Third District Court of Appeal

State of Florida, January Term, A.D. 2011

Opinion filed February 9, 2011.
Not final until disposition of timely filed motion for rehearing.

No. 3D10-1532
Lower Tribunal No. 08-4773

Richard J. Habeeb, as Personal Representative of the Estate of Mitchell Habeeb, deceased,
Appellant,

vs.

Catherine Risk Linder, as Personal Representative of the Estate of Virginia Habeeb, deceased,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Celeste Hardee Muir, Judge.

Rohan Kelley (Fort Lauderdale); George Elias, Jr., for appellant.

Goldman Felcoski & Stone, and Robert W. Goldman (Naples), for appellee.

Before SUAREZ, ROTHENBERG, and SALTER, JJ.

SALTER, J.

Richard J. Habeeb, as personal representative of the estate of Mitchell Habeeb, appeals from a summary judgment order finding that a warranty deed executed by Mitchell and his spouse Virginia conveying their marital homestead to Virginia relinquished all spousal homestead rights Mitchell had in the property. We affirm.

Facts

Mitchell and Virginia Habeeb were married for approximately fifty years until Virginia died in 2008. In 1973, the couple took title to a Key Biscayne condominium unit as tenants by the entireties. The condominium unit was their residence and Florida homestead. In 1979, Mitchell and Virginia executed a warranty deed granting to Virginia a fee simple interest in the homestead property. The deed did not include a provision containing the terms "waiver" and "homestead rights," but it did contain the traditional, sweeping terms of a warranty deed.[1]

In 2006, Virginia executed a will devising a life estate in the condominium unit to Mitchell, with the remainder to her sister Betty. Under the will, Mitchell also received the residuary estate. The couple continued to live in the Key

[1] The warranty deed, a "Ramco Form 01," was a pre-printed form widely used by Florida practitioners in the days when "word processors" were human typists rather than compact machines. The all-encompassing terms of transfer provide that the grantor "grants, bargains, sells, aliens, remises, releases, conveys, and confirms" to the grantee "all that certain land," as well as "all the tenements, hereditaments and appurtenances thereto," "in fee simple forever."

Biscayne property until Virginia passed away in November 2008. Virginia was survived by both Mitchell and Betty. Mitchell died in January 2009, survived by six nephews, including Richard Habeeb (appellant and personal representative of Mitchell's estate). Betty died in July 2010, survived by her daughter Catherine Risk Linder (appellee and personal representative of Virginia's estate).

Mitchell's estate challenged the devise of the homestead property under Virginia's will. Mitchell's estate moved for a summary judgment striking the devise and determining that Virginia's fee simple interest in the condominium passed to Mitchell as her surviving spouse. The trial court denied the motion, and instead granted the appellee's cross-motion for summary judgment. The trial court concluded that Mitchell had relinquished his entire interest in the property in the 1979 warranty deed, including any spousal rights in the homestead. This appeal followed.

Analysis

The question presented, apparently one of first impression in Florida, is whether the 1979 warranty deed accomplished a complete transfer or waiver of Mitchell's homestead rights under article X, section 4(c) of the Florida Constitution. Expressed another way, the appellant argues that no such transfer or waiver of Mitchell's homestead interests was effectual in 1979 because the

warranty deed failed to satisfy the requirements of section 732.702(1), Florida Statutes (1979).

Section 732.702, as in effect in 1979,[2] states:

> **Waiver of right to elect and of other rights.**
>
> (1) The right of election of a surviving spouse, the **rights of the surviving spouse as intestate successor** or as a pretermitted spouse, and **the rights of the surviving spouse to homestead**, exempt property, and family allowance, or any of them, **may be waived**, wholly or partly, before or **after marriage**, **by a written contract, agreement, or waiver, signed by the waiving party. Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse**, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, **is a waiver of all rights to** elective share, **intestate share**, pretermitted share, **homestead property**, exempt property, and family allowance by each spouse in the property of the other **and a renunciation by each of all benefits that would otherwise pass to either from the other by intestate succession** or by the provisions of any will executed before the waiver or property settlement.
>
> (2) Each spouse shall make a fair disclosure to the other of his or her estate if the agreement, contract, or waiver is executed after marriage. No disclosure shall be required for an agreement, contract, or waiver executed before marriage.
>
> (3) No consideration other than the execution of the agreement, contract, or waiver shall be necessary to its validity, whether executed before or after marriage. (Emphasis added).

Among other alleged infirmities, the appellant argues that there is no indication that Mitchell and Virginia ever made "fair disclosure to the other of his

[2] The statute was amended after 1979, but those changes do not affect the analysis in this case.

or her estate" before the 1979 deed. The appellant also argues that Mitchell's joinder in the 1979 deed was insufficient to constitute a knowing, intelligent waiver of his constitutional rights.

"Fair Disclosure"

The 1979 deed was signed by both spouses many years into a long-term marriage and at a time when both occupied the condominium in question. The deed was prepared for them by a Florida attorney. Each spouse signed the instrument before two subscribing witnesses and a notary public. The spouses also later prepared last wills and testaments reflecting the intended disposition of their respective assets based on the assumption that the 1979 deed effectively relinquished Mitchell's property rights, including homestead interests, in the condominium.

A month after Virginia passed away in November 2008, Mitchell executed under oath a petition for administration of Virginia's estate and a petition to determine the continued homestead status of the condominium property. These documents further illustrated Mitchell's understanding that the 1979 deed had validly transferred all of his rights in the property to Virginia at that time, with the result that the devise of the property in her later will was also valid and effective.[3]

[3] Only when Mitchell passed away in January 2009 was it suggested that the 1979 deed failed to relinquish to Virginia, or waive, Mitchell's homestead rights.

From this record, the trial court properly concluded that the spouses made "fair" disclosure to each other, and there is certainly no evidence to the contrary.

Legal Sufficiency of the Transfer or Waiver

The appellant next invokes well-settled principles applied to the waiver of constitutional rights. First, when there is doubt whether a constitutional right has been waived, a presumption should be applied against the waiver.[4] Second, the waiver of a constitutional right requires (a) the existence of the right at the time of the waiver, (b) actual or constructive knowledge of the existence of the right, and (c) the voluntary and intentional relinquishment of that right, or conduct which implies the voluntary and intentional relinquishment of the right.[5]

In this case, however, section 732.702 provides more specific guidance regarding the waiver of the particular constitutional rights involved, namely, the constitutional rights of one spouse in a marital homestead. The statute establishes, and the warranty deed satisfied, the requisite elements of a valid waiver as a matter of law.

The statute itself contemplates that a "written contract, agreement, or waiver" may be used to memorialize a relinquishment of a spouse's homestead

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[4] The appellant cites this Court's decision to support this principle. In Loiselle v. Gladfelter, 160 So. 2d 740 (Fla. 3d DCA 1964), the Court addressed an alleged waiver of the constitutional right to trial by jury.

[5] The appellant primarily relies upon Raymond James Fin. Serv., Inc. v. Saldukas, 896 So. 2d 707 (Fla. 2005), and Winans v. Weber, 979 So. 2d 269 (Fla. 2d DCA 2007), for this principle.

rights. These alternatives demonstrate that "waive" is not a talismanic word within the statute, so that a contract or agreement may accomplish the same result. Neither the statute nor any interpretation of the statute supports the appellant's argument that Mitchell was required to execute a **second** "contract, agreement, or waiver" after (1) title had vested exclusively in Virginia's name, (2) she "formed the intention that the property would be her domicile or permanent residence," **and** (3) he survived her. To the contrary, the Florida Supreme Court has concluded that a spouse's single agreement under section 732.701(1) "is the legal equivalent of predeceasing the decedent, for purposes of article X, section 4(c)." City National Bank of Florida v. Tescher, 578 So. 2d 701, 702 (Fla. 1991). In that case, as here, the surviving spouse had waived homestead previously and no minor children survived the decedent.

Regarding the argument that Virginia had to reestablish an independent and subsequent intention to reside permanently in the condominium after recordation of the 1979 deed, her intention to continue residing (and her actual residency) in the condominium as her Florida homestead after the transfer is undisputed. As the simplest illustration, she listed the same condominium as her address as grantee in the 1979 deed. There is no evidence that she changed her residence at any time before her death.

The appellant is certainly correct that third-party lenders and buyers ordinarily require the joinder and consent of a spouse in a situation such as Mitchell's after the 1979 deed (married to the owner of record, but not himself on title). Title insurance underwriting requirements cited by the appellant require such a joinder and consent, even if the parties present a "valid nuptial agreement" relinquishing spousal homestead rights in conformance with section 732.702. In the case at hand, however, Virginia participated in and relied upon Mitchell's relinquishment of rights in the 1979 deed. Mitchell was not a third party, he was a trusted and trusting spouse in a cashless transaction. Virginia drafted her will granting Mitchell a life estate and her sister a remainder interest without a third-party's financial interests and compulsive need for both belt and suspenders.

Conclusion

Article X, section 4(c) of the Florida Constitution expressly authorizes a husband and wife to alienate their homestead property "by mortgage, sale or gift," and that is what both spouses did in 1979. In this case the term "heriditaments" in the 1979 warranty deed encompasses the homestead rights of each grantor as survivor. The term includes "anything capable of being inherited, whether it is corporeal, incorporeal, real, personal, or mixed." 42 Fla. Jur. 2d Property §7 (2010). The appellant's parade of horrible hypotheticals following such transactions (which he characterizes as "gotcha waivers") is also unavailing.

Spouses who have engaged attorneys to prepare warranty deeds from the two of them to one of them should not be subjected to post-mortem requirements—which they are obviously powerless to satisfy—in order to give effect to their written directives. As it relates to the condominium, the spouses' right to convey was clear, their intentions expressed in both the deed and Virginia's will were clear, and the result here is thus equally clear.

Affirmed.