IN THE SUPREME COURT OF FLORIDA
Case No. SC11-554

PEDRO J. GARCIA,
AS PROPERTY APPRAISER
OF MIAMI-DADE COUNTY,

Petitioner,

vs.

DAVID ANDONIE AND ANA L. ANDONIE; AND
LISA ECHEVERRI, AS EXECUTIVE DIRECTOR
OF THE STATE OF FLORIDA
DEPARTMENT OF REVENUE,

Respondents.

ANSWER BRIEF OF RESPONDENT DEPARTMENT OF REVENUE

ON PETITION FOR DISCRETIONARY REVIEW FROM A
DECISION OF THE THIRD DISTRICT COURT OF APPEAL

PAMELA JO BONDI
ATTORNEY GENERAL
Scott D. Makar (FBN 709697)
Solicitor General
Joseph C. Mellichamp, III (FBN 133249)
Chief Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
Counsel for Department of Revenue

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Florida Constitution

Florida Statutes

Other Authorities

INTRODUCTION

This Court is being asked to determine, as a matter of law and in the specific context of Florida's constitutional provision of homestead exemption from ad valorem taxation, whether citizens of another country who are lawfully residing in the United States and Florida pursuant to a temporary visa can apply for that exemption on behalf of their minor children who are citizens of the United States and Florida.

The Petitioner will be referred to as "Property Appraiser." Respondents David and Ana Andonie will be referred to as "Andonies" or "Taxpayers." Lisa Echeverri, in her official capacity as the Executive Director of the Florida Department of Revenue, will be referred to as "the Department." References to "homestead exemption" are to the homestead exemption from ad valorem taxation, unless otherwise indicated. The real property that is the subject of this dispute may be referred to as "subject property." The references to the record in this case will be referred to the portions of the record included in the Appendix to the Property Appraiser's Initial Brief and referred to as (App. Ex.__: pg__).

STATEMENT OF THE CASE AND FACTS

On January 1, 2006, David and Ana Andonie, were citizens of Honduras, lawfully residing in the United States pursuant to temporary visas issued by the United States Department of Homeland Security. (App. B:5). In 2003, the Andonies had purchased a condominium in Key Biscayne, Florida. On January 1, 2006, they occupied this condominium together with their three minor children, then ages 7, 12, and 14. (App. B:9; App. C:1-2). The Andonies' children are United States citizens and citizens of the State of Florida under Amendment 14 of the United States Constitution. See U.S. Const., amend. XIV, § 1. (App. B:6-8).

Prior to January 1, 2006, the Andonies timely filed an application for an exemption from real estate taxes on the property, pursuant to article VII, section 6(a) of the Florida Constitution, for the 2006 ad valorem taxing year. (App. B:9-10). See Art. VII, § 4(d), Fla. Const. (1968). On the application form, David Andonie stated under oath: "My children are U.S. citizens, aged 7, 12, and 14 living at this address and are legally and naturally dependent on me, thereby qualifying for the homestead exemption." (App. B:9). It is undisputed that David and Ana Andonie are legally incapable of qualifying as "permanent residents" of Miami–Dade County.

The Property Appraiser denied the application (App. B:4). That decision was overturned by the Miami–Dade County Value Adjustment Board. (App. D:1). The

Property Appraiser challenged the decision of the Miami–Dade County Value Adjustment Board in circuit court. See §§ 194.171(1), Fla. Stat. (2006); 194.036(3), Fla. Stat. (2006). In the trial court, the Andonies filed an affidavit of David Andonie (App. C:1-2), which included the following statement in paragraph three (3) of the affidavit. (App. C:1).

> 3. In this present summary judgment proceedings, my wife and I do not claim the right to homestead exemption based on our permanent residence at this location, but upon the fact that our three minor children, who are naturally and legally dependent upon my wife and me, live here on the subject property, which we as their parents and natural and legal guardians, make their home. For our children, this home is their permanent residence, where they live along with their mother and me.

This statement of the parents' intent that the subject property was to be the permanent residence of their children is uncontroverted in this case. De La Mora v. Andonie, 51 So. 3d 517, 521 (Fla. 3d DCA 2010) (Andonie). Both the parents and the children were present in Miami–Dade County on January 1, 2006, the date on which the use of the property has been determined to be the permanent residence of the children. (App. B:9-10). On cross-motions for summary judgment, the trial court found the Andonies were entitled to the exemption. (App. E:1).

The Property Appraiser appealed the trial court's final judgment in favor of the Andonies to the Third District. The Department determined as the basis for its appeal that the order appealed from did not contain a determination that the minor

children were permanent residents on the property. See Property Appraiser's Initial Brief, page 6, fn 3. The permanent residency of the children in Florida should be the sole determining factor as to whether the exemption should have been granted. Id.

In its brief in the proceedings before the Third District, the Department requested that the District Court remand so that a finding could be made by the trial court as to whether the Andonies' minor children were "permanent residents" for purposes of Chapter 196, Florida Statutes. At oral argument, counsel for both the Andonies and the Property Appraiser agreed that the relevant undisputed facts pertaining to the Andonies and their children as contained in the trial court record were sufficient for the District Court to issue an opinion. See Property Appraiser's Initial Brief, page 6, fn 3.

Therefore, the Department believed there was an issue appropriate for resolution by the Third District. The Department was a defendant in the lower court proceedings, pursuant to Section 194.181, Florida Statutes, and, as announced at the oral argument in the Third District, yielded its time (five minutes) to give the full ten minutes allotted to the Property Appraiser.

The Third District affirmed the trial court and found there was no evidence in the record contradicting the factual assertions, supporting permanent residency

of the minor children, made by David Andonie in his affidavit. Andonie, 51 So. 3d at 521.

The Third District held that the Andonies can obtain an exemption from ad valorem taxation under article VII, section 6(a), based upon the use of the property as the permanent residence of their children and that the Property Appraiser is without any constitutional and statutory authority to condition this exemption on the legal status of the Andonies in the United States. Andonie, 51 So. 3d at 522. Furthermore, the Court held that in section 196.031(1)(a), Florida Statutes, the phrase "who resides thereon," while removed from the Constitution in 1968 but "probably inadvertently carried forward into the modern statutory scheme," was "legally ineffective" and could not alter, contract or enlarge the constitutional provision. Andonie, 51 So. 3d at 523-524.

The Third District thus resolved the issue of permanent residency of the minor children in favor of the Andonies. Based on the constitution and statutes the Department did not appeal the Third District's decision.

SUMMARY OF ARGUMENT

The Andonies seek to obtain on behalf of their children an exemption from ad valorem taxation under article VII, section 6(a), based upon the use of the property in question as the permanent residence of their naturally dependent children who are citizens of the United States and Florida. The Property Appraiser seeks to impose a residency requirement on the Andonies who have legal title to real estate. No such requirement can be found in the plain language of the exemption, article VII, section 6(a) of Florida's Constitution. The amicus briefs in this case cover the same issues and arguments contained in petitioner's brief and therefore need not be separately addressed.

Article VII, section 6(a) establishes that the legal title owner can apply for the homestead exemption on behalf of "legally or naturally dependent" individuals, children in this case, who use such homestead as their permanent residence. The plain language found in article VII, section 6(a), does not impose a requirement that the Andonies be residents of Florida or that they reside on the property when they apply for homestead exemption on behalf of their children. Such requirements were long ago removed from Florida's Constitution. See De La Mora v. Andonie, 51 So. 3d 517, 523-524 (Fla. 3d DCA 2010) (Andonie). See In re Advisory Opinion to the Atty. Gen. re Additional Homestead Tax Exemption, 880 So. 2d 646, 655 (Fla. 2004) (Quince, J., concurring in result only).

Under article VII, section 6(a) the only requirement for a person who applies for an exemption on behalf of "another legally or naturally dependent upon the owner" is that the person have legal title to the real estate. The Andonies have met this requirement. As the Andonies are legally incapable of qualifying as "permanent residents" of Miami–Dade County, the Property Appraiser seeks to engraft this legally incapability on to the Andonies' children, and, thus, claim that their children are incapable of establishing permanent residency. In this case, the Andonies filed an affidavit declaring the permanent residency of their children to be in Florida. Their intent is uncontroverted in this case. Andonie, 51 So. 3d at 521. The central issue before this Court is, therefore, whether real property can qualify under article VII, section 6(a) for the homestead exemption where homeowners, who are citizens of another country, lawfully residing in the United States and Florida pursuant to a temporary visa, declare the real property to be the permanent residence of their minor children, who are United States and Florida citizens.

The record establishes that the property is being used as a homestead for the children of the legal owner of the property. The facts establishing the use of the property as a homestead and the entitlement of the children to the exemption are also uncontroverted. While the Property Appraiser seeks to challenge the uncontroverted fact that the Andonies have established the property as the

permanent residence for their children, the Property Appraiser does not dispute that the children are citizens of the United States and Florida.

The application for homestead exemption on its face, together with the declaration of the Andonies, as parents of dependent children who are citizens of the United States and Florida, appears to establish the entitlement of the dependent children to the exemption. This affidavit as to the Andonies' intent that their minor children are permanent residents for the purposes of homestead exemption serves to rebut the presumption relied upon by the Property Appraiser that the domicile of these children must be a place other than Florida. The decision of the Third District upholds Florida's longstanding public policy of trying to protect the homestead in a State where citizens have feared, since the Great Depression, that escalating property tax rates would drive them from their homes. *E.g.*, Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328, 330 (1940) (finding preservation of homestead is of paramount importance).

ARGUMENT

The Andonies, on behalf of their minor children, seek to obtain an exemption from ad valorem taxation under article VII, section 6(a), based upon the use of the property in question as the permanent residence of their children. No constitutional provision conditions this benefit on the legal status of the Andonies in the United States. Op. Att'y Gen. Fla. 63-10 (1963); Smith v. Voight, 28 So. 2d 426 (Fla. 1946); Reinish v. Clark, 765 So. 2d 197, 205 (Fla. 1st DCA 2000), review denied, 790 So. 2d 1107 (Fla. 2001), cert. denied, 534 U.S. 993 (2001) (Reinish) (holding that protecting and providing benefits to homestead owners are legitimate compelling state interests).

Prior to its amendment in 1968, the Florida Constitution had since 1938 contained a requirement that the owner "reside thereon." It provided:

> Section 7. Every person who has legal title or beneficial title in equity to real property in this State and **who resides thereon** and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed value of Five Thousand Dollars on the said home and contiguous real property for the year 1938 and thereafter.

Art. X, § 7, Fla. Const. (1885) (amended 1938) (Emphasis added).

Article VII, section 6(a) of the Florida Constitution states in pertinent part that

> **Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of** the owner, or **another legally or naturally dependent upon the owner, shall be exempt from taxation thereon,** except assessments for special benefits, **up to the assessed valuation of twenty-five thousand dollars** and, for all levies other than school district levies, on the assessed valuation greater than fifty thousand dollars and up to seventy-five thousand dollars, upon establishment of right thereto in the manner prescribed by law. (Emphasis supplied)

By its express terms, article VII, section 6(a) "applies to real estate that is maintained as the 'permanent residence' of the legal or equitable titleholder **or** of 'another legally or naturally dependent upon the owner.'" Reinish, 765 So. 2d at 205.

Under article VII, section 6(a) the only requirement for a person who applies on behalf of "another legally or naturally dependent upon the owner" is that the person have legal title to the real estate. In this case, the Andonies have met this requirement. As the Andonies are legally incapable of qualifying as "permanent residents" of Miami–Dade County, the Petitioners seek to engraft this legally incapability on to the Andonies' children, and, thus, claim that their children are incapable of establishing permanent residency. But, the Andonies, as parents, have sought to exercise the right to establish the permanent residence of their children. And here, the Andonies filed an affidavit declaring their intent to make the permanent residency of their children be in Florida. Their intent is uncontraverted in this case.

Article VII, section 6(a) also contains a disjunctive "or" which provides that every person who has legal title can apply on behalf of "legally or naturally dependent" individuals who are using the real property as a permanent residence.

In this case, the two requirements for a qualifying homestead exemption have been met. First, the Andonies, as legal title holders of the property and resident aliens, timely applied for the homestead exemption. Second, the Andonies applied for the homestead exemption on behalf of their minor children who are "legally or naturally dependent" upon their parents.

The Property Appraiser's reliance on Beekman v. Beekman, 53 Fla. 858, 43 So. 923 (Fla. 1907) and Chisholm v. Chisholm, 98 Fla. 1196, 125 So. 694 (Fla. 1929), is misplaced because those cases are distinguishable. First, those cases concern whether a person under age 21, a minor at the time those cases were decided, can obtain jurisdiction of a Florida court for the purpose of obtaining a divorce if that person has not been a resident of Florida for at least two years. This case has nothing to do with jurisdiction of the court. It concerns whether non-citizens may obtain a homestead exemption on behalf of their minor children, who are citizens.

Second, to the extent that Beekman and Chisholm create a presumption that the domicile of minor children is determined by the domicile of the children's father, that presumption has been rebutted here. Here, it is undisputed that it is the

intent of the Andonies that their children permanently reside on the subject property. Andonie, 51 So. 3d at 521. In both Beekman and Chisholm, however, the parents and minor children were not residing at the same time and in the same residence in Florida for the relevant periods at issue. And no facts were presented indicating the parents' intent as to where the minor child should reside.

Furthermore, Florida courts have cautioned against applying cases involving the homestead exemption from taxes to preclude, as a matter of law, a nonimmigrant alien from establishing residency for the purpose of seeking a divorce. *See, e.g.*, Weber v. Weber, 929 So. 2d 1165, 1169 (Fla. 2d DCA 2006). In Weber, the Second District explained that cases involving the homestead exemption from taxes and attachment by creditors raise significantly different and unique policy issues from a case involving a nonimmigrant alien legally in the state and hoping to remain from seeking dissolution of marriage. Id. The presumption regarding a minor's domicile can be rebutted in divorce proceedings resulting in a court-ordered determination of residency, or in cases where guardians are appointed. But the presumption regarding a minor's domicile involved in those types of cases is not applicable here.

The record in this case establishes that the property is being used as a homestead for the children of the legal owner of the property. The facts

establishing the use of the property as a homestead and the entitlement of the children under article VII, section 6(a) to the exemption are uncontroverted.

The presumption regarding a minor's domicile can be rebutted in divorce proceedings resulting in a court-ordered determination of residency, or in cases where guardians are appointed. The presumption regarding a minor's domicile involved in those types of cases is not applicable in this case.

The central issue before this Court is, therefore, whether real property can qualify under article VII, section 6(a) for the homestead exemption where the homeowners, who are citizens of another country, lawfully residing in the United States and Florida pursuant to a temporary visa, declare the real property to be the permanent residence of their minor children, who are United States and Florida citizens.

CONCLUSION

This Court should determine whether the decision of the Third District is incorrect under Florida's constitutional homestead exemption provision.

Respectfully Submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Joseph C. Mellichamp, III
Scott D. Makar (FBN 709697)
Solicitor General
Joseph C. Mellichamp, III (FBN 133249)
Chief Assistant Attorney General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 410-2672 (fax)

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that this notice is prepared in Times New Roman 14-point font consistent with Florida Rule of Appellate Procedure 9.210, and that a true copy of the foregoing has been served by U.S. Mail to the Florida Supreme Court this 19th day of September, 2011 and sent by U.S. Mail this 19th day of September, 2011, to: Melinda S. Thornton, Esq. and Shanika A. Graves, Esq., Assistant County Attorneys, Office of Miami-Dade County Attorney, 111 NW 1st Street, Suite 2810, Miami, Florida 33128 (Counsel for Petitioner Pedro Garcia as Property Appraiser of Miami-Dade County); Daniel A. Weiss, Esq., Tannebaum Weiss, PL (Counsel for Respondents David and Ana Andonie), Museum Tower - Penthouse 2850, 150 West Flagler Street, Miami, FL 33130; Kenneth P. Hazouri, Esq., de Beaubien,

Knight, Simmons, Mantzaris & Neal, LLP, 332 N. Magnolia Avenue, Orlando, Florida 32801 (Counsel for Orange County Property Appraiser, Bill Donegan); Thomas M. Findley, Esq. and Robert J. Telfer, III, Esq., Messer, Caparello & Self, P. O. Box 15579, Tallahassee, Florida 32317 (Counsel for Amicus Curiae Florida Association of Property Appraisers); and Loren E. Levy, Esq. and Ana C. Torres, Esq., The Levy Law Firm, 1828 Riggins Lane, Tallahassee, Florida 32308 (Counsel for Amicus Curiae The Property Appraisers' Association of Florida, Inc.).

/s/ Joseph C. Mellichamp, III
Attorney