

IN THE
SUPREME COURT OF FLORIDA

CONSOLIDATED CASE NOS. SC15-1881 & SC16-589
4DCA Case No. 4D13-1841
15th Cir. Case No. 502010DR004790XXXXNB

NANCY HOOKER,
Petitioner/Cross-Respondent,

v.

TIMOTHY I. HOOKER,
Respondent/Cross-Petitioner.

**AMICUS CURIAE BRIEF OF THE FLORIDA BANKERS ASSOCIATION
IN SUPPORT OF RESPONDENT/CROSS-PETITIONER'S
MOTION FOR REHEARING**

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STATEMENT OF INTEREST

Amicus Curiae, Florida Bankers Association (“FBA”), is a voluntary organization that represents the interests of lenders in Florida and is composed of more than 300 banks and financial institutions ranging in size from small community banks and thrifts, to medium sized banks operating in several parts of the state, to large regional financial institutions that are headquartered in Florida or outside the state. The FBA regularly represents the interests of its members before all branches of the government and frequently appears as *Amicus Curiae* in the state and federal courts in order to present the interests of its membership on issues of great import.

The issue in this appeal relating to the effect of a non-owner spouse’s joinder in a conveyance of homestead property on the classification of the homestead property, where the non-owner is subject to a prenuptial agreement, is a matter of great public importance. It is also of particular importance to the FBA and its members because a large part of FBA members’ business is making residential mortgage loans. The Court’s March 30, 2017 Opinion (the “Opinion”) holds that a non-owner spouse’s joinder in a conveyance of homestead property constitutes competent, substantial evidence that the homestead property is marital—and subject to equitable distribution—as a result of an interspousal gift, even though (1) the homestead property was purchased with the premarital assets of the other spouse and titled in the other spouse’s name alone, and (2) the spouses executed a prenuptial

agreement providing that, upon dissolution, each spouse would retain his or her premarital assets and any appreciation of those assets.

The Court's holding harms the residential mortgage lending market and, in turn, the housing market, in two distinct ways: First, by deterring potential residential borrowers who are married and subject to prenuptial agreements from entering into residential mortgage loans; and second, by increasing the transaction costs associated with residential mortgage loans, which costs are passed on to borrowers. Moreover, the Court's holding may discourage married individuals subject to prenuptial agreements from purchasing real property to establish homesteads for their families, which contradicts the public policy underlying Florida's homestead laws. Thus, the proper resolution of this case is of great interest not only to the FBA, but also to the citizens of Florida.

SUMMARY OF THE ARGUMENT

The FBA respectfully submits that the Court's Opinion incorrectly holds that Hickstead¹ was marital property subject to equitable distribution. The FBA takes issue with the Court's Opinion solely to the extent that its holding concerning the Hickstead property is based on Wife's signature on the Hickstead mortgage and the deed conveying Hickstead to Hooker Hollow. Because Wife had already waived her

¹ All capitalized terms herein have the same meanings as in the Court's Opinion, unless otherwise defined.

rights in Husband's premarital estate when she executed the prenuptial agreement, and because the validity of the prenuptial agreement is not disputed, Wife's joinder in conveyances of Hickstead (either by mortgage or by deed) should not be considered competent, substantial evidence of Husband's intent to gift Hickstead to Wife.

This is because the Florida Constitution *requires* non-owner spouses to join in conveyances of homestead property. Even though non-owner spouses may be entitled to waive their homestead rights in a prenuptial agreement, non-owner spouses are still required to join in conveyances of homestead property as a matter of course by the residential mortgage lending and title insurance industries. Thus, without the non-owner spouse's joinder in any conveyance of homestead property, a title insurance policy will not issue, and a residential mortgage loan will not be made.

Accordingly, where the non-owner spouse is subject to a prenuptial agreement, his or her joinder in a conveyance of homestead property is not necessarily evidence of the owner spouse's donative intent inasmuch as it is evidence of a residential mortgage lending industry standard. Therefore, this Court should grant rehearing and issue a revised opinion regarding the classification of Hickstead as marital property. The FBA respectfully requests that the revised opinion clarify that Wife's signatures on the Hickstead mortgage and the deed

conveying Hickstead to Hooker Hollow do not constitute competent, substantial evidence that Hickstead was an interspousal gift and, therefore, included in the marital estate subject to equitable distribution.

STANDARD OF REVIEW

The FBA agrees with this Court that the standard of review on appeal is competent, substantial evidence. The purpose of a motion for rehearing is to apprise a court of “the points of law or fact that the court has overlooked or misapprehended.” *Brennan v. State*, 754 So. 2d 1, 6 n. 4 (Fla. 1999) (quoting Fla. R. App. P. 9.330(a)).

ARGUMENT

I. THE COURT SHOULD GRANT REHEARING AND ISSUE A REVISED OPINION REGARDING THE CLASSIFICATION OF HICKSTEAD AS MARITAL PROPERTY.

In its Opinion, the Court affirmed in part and quashed in part the opinion of the Fourth District Court of Appeal, which resulted in a reinstatement of the trial court’s Amended Final Judgment. [Op., p. 21] The trial court’s Amended Final Judgment determined, in relevant part, that Hickstead was marital property subject to equitable distribution because Husband gifted Hickstead to Wife during the marriage. [Op., p. 19]

This Court found that the trial court’s determination was supported by competent, substantial evidence in the record, including the following:

- (1) Husband and Wife both signed the mortgage on Hickstead [Op., p. 15];
- (2) Hickstead was the parties' marital residence throughout the vast majority of the marriage, and it was where the parties raised their children and lived as a family [Op., p. 15];
- (3) Wife was extremely and directly involved in all aspects of Hickstead, which was the family's primary home for 20 years [Op., p. 16];
- (4) Hickstead was conveyed to Hooker Hollow, which was created by Husband during the marriage to hold Hickstead [Op., p. 16];
- (5) Wife signed the deed, closing documents, and sale documents conveying Hickstead to Hooker Hollow [Op., p. 16]; and
- (6) Husband told Wife that it was in their best interests to convey Hickstead to Hooker Hollow [Op., p. 18].

This Court expressly held that “[w]hile one [of the above-listed] factor[s] independently—such as Wife signing the Warranty Deed or being listed on the mortgage, or Wife’s unfettered access to and autonomy in residing, maintaining, and improving Hickstead—does not establish an interspousal gift for purposes of equitable distribution in a dissolution of marriage,” the factors taken together constituted competent, substantial evidence supporting the trial court’s finding that Hickstead was marital property subject to equitable distribution.

However, Wife’s signatures on the Hickstead mortgage and on the deed conveying Hickstead to Hooker Hollow cannot constitute competent, substantial evidence to support the trial court’s finding because Wife waived her rights in Husband’s premarital property when she executed the prenuptial agreement, and

Hickstead was part of Husband's premarital estate. Thus, Wife's signatures on the Hickstead mortgage and on the deed conveying Hickstead to Hooker Hollow are no more than a reflection of a residential mortgage lending industry standard arising out of Florida's homestead laws and not a reflection of Husband's donative intent.

Accordingly, this Court should grant rehearing and issue a revised opinion regarding the classification of Hickstead as a marital asset, omitting any reliance on evidence in the record of Wife's signatures on the Hickstead mortgage or the deed conveying Hickstead to Hooker Hollow.

A. The Florida Constitution Requires Spouses to Join in Conveyances of Homestead Property.

The Florida Constitution defines and protects owners of homestead property, along with their spouses and minor children (if any) in three distinct ways: (1) by providing an exemption from taxes; (2) by precluding creditors from forcing a sale of the homestead property; and (3) by restricting the owner's ability to alienate or devise the homestead property. *See Snyder v. Davis*, 699 So. 2d 999, 1001-02 (Fla. 1997) (footnotes omitted).

The third protection for homestead property—protection from alienation or devise—is germane to this case and is governed by Article X, Section 4(c) of the Florida Constitution, which provides, in relevant part:

The owner of homestead real estate, *joined by the spouse if married*, may alienate the homestead by mortgage, sale or gift

Fla. Const. art. X, § 4(c) (emphasis added). Thus, in Florida, homesteads are regarded as “sacred cows” and cannot be alienated to the detriment of the interests of those meant to be protected by their very character as homesteads. *In re Gatto*, 380 B.R. 88, 92 n.4 (Bankr. M.D. Fla. 2007) (citing *Daniels v. Katz*, 237 So. 2d 58, 60 (Fla. 3d DCA 1970)).

Accordingly, homestead property may not be alienated to a third party, including by mortgage, sale, or gift, unless *both* spouses join in the conveyance of the homestead, *even where* the homestead is owned by only one spouse. *See, e.g., Jameson v. Jameson*, 387 So. 2d 351, 353 (Fla. 1980). Any purported conveyance of the homestead *not* in compliance with Article X, Section 4(c) of the Florida Constitution is void or voidable. *See, e.g., Robbins v. Robbins*, 360 So. 2d 10, 11-12 (Fla. 2d DCA 1978).

B. Although Non-Owner Spouses are Required to Join in Conveyances of Homestead Property, Homestead Status Does Not Confer Property Rights on Non-Owner Spouses.

Under Florida law, homestead is simply a “status” that confers no additional property rights. *In re Reinhard*, 377 B.R. 315, 319 (Bankr. N.D. Fla. 2007) (applying Florida law). Generally, real property acquires the homestead “status” after title is acquired thereto and a home is established thereon. *See, e.g., In re Rogers*, 396 B.R. 100, 103 (Bankr. M.D. Fla. 2008) (citing *In re Magelitz*, 386 B.R. 879, 883 (Bankr. N.D. Fla. 2008)). “[N]o action of the Legislature or declaration or other act on [the]

part [of the owner is] required to make it his [or her] homestead.” *Turner*, 130 So. at 624; *see also Magelitz*, 396 B.R. at 883 (characterizing Florida’s homestead status as “self-executing”).

Accordingly, “homestead status in Florida is *not* properly conceptualized as a stick in the bundle [of property rights]; rather, it is a protective safe in which the bundle [of property rights] is put.” *Reinhard*, 377 B.R. at 319 (emphasis added). Indeed, it has long been settled that “the homestead provisions of the Florida Constitution do not create property rights in the [owner’s] husband, wife or children.” *Weitzner v. U.S.*, 309 F.2d 45, 48 (5th Cir. 1962) (applying Florida law); *see also Reed v. Fain*, 145 So. 2d 858, 868 (Fla. 1961), *on rehearing* (characterizing interests of non-owner spouses and minor children in homestead property as “inchoate” as opposed to “vested” because they are “incipient, dependent and contingent” on owner’s death).

C. Non-Owner Spouses are Entitled to Waive Their Homestead Rights in a Valid Prenuptial Agreement.

Under Florida law, non-owner spouses are entitled to waive their homestead rights. *See* §§ 61.079(4)(a)(1), (2), Fla. Stat. (“Parties to a premarital agreement may contract with respect to: 1. The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located; 2. The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend,

assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property”)

Waiver of homestead rights is typically discussed in the context of “devises.” The Florida Probate Code defines “devise” as “a testamentary disposition of real or personal property,” when used as a noun, and “to dispose of real or personal property by will or trust,” when used as a verb. *Id.* at § 731.201(10). Article X, Section 4(c) of the Florida Constitution—the same section that requires non-owner spouses to join in conveyances of homestead property—prohibits homestead property from being “subject to devise if the owner is survived by a spouse or minor child, except the homestead may be devised to the owner’s spouse if there is no minor child.” Fla. Const. art. X, § 4(c).

However, notwithstanding Article X, Section 4(c) of the Florida Constitution, homestead property *can* be devised if the non-owner spouse waives his or her homestead rights (and the owner is not survived by any minor children). *See id.* at § 732.702 (“The rights of a surviving spouse to . . . homestead . . . may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver signed by the waiving party in the presence of two subscribing witnesses.”). Such a waiver of homestead rights is the “legal equivalent of [the non-owner spouse] predeceasing the owner.” *City National Bank of Florida v. Tescher*, 578 So. 2d 701, 703 (Fla. 1991).

The Fifth District Court of Appeal has extended this logic to the right of a non-owner spouse to join in any conveyance of homestead property. *See James v. James*, 843 So. 2d 304, 307 (Fla. 5th DCA 2003). In other words, where the non-owner spouse executes a valid prenuptial agreement waiving his or her homestead rights, the owner is entitled not only to devise the homestead property (assuming the owner is not survived by any minor children), but also to convey the homestead property without the non-owner spouse's joinder. *See id.* (“It follows that a waiving spouse's joinder on a conveyance of homestead property by the owner is *not* required to pass title.”) (emphasis added). Even so, and as noted below, the residential mortgage lending industry requires such joinder regardless of whether there is a prenuptial agreement.

D. The Residential Mortgage Lending Industry Requires Non-Owner Spouses to Join in Conveyances of Homestead Property, Regardless of Whether They Previously Waived Their Homestead Rights.

Even if non-owner spouses who waived their homestead rights may not be *constitutionally* required to join in conveyances of homestead property (as held by the Fifth District Court of Appeal in *James*), they are required to do so by the residential mortgage lending industry. Indeed, Fund Title Note 16.04.14 answers the following question in the negative:

Whether a waiver of homestead rights by a valid nuptial agreement can be relied on to dispense with spousal joinder in a mortgage or alienation of homestead property by the owner.

Attorneys' Title Ins. Fund, Title Note 16.04.14. Accordingly, without the non-owner spouse's joinder in any conveyance of homestead property, a title insurance policy will not issue, and residential mortgage financing will not be able to be secured.

Therefore, where homestead rights have been waived, a non-owner spouse's joinder in a conveyance of homestead property is reflective of Florida's homestead protections as implemented by the residential mortgage lending industry, and not of the owner spouse's intent to gift the homestead property to the non-owner spouse. As such, a non-owner spouse's joinder in a conveyance of homestead property should not be considered competent, substantial evidence supporting a determination that the homestead property was intended to be converted from nonmarital property to marital property, especially since the non-owner spouse's homestead rights confer no actual ownership rights in the homestead property.

E. This Court's Opinion Contradicts the Longstanding Public Policy Underlying Florida's Homestead Laws.

Florida's homestead protections are supposed 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." *McKean v. Warburton*, 919 So. 2d 341, 344 (Fla. 2005) (quotation omitted). This purpose derives from public policy rather than principles of equity. *See Traeger v. Redit First Nat. Ass'n*, 864 So. 2d 1188, 1190 (Fla. 5th DCA 2004). Thus, equitable

principles, including the principles of equitable distribution, cannot operate to nullify a homestead interest. *See Rutherford v. Gascon*, 679 So. 2d 329, 331 (Fla. 2d DCA 1996).

By finding that a non-owner spouse's joinder in a conveyance of homestead property constitutes competent, substantial evidence supporting a determination that the homestead property is an interspousal gift and part of the marital estate subject to equitable distribution, even where the non-owner spouse previously waived his or her homestead rights by executing a prenuptial agreement, the Court's Opinion converts a homestead protection into a homestead deterrent—it discourages married individuals subject to prenuptial agreements from purchasing real property to establish homesteads for their families.

CONCLUSION

For the reasons expressed in this *Amicus Curiae* Brief and the Motion for Rehearing filed by Respondent/Cross-Petitioner Timothy I. Hooker, *Amicus Curiae* Florida Bankers Association respectfully requests that this Court grant rehearing and issue a revised opinion clarifying that Wife's signatures on the Hickstead mortgage and the deed conveying Hickstead to Hooker Hollow do not constitute competent, substantial evidence that Hickstead was an interspousal gift and, therefore, included in the marital estate subject to equitable distribution.

Respectfully submitted,

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STRICTLY CONFIDENTIAL

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the *Amicus Curiae* Brief of Florida Bankers Association, complies with the requirements of Rule 9.210, Fla. R. App. P., and is printed in Times New Roman 14-point font.

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