Third District Court of Appeal

State of Florida

Opinion filed December 4, 2019.

No. 3D18-1505
Lower Tribunal No. 18-591

Pauline Walters, as the personal representative of The Estate of Enid May Townsend,
Appellant,

vs.

Agency for Health Care Administration,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Maria M. Korvick, Judge.

Law Office of Dexter F. George, and Dexter F. George (Plantation), for appellant.

Alexander R. Boler (Tallahassee), for appellee.

Before EMAS, C.J., and SALTER and LOBREE, JJ.

EMAS, C.J.

ON MOTION FOR REHEARING, REHEARING EN BANC AND CERTIFICATION

We deny appellant's motion for rehearing and rehearing en banc, withdraw our previously-issued opinion and substitute the following in its stead:

Enid Townsend ("Decedent") died on August 29, 2017. She left behind, as her sole heir, her adult daughter Pauline Walters ("Walters"). In February 2018, Walters petitioned the probate court for summary administration of the Decedent's intestate estate, the sole asset of which was the Decedent's interest in a cooperative apartment in North Miami Beach. The petition for summary administration listed this asset as "Cooperative Stock, 16900 NW 14th Avenue, Apt. 203, North Miami Beach, FL 33162" and described it as being "PROTECTED HOMESTEAD." Walters sought distribution of this asset to her, despite the existence of at least one creditor.

Walters also petitioned the probate court to determine the homestead status of the cooperative stock and alleged that "the Property constituted the homestead of the decedent within the meaning of the Constitution of the State of Florida." Walters requested that the court enter an order determining that "the Property" constituted exempt homestead of the Decedent, that title descended to Walters upon Decedent's death, and that the constitutional exemption from claims inured to Walters' benefit at that time.

Following notice to creditors (which included appellee, the Agency for Health Care Administration ("AHCA")), AHCA filed a statement of claim against the estate

in the amount of $81,276.76, and objected to Walters' petition for homestead protection as to "the Property," asserting that the cooperative stock was not entitled to homestead protection because it was not a fee simple interest in land as required by law. See Art. X, § 4, Fla. Const.; § 732.401, Fla. Stat. (2017).

Following a hearing, the trial court denied Walters' petition to declare the cooperative stock homestead property, relying upon In re Wartels' Estate, 357 So. 2d 708 (Fla. 1978) and Phillips v. Hirshon, 958 So. 2d 425 (Fla. 3d DCA 2007). This appeal followed, and we review the court's order denying homestead protection de novo. Spector v. Spector, 226 So. 3d 256 (Fla. 4th DCA 2017).

As the Florida Supreme Court has previously explained:

> Our constitution protects Florida homesteads in three distinct ways. First, a clause, separate and apart from the homestead provision applicable in this case, provides homesteads with an exemption from taxes. Second, the homestead provision protects the homestead from forced sale by creditors. Third, the homestead provision delineates the restrictions a homestead owner faces when attempting to alienate or devise the homestead property.

Snyder v. Davis, 699 So. 2d 999, 1001-02 (Fla. 1997).

Walters asserts that the instant case involves a forced sale, while AHCA contends it falls into the category of devise and descent. Such a distinction is significant because the Florida Supreme Court (in Wartels), and this court (in Hirshon), held that a cooperative apartment cannot be considered homestead property for the purpose of descent and devise because it does not constitute "an

interest in realty." See Wartels, 357 So. 2d at 711 (holding "a cooperative apartment may not be considered homestead property for the purpose of subjecting it to Florida Statutes regulating the descent of homestead property"); Hirshon, 958 So. 2d at 430 (adhering to Wartels while questioning its continued vitality in light of statutory changes to the law of cooperative apartments). See also § 196.041(1), Fla. Stat. (2017) (providing that "a tenant-stockholder or member of a cooperative apartment corporation who is entitled solely by reason of ownership of stock or membership in the corporation to occupy for dwelling purposes an apartment in a building owned by the corporation, for the purpose of homestead exemption from ad valorem taxes and for no other purpose, is deemed to have beneficial title in equity to said apartment and a proportionate share of the land on which the building is situated") (emphasis added).

Notably, this court in Hirshon observed that "following the date of the operative factual scenario under which Wartels was decided, the Florida legislature adopted a new Cooperative Act, Chapter 719, Florida Statutes . . . which places co-ops on equal footing with all other 'interest[s] in realty', as defined by Wartels, which have long been eligible to be impressed with the character of homestead for the purposes of devise and descent. . . ." Hirshon, 958 So. 2d at 428.

And though our opinion in Hirshon questioned the continued vitality of the Florida Supreme Court's decision in Wartels, we nevertheless concluded in that case

that "our proper institutional role obligates us to adhere to Wartels" and that "[t]he better course is to affirm and certify." Id. at 429-30. We therefore affirmed the trial court's order in Hirshon and held that the decedent's cooperative apartment could not be considered homestead property for the purpose of devise and descent. And in light of the post-Wartels statutory changes, we also certified the following question to the Florida Supreme Court, as one of great public importance:

> 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?

Id. at 430. After initially accepting jurisdiction, the Florida Supreme Court exercised its discretion and discharged jurisdiction of the cause. See Levine v. Hirshon, 980 So. 2d 1053 (Fla. 2008).

We affirm the order below, and conclude that the instant case is not a forced sale but, as in Wartels and Hirshon, instead falls within the devise and descent category.[1] We continue to adhere to the Florida Supreme Court's decision in Wartels, and to our own decision in Hirshon, and affirm the trial court's denial of Walters' petition to declare the cooperative stock to be homestead property. We recognize that, under circumstances similar to the instant case, the Second District,

[1] Conversely, the Fifth District has held that the owner of a cooperative apartment is exempt from forced sale by a creditor under Florida's homestead protections. See Southern Walls, Inc. v. Stilwell Corp., 810 So. 2d 566 (Fla. 5th DCA 2002).

in Geraci v. Sunstar EMS, 93 So. 3d 384 (Fla. 2d DCA 2012), held that the homestead protection at issue was a forced sale rather than a devise and descent, and held that the decedent's condominium was homestead property for purposes of the exemption from forced sale even though it did not constitute a fee simple interest in land.[2] We therefore certify conflict with our sister court's decision in Geraci. We also certify, as a question of great public importance, the same question certified by this court in Hirshon:

> 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?

[2] The Florida Supreme Court after initially accepting jurisdiction based on an asserted conflict with Hirshon, later exercised its discretion and discharged jurisdiction. See Sunstar EMS v. Geraci, 129 So. 3d 1069 (Fla. 2013) (Table).