103(a), Fla. Stat. This means that the legislature has declared it to be a form of ownership of real property for a

cooperative unit owner to own an interest in a cooperative association and a lease.

Orlin suggests that the Legislature was speaking of the legal title owned by the association. Orlin Brief, p.13. This interpretation is belied by the language of the Cooperative Act. The definition emphasizes that it is the "units [that are] subject to ownership by one or more owners." *Id.* The Cooperative Act speaks in terms of "Unit owner[s]," § 719.103(25), and emphasizes that the association merely "owns the record interest." § 719.103(2). Thus, while cooperatives retain their structure with respect to the legal title, the interest that is owned is no longer a mere ownership of the corporate entity and a lease, but rather it is the unit itself that is "subject to ownership." *Id.* This is further stated to be "ownership of improved real property." *Id.*

In her brief on the merits, Orlin misinterprets *Ammerman v. Markham,* 222 So. 2d 423 (Fla. 1969). Orlin mistakenly assumes "that *Ammerman* was concerned with Art. 7 § 6" of the current Constitution. Orlin's brief, p.17 n.7. In fact, this Court stated that it was not interpreting the current Constitution. Rather, the Court was interpreting the 1885 Constitution, particularly Art. 10 § 7. *Ammerman,* 222 So. 2d at 425. That provision is not the one that is quoted in Orlin's brief. That provision of the 1885 Constitution, like Art. 10 § 4 of the current Constitution, applied to "real property." This Court decided in *Ammerman* that the Legislature had the power to define what constituted real property so as to "extend the

provisions of [the 1885 Constitution] to the owners of cooperative and condominium apartments," *Ammerman,* 222 So. 2d at 425, and concluded that the Legislature had that power. This Court noted that "[t]he Legislature modified the frozen common law concept of real property ownership." *Id.* at 426. The Legislature has done so again with the adoption of the Cooperative Act.

In her argument Point II, Orlin attempts to denigrate the importance of this question by suggesting that cooperatives make up a small percentage of the residential market. However, whatever that percentage may be, the question remains significant. According to the Department of Business and Professional Regulation website, as of December 2, 2007, there were over 176,500 cooperative projects in the State of Florida. http://www.myfloridа.com/dbpr/sto/file_download/lsc_download.shtml. Each of those projects contains multiple units, each of which represents a family potentially interested in the resolution of this question. This makes the pending question one of great public importance. Of course, the Legislature considered the question of cooperatives important enough to warrant its own chapter in Florida.

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

The predicate of Orlin's response to this point, contained in her Point III, is the point which the Appellants have already conceded, that "the Florida Constitution 'protects Florida homestead in three distinct ways.'" Initial Brief, p.10, quoting *Snyder v. Davis*, 699 So. 2d 999, 1001 (Fla. 1997). From that proposition, Orlin mistakenly concludes that there must also be three separate definitions of homestead property. There are not. As the district court noted, Art. 10 § 4 grants two different homestead protections (protection from forced sale, and protection from devise) to the same property that is defined once in Art. 10 § 4(a)(1). Slip Opinion, p.6. Thus, while there are three homestead protections, there are only two homestead definitions in the Florida Constitution. *Southern Walls, Inc. v. Stillwell Corp.*, 810 So. 2d 566 (Fla. 5th DCA), *rev. denied* 829 So. 2d 919 (Fla. 2002), is in conflict with *Wartels* and the decision below because it applies the same definition to the same form of property and reaches a different conclusion as to whether it may qualify for homestead protection. Orlin cannot resolve the conflict between *Southern Walls* and *Wartels* in this case by bootstrapping the invalid distinctions drawn by the *Southern Walls* court. *See*, Orlin's Brief, p.18, 19. This ineffective distinction makes the same error as Orlin,

by focusing on the three different protections rather than the two definitions.

Orlin completely overlooks the policy arguments discussed in this section of the Appellant's Initial Brief on the Merits. Apparently, but not surprisingly, Orlin cannot refute that Florida's homestead policy is served by protecting cooperatives. The protection of Florida families by the protection of homesteads has long been the public policy in Florida "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 v. Davis,* 699 So. 2d 999, 1002 (Fla. 1997) *quoting Public Health Trust v. Lopez,* 531 So. 2d 496, 498 (Fla. 1998). For this public policy reason, this Court should, as it did in *Stephen Bodzo Realty, Inc. v. Willits International Corp.*, 428 So. 2d 225 (Fla. 1983), take this occasion to reverse a prior decision that had been based on outmoded legal principles, and substitute a rule of law that comports with Florida's public policy.

In a final effort to preserve her own bequest, even in the event of a reversal, Orlin argues that any application of Florida's homestead policy to cooperatives should nevertheless not be applied to her. She places her reliance on *Bunkley v. State,* 833 So. 2d 739 (Fla. 2002), *reversed*, 538 U.S. 835, 123 S. Ct. 2020, 155 L. Ed. 2d 1046 (2003). Presumably, Orlin does not mean her *Bunkley* argument to

apply in the event this Court finds that the Cooperative Act defines a cooperative as real property. If so, this Court will simply be applying existing law.

Bunkley does not support Orlin's position even assuming its rationale survived its reversal. In that case, a criminal defendant was attempting on collateral review to overturn a conviction that had been entered and affirmed on appeal years prior. The basis for this effort was a subsequent decision which refined the definition of a weapon and would have justified convicting him of a lesser offense, *i.e.,* burglary rather than armed burglary. Thus, the court was concerned with "an abridgment of the finality of judgments." 833 So. 2d at 744. That concern is not implicated in this case. Interesting, in *L.B. v. State,* 700 So. 2d 370 (Fla. 1997), the case upon which *Bunkley* relied for refining the definition of a weapon, this Court applied the refined definition to the pending case that raised the question. *Id.* at 373. This Court should do the same in this case.

Orlin contends that applying a reversal to her would be inappropriate because it would undermine the intent of the testator. But that is exactly the point. The entire purpose of Art. 10 § 4(c), Fla. Const., is to undermine a testator's intent. If a reversal were not applied to Orlin, that would be elevating the intent of the testator over the public policy and Constitution of the State of Florida.

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 *In re Estate of Wartels v. Wartels*, 357 So. 2d 708 (Fla. 1978)*;* 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,

RUDEN, McCLOSKY, SMITH,
SCHUSTER & RUSSELL, P.A.
200 East Broward Boulevard, 15th floor (33301)
Post Office Box 1900
Fort Lauderdale, Florida 33302
(954)764-6660, 527-2469; Fax: (954)333-4069

By: _____
John H. Pelzer
john.pelzer@ruden.com
Florida Bar Number 376647
Norman S. Segall
norman.segall@ruden.com
Florida Bar Number 158302

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to counsel of record as noted below, by U. S. Mail, on December 11, 2007.

CERTIFICATE OF COMPLIANCE

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

RUDEN, McCLOSKY, SMITH,
SCHUSTER & RUSSELL, P.A.
200 East Broward Boulevard, 15th floor (33301)
Post Office Box 1900
Fort Lauderdale, Florida 33302
(954)764-6660, 527-2469; Fax: (954)333-4069

By: _____
John H. Pelzer
Florida Bar Number 376647

counsel of record:

Steven M. Toister, Esq.
9990 S.W. 77th Avenue, PH-4
Miami, Florida 33156
(305) 596-2345
Attorney for Karin J. Orlin

Jay M. Levy, Esq.
9130 South Dadeland Boulevard
Two Datran Center - Suite 1510
Miami, Florida 33156
305/ 670-8100
Appellate Attorney for Karin J. Orlin

Mary E. Clarke, Esq.
Holland & Knight, LLP
701 Brickell Avenue, Suite 3000
Miami, Florida 33131
Attorney for Janice Hirshon,
Personal Representative

Kenneth G. Lancaster, Esq.
King & Lancaster, P.A.
5975 Sunset Drive, Suite 703
South Miami, Florida 33143
counsel for Joseph Alan Levine

John H. Pelzer, Esq.
Ruden, McClosky
P.O. Box 1900
Fort Lauderdale, Florida 33302
Attorneys for David J. Levine
and Joseph Alan Levine

Norman S. Segall, Esq.
Ruden, McClosky
701 Brickell Avenue, Suite 1900
Miami, Florida 33131
Attorneys for David J. Levine
and Joseph Alan Levine

Thomas D. Hall, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927
(850) 488-0125