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IN THE SUPREME COURT FOR THE STATE OF FLORIDA

CASE NO: SC16-1312
L.T. CASE NOS.: 4D14-1436
502013DR002143

IN RE: ANNULMENT OF MARRIAGE OF:

GLENDA MARTINEZ SMITH,

Petitioner / Appellant,

v.

J. ALAN SMITH,

Respondent / Appellee.

AMICUS BRIEF OF THE ELDER LAW SECTION OF THE FLORIDA BAR and ACADEMY OF FLORIDA ELDER LAW ATTORNEYS

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PRELIMINARY STATEMENT

This is an appeal by Glenda Martinez Smith, Petitioner/Appellant, from an Order of the Fourth District Court of Appeal entered on June 29, 2016 granting Appellant's motion to certify a question of great public importance.

Throughout this brief Glenda Martinez Smith will be referred to as "Appellant" or by name. J. Alan Smith will be referred to as "Ward" or by name. Mr. Cramer will be referred to as "Guardian" or by name. The Elder Law Section of the Florida Bar will be referred to as "the Section". The Academy of Florida Elder Law Attorneys will be referred to as "AFELA".

The following references will be used in this brief:

[A.] Appellant's Appendix to Initial Brief filed in the Fourth District Court of Appeal.

[AA.] Petitioner's Appendix to Initial Brief filed in the Florida Supreme Court.

[R.] Record on Appeal.

[V.] Citations to excerpts from the hearing transcripts will include the volume number ("V") from the index to the record on appeal followed by the appropriate page number(s) appearing in the transcript.

STATEMENT OF INTEREST

I. The Elder Section of the Florida Bar

This filing was approved by the Executive Committee of the Board of Governors of The Florida Bar on September 26, 2016 consistent with applicable standing board policies, and further premised on the declaration that this appearance is by the Elder Law Section of The Florida Bar, wholly supported by the separate resources of that voluntary organization - not in the name of The Florida Bar - and does not otherwise implicate the membership fees paid by every Florida Bar licensee. The Elder Law Section received the Florida Bar's approval to brief only the separation of powers issue.

The Elder Law Section is comprised of approximately 1625 Florida lawyers who principally practice in the areas of elder law and disability law and who are dedicated to serving all Florida lawyers and the public in these fields of practice. The Section produces educational materials and seminars, drafts legislation and rules of procedure, provides pro bono services and, on occasion, seeks to file an *amicus* brief on issues related to the Section's fields of practice. The Section is interested in this case because the issue will impact an important aspect of elder and disability law: whether a marriage entered into by a person whose right to marry

has been made subject to court approval, due to the removal of the right to contract, is void or merely voidable.

II. Academy of Florida Elder Law Attorneys

The Academy of Florida Elder Law Attorneys ("AFELA") is a state chapter of the National Academy of Elder Law Attorneys, a national organization of public and private sector attorneys dealing with legal issues affecting people as they age and people with disabilities. AFELA was founded in 1993. It is a not-for-profit organization formed as a 501(c)(6).

AFELA consists of 345 elder law attorney members, most of whom are private practice elder law attorneys in Florida, who practice in the areas of guardianship; health and personal care planning; family issues; fiduciary representation; estate planning; probate; government benefit eligibility and age or disability planning. Over 95% of AFELA members are also members of the Florida Bar's Elder Law Section.

AFELA desires to assist the Court in the disposition of this case as Court's interpretation of guardianship law and its interplay with the Florida and the United States Constitution is very important to AFELA's members and the citizens of Florida.

SUMMARY OF ARGUMENT

The trial court and the Fourth DCA correctly held the marriage was void.

The requirement of court approval under Section 744.3215(2)(a), Florida Statutes would be ineffective if a marriage entered into by a person whose right to contract has been removed, but who has not obtained court approval, were considered voidable, not void. A voidable marriage exists without court approval and, if not disapproved by the court while both the ward and the ward's alleged spouse are living, will remain valid regardless of whether court approval is ever granted, rendering Section 744.3215(2)(a), Florida Statutes ineffective. A void marriage cannot exist in the absence of court approval, as is required by statute, and is a nullity which cannot be cured by ratification.

The certified question should be answered as follows:

Where the fundamental right to marry has not been removed from a ward under Section 744.3215(2)(a), Florida Statutes, but the right to contract has been removed, the right to marry is subject to court approval which must be obtained prior to exercising the right to marry or the purported marriage which results will be void ab initio.

ARGUMENT

I. Court Approval must be obtained prior to the act of marriage or the plain and obvious meaning of the statute would be rendered ineffective.

Standard of Review

"The interpretation of a statute is a purely legal matter and therefore subject to the de novo standard of review." Davila v. State, 75 So. 3d 192, 195 (Fla. 2011).

Section 744.3215(2)(a), Florida Statutes is clear and unambiguous and has a plain and obvious meaning, to wit: "If the right to enter into a contract has been removed, the right to marry is subject to court approval." Appellant does not dispute court approval is required, but argues the absence of the word "prior" in the statute allows for ratification of a marriage entered into without court approval.

In order for it to be possible to ratify a marriage entered into by a person whose right to contract has been removed, but who has not obtained court approval, such a marriage would have to be voidable, not void, as a void marriage is a nullity not subject to subsequent ratification. "… the term 'void' can only be properly applied to those contracts that are of no effect whatsoever, such as are a mere nullity, and incapable of confirmation or ratification." Pitts v. Pastore, 561 So. 2d 297, 300 (Fla. 2d DCA 1990)

"… marriages are considered as being either void or voidable, depending upon the circumstances involved." Jones v. Jones, 161 So. 836, 829 (Fla. 1935) Legal precedent, historical context and the mechanical application of Section

744.3215(2)(a), Florida Statutes all provide guidance for determining whether such a marriage is in fact void or voidable.

"… modern civilization strongly condemns the harsh doctrine of ab initio sentences of nullity… [A] marriage is considered voidable, rather than void… when it is possible for the parties to ratify it when there has been removed a disabling or voiding impediment which was unknown to both parties at the time the invalid marriage was originally contracted…" Jones v. Jones, 161 So. 836, 830 (Fla. 1935) The record on appeal clearly indicates the voiding impediment to marriage, the lack of court approval, was known to Glenda at the time of the invalid marriage, rendering the marriage void, not voidable. [V.4, T.34]

Historically, incapacity has always been among the rare circumstances which render a marriage void. "At the common law, the canonical disabilities of consanguinities, affinity, and impotence rendered the marriage voidable and not void, while insanity rendered it absolutely void… marriage with an idiot or lunatic be absolutely void…" Kuehmsted v. Turnwall, 138 So.775, 777 (Fla. 1932)

Application of Section 744.3215(2)(a), Florida Statutes demonstrates it is only effective if a marriage entered into without court approval is void. "Although the validity of a void marriage may be asserted in either a direct or collateral proceeding and at any time, either before or after the death of the husband, the wife or both, a voidable marriage is good for every purpose and can only be attacked in a direct

proceeding during the lifetime of the parties." Kuehmsted v. Turnwall, 138 So.775, 777 (Fla. 1932) "Upon the death of either party, the marriage is good *ab initio*." Arnelle v. Fisher, 647 So.2d 1047, 1048 (Fla. 5th DCA 1994) These limitations on disaffirmation of a marriage that is only voidable allow for circumstances wherein a marriage entered into by a person whose right to contract has been removed, but who has not obtained court approval, would nonetheless stand as valid, defeating the statute's clear and unambiguous requirement of court approval.

"A court's purpose in construing a statute is to give effect to legislative intent, which is the polestar that guides the court in statutory construction." Davila v. State, 75 So. 3d 192, 195 (Fla. 2011) "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning ... the statute must be given its plain and obvious meaning." Id. The courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications." Id. Appellant's argument is predicated upon such a marriage entered into by a person whose right to contract has been removed, but who has not obtained court approval, being deemed voidable, not void, but such a conclusion would clearly modify and limit the express terms of the statute and its reasonable and obvious implications and would defeat the statute's plain and obvious meaning.

Judge Warner's dissent

In her dissent from March 2, 2016 Judge Warner asks, "What is the harm to allowing a court to determine post-marriage whether the elderly person understands that he is married and ensure that he has not been taken advantage of financially by the marriage?" [AA.1, p.9]

In his dissent from June 29, 2016 Judge Damoorgian provided a general answer, "… the condition precedent imposed on the ward's right to marry is not unduly burdensome. The implication of the majority's certified question is to allow a ward to be victimized and then have the court system unravel the mess." [AA.2, p.2]

The potential harm posed by finding a marriage entered into by a person whose right to contract has been removed, but who has not obtained court approval, voidable is considerable. The new spouse will acquire the right to seek support from the ward under Section 744.397, Florida Statutes and Section 744.421, Florida Statutes, as well as the right to claim an elective share from the ward's estate under Section 732.201 Florida Statutes. Under Section 744.3725(1), Florida Statutes the ward's guardian will be obligated to seek appointment of independent counsel for the ward to pursue ratification of the marriage and, under Section 744.20041, Florida Statutes and the rules of the newly established Office of Public and Professional Guardians, may be obligated to pursue disaffirmation of

the marriage unless and until there is sufficient evidence to establish the marriage is in the ward's best interest and comports with the ward's desires.

Judge Warner also notes, "The provision requiring court approval is a late addition to the statute." [AA.1, p.8] Prior to 2006 the right to marry was removable, but not delegable, without mention of the right to contract. This meant a court had only two choices when determining incapacity to marry: a) remove the right to marry and deny the ward any future opportunity to wed, or; b) do not remove the right and deny the ward any protection from "exploitation by matrimony". The 2006 legislature reinforced "the significance of the right to marry" by giving the court an option which preserves a ward's potential to marry while still affording the ward protection from exploitation, making the right to marry subject to court approval if the right to contract has been removed.

II. The Ward's court appointed counsel had no authority to petition for annulment; and it was a conflict of interest for the ward's counsel to represent the ward's guardian in the annulment proceeding.

The Section and AFELA take no position herein regarding Appellant's second argument regarding the actions of the Ward's court-appointed attorney.

III. Due process of the ward was not sufficiently protected

The Section and AFELA no position herein regarding Appellant's third argument regarding due process of the Ward.

CONCLUSION

For all the foregoing reasons, the Section and AFELA respectfully request that the certified question be answered as follows:

Where the fundamental right to marry has not been removed from a ward under Section 744.3215(2)(a), Florida Statutes, but the right to contract has been removed, the right to marry is subject to court approval which must be obtained prior to exercising the right to marry or the purported marriage which results will be void ab initio.

Respectfully Submitted on September 26, 2016,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type in this brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 26, 2016 a true copy of the foregoing was furnished via transmission through the Florida Supreme Court E-Filing Portal to the email addresses of the following:

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