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IN THE SUPREME COURT  
OF FLORIDA

CASE NO. 75,931

FLA. BAR NO. 037341

CITY NATIONAL BANK OF  
FLORIDA, et al.,

Petitioners/  
Appellants

vs.

DONALD R. TESCHER, etc.,  
et al.,

Respondents/  
Appellees

\_\_\_\_\_ /

APPELLANTS' REPLY BRIEF

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TABLE OF AUTHORITIES

Hulsh v. Hulsh, 431 So.2d 1658 (Fla. 3d  
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STATUTES

Article X, Section 4(c), Constitution of Florida. . . . . 4  
Section 732.4015, Florida Statutes (1987).. . . . . 4  
Rule 9.210(d), Rules of Appellate Procedure . . . . . 3

## ARGUMENT

Pursuant to the dictates of Rule 9.210(d) of the Rules of Appellate Procedure, the Appellants will simply answer the arguments of the Appellee's Brief without taking issue on any matters with respect to the facts in the case inasmuch as the parties appear to agree on the facts but have divergent views on the correct application of the law.

The guiding issue in this case appears to be the fact that the Appellees contend that the property settlement agreement by the decedent's spouse waiving all his rights in her property, including the homestead, was such that it precluded all other heirs of the decedent from an interest in real property that had been established as homestead. The fact that the surviving husband of the decedent executed a property settlement agreement and waived his rights in the decedent's property should not bind the other heirs of the decedent even though they were not minor children. The constitution did not direct or imply that the homestead is subject to devise if the owner is survived by a spouse who has waived his right in homestead property. A surviving spouse is a survivor whether or not he or she has or has not waived his or her rights in the homestead property.

In short, what the District Court of Appeal we respectfully suggest overlooked in the case sub judice was the fact that they were permitting the decedent's spouse to dictate the rights of heirs of the decedent to take an interest in the homestead property. A surviving spouse of the decedent has, of course, the

right to forego his or her rights in the property of the other spouse, but neither the constitution nor statute, Section 732.401(1) of Florida Statute confer the right or authority to waive the rights of the homesteader's lineal descendants in the homestead property, nor by his or her acts to change the effect of the constitutional requirement of descent and distribution so as to interdict the constitutional and statutory hereditary rights of the homesteader's lineal descendants. Although the spouse of the decedent in this case waived his rights of a life estate in his wife's homestead, she was nevertheless survived by a spouse, and under the constitution the result is that the homesteader could not devise the homestead and her attempts to do so are to have it devolve under a general residuary clause should be considered invalid.

Again, we stress the fact that the Appellee's position is not only inconsistent with a fair reading of the constitution and statutory provision, but causes a loss of a right and interest by surviving heirs by reason of the fact of their predecessor's execution of a property settlement agreement. In short, the predecessor should not be permitted to force the children and lineal descendants of the decedent to forfeit their interest in homestead property merely because the spouse elected to waive his rights in the property.

The District Court in discussing the effect of Article X, Section 4(c) of the Florida Constitution and Section 732.4015, F.S. (1987) concluded that although the decedent's husband was

physically alive at the time of her death, the ante-nuptial agreement which the husband signed was the legal equivalent of his having predeceased her and therefore the decedent was not survived by a spouse, citing Hulsh v. Hulsh, 431 So.2d 658 (Fla.3d DCA, 1983). The analogy of Hulsh does not fit the application of the Constitutional provisions of Article X, Section 4(c). The ante-nuptial agreement is based on the loss by the husband spouse of his constitutional right in the homestead property. It does not eliminate the constitutional rights of the decedent heirs to their claims in the homestead property. The husband, as far as the constitutional rights of the decedent children are concerned, survived the decedent as her husband and inasmuch as the husband was no longer able to claim any interest in the homestead property, his execution of the property settlement agreement could not bar the lineal descendants of their constitutional rights. They were not parties to the property settlement agreement and could not be barred by it. The husband's execution of the property settlement agreement operated only to bar his claims - not the claims of others.

CONCLUSION

The opinion and decision of the Third District Court of Appeal should be reversed and the cause remanded to that court for appropriate action in accordance with this Court's opinion and decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to: VEGA AND PEREZ, 362 Minorca Avenue, Suite 101, Coral Gables, Florida 33134; ARMANDO MARRAIO, ESQUIRE, Attorney for City National Bank, 7600 Red Road, Suite 127, South Miami, Florida 33143; KYLE R. SAXON, ESQUIRE, Attorney for Elda Martinez, 1700 Alfred I. DuPont Building, 169 East Flagler Street, Miami, Florida 33131; and GLADYS R. NAVARRO, ESQUIRE, Attorney for Estate, Rivergate Plaza, Suite 1028, 444 Brickell Avenue, Miami, Florida 33131, this 26 day of December, 1990.

By:

*Mallory H. Horton*  
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