IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-554

(Lower Tribunal Case No. 3D09-3427)

PEDRO J. GARCIA, AS PROPERTY APPRAISER OF MIAMI-DADE COUNTY,

Petitioner,

vs.

DAVID ANDONIE AND ANA L. ANDONIE; AND LISA ECHEVERRI, AS EXECUTIVE DIRECTOR OF THE STATE OF FLORIDA DEPARTMENT OF REVENUE

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

This Reply Brief on the Merits is filed by Petitioner Pedro J. Garcia, the Miami-Dade County Property Appraiser ("Property Appraiser"). References used in the Initial Brief on the Merits will apply herein.

Property Appraiser points out that Andonies have requested that "costs and fees [be] taxed in favor of David and Ana L. Andonie, to the fullest extent permitted by law." Not only must the requirements of Fla. R. App. P. 9.400 be met, but there is no provision in the ad valorem tax laws for the awarding of fees in this case. Therefore, such request should be disregarded.

SUMMARY OF REPLY

The central issue in this case is how, for homestead exemption purposes, Florida's property appraisers are to determine the permanent residence of minors whose parents are not permanent residents themselves. This question is one of first impression for purposes of judicial review. That is not to say, however, that the answer cannot be found in Florida's ad valorem statutes and regulations, which the Property Appraiser followed in denying Andonies' homestead exemption application.

Andonies and DOR do little more in their answer briefs than echo the Third District's ruling. Respondents, in seeking affirmance of the Third DCA's opinion granting the exemption, wrongfully advocate that long-standing ad valorem tax law

be ignored. Respondents are wrong that undefined terms in the Florida Constitution have a "plain meaning," and need no statutory implementation or judicial construction. Respondents are wrong when they state that the common law principles governing a minor's domicile are premised on inapplicable case law, and ignore the adoption of that same case law by DOR and Florida's Attorney General with respect to determinations of a minor's permanent residence for ad valorem tax purposes. Respondents are wrong that a mere statement of intent as to domicile, without proof that the intent has been effectuated as of the taxing date, is a sufficient basis for granting the homestead exemption. Respondents wrongly support the Third DCA's overreaching on issues not germane to this case, and not raised by the parties. Respondents' positions, if affirmed by this Court, would leave the state's property appraisers with uncertainty in how to fulfill their obligation to ensure uniform application of the homestead exemption laws.

Property Appraiser also submits that it is inconsistent with Florida public policy to allow parents to obtain the financial benefit of a homestead exemption by merely asserting that they wish their minor children to permanently reside in Florida – whether they are with them in Florida or not. Rather, before obtaining a homestead exemption, they should also be required to show that by the taxing date they had formally ensured that their children would be looked after by a responsible adult in their absence.

Property appraisers do not make policy; they do not enact laws. However, they are duty-bound to follow them, just as the courts are prohibited from rewriting them to affect desired results. The homestead exemption requested by Andonies must be denied because exemptions are strictly construed against the taxpayer, and the law dictates that denial was appropriate.

ARGUMENT

I. PERMANENT RESIDENCE, A CONSTITUTIONAL PRE-REQUISITE FOR ENTITLEMENT TO THE HOMESTEAD EXEMPTION, IS DETERMINED UNDER COMMON LAW RULES OF DOMICILE, AS CODIFIED IN FLORIDA'S STATUTES AND REGULATIONS.

Article VII, Section 6 (a), Florida Constitution, requires that entitlement to homestead exemption from ad valorem taxation be based upon the permanent residence of the property owner or his dependent. Despite Respondents' assertion that this requirement is couched in "plain" language, the Constitution itself does not define what is meant by the term "permanent residence."

Section 196.012 (18), Florida Statutes, does define "permanent residence," and in so doing incorporates the common law principles of the law of domicile, including the rule that "[a] person may have only one permanent residence at a time; and, once a permanent residence is established in a foreign state or country, it is presumed to continue until the person shows that a change has occurred." The Third District recognized here that "[a]lthough the concepts of 'residence' and

'domicile' are not interchangeable, they do overlap in some cases. That is so in this case." *Saiz de la Mora v. Andonie,* 51 So. 3d 517, 522, n. 4 (Fla. 3d DCA 2010).

Andonies assert that the law of domicile is inapplicable here because they were "present" in Florida on the taxing date. However, the "permanent residence" requirement connotes more than mere presence. *See Minick v. Minick*, 111 Fla. 469, 149 So. 483, 489 (Fla. 1933) (" 'Residence is of a more temporary character than 'domicile' "); *Weiler v. Weiler*, 861 So. 2d 472, 476-477 (Fla. 5th DCA 2003) ("There is a difference between the terms 'domicile' (sometimes referred to as legal, permanent or primary residence) and 'residence'. ")[1]

Because in this case, the Andonie parents cannot establish their permanent residence, eligibility for homestead exemption depends on a showing that their minor children were permanent residents on the taxing date. There is no specific statutory criteria relating to minors; therefore, it is appropriate to look to the common law to determine the answer.

The common law presumption of a minor child's domicile, which, as a matter of law, is assigned to a child at birth, is set forth in the

[1] *See also, Maldonado v. Allstate Ins. Co.*, 789 So. 2d 464, 467-8 (Fla. 2d DCA 2001) ("the relationship between one's national citizenship and one's residency is tenuous at best.") The Third District's opinion is unclear as to whether its holding is dictated by the Andonie children's status as United States citizens. However, because they are minors, whose domicile is dictated by that of their parents, their citizenship status is irrelevant to the issue of their permanent residence.

Restatement (Second) of Conflict of Laws, Section 14 (2) (1971): "The domicil[e] of a legitimate child at birth is the domicil[e] of its father at that time." This is the same presumption referenced in *Beekman v. Beekman*, 53 Fla. 858, 43 So. 923, 924 (Fla. 1907) ("Under the laws of Florida the domicile of the father is the domicile of his minor children, and such … disability continues here with all minors…until they arrive at the age [of majority].") and *Chisholm v. Chisholm*, 98 Fla. 1196, 125 So. 694, 702 (Fla. 1929) ("…usually the residence of the father establishes the residence of his minor child."). *See also,* the discussion of the presumption in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 1608, 104 L. Ed. 2d 29 (1989).

The common law presumption, as set forth in *Beekman*, is the basis of Fla. Admin. Code R. 12D-7.014 (2), enacted in 1976, which provides, "An unmarried minor…may not maintain a permanent home away from his parents such as to entitle him or her to homestead exemption…." This presumption has also been cited in numerous Attorney General opinions regarding homestead exemption issues, as noted in the Initial Brief. Read *in pari materia* with the requirement of Section 196.012 (18), Florida Statutes, this presumption continues until a change in circumstances is proven.

Despite clear reliance in Florida on this bedrock principle of common law, the Respondents supported the Third District's rejection of the applicability of

Beekman and *Chisholm* to this case, solely because the cases dealt with jurisdictional issues in divorce proceedings.[2] Especially surprising is the DOR's agreement with the court that the cases are distinguishable, when DOR's own regulation[3] – which DOR did not even reference in its Answer Brief – applies *Beekman* in the context of ad valorem taxation. DOR's position conflicts with its own regulation and only adds to the confusion caused by the Third District's opinion.

This rejection of the common law principle determining a minor's domicile, on the assumption that it only applies to family law, is based on flawed reasoning. As noted in Restatement (Second) of Conflict of Laws, Section 11(1) (1971), comment c,

> The functions served by domicil[e] in Conflict of Laws fall into three broad categories. These are judicial jurisdiction; choice of law, particularly in matters where continuity of application of the same law is important, as family law and decedents' estates; *and governmental benefits and burdens*.

(emphasis added). Ad valorem tax exemptions are governmental benefits;

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[2] The Third District also erroneously disregarded, based on context (eligibility for in-state tuition at a Florida university), the acknowledgment of the presumption in *Florida Dep't of Educ. v. Harris*, 338 So. 2d 215, 219 (Fla. 1st DCA 1976).

[3] " 'Rules and regulations of an administrative agency made under the power conferred by the statute have the force and effect of the statute if made within the scope and intent of the authority conferring them.' " *Bystrom v. Equitable Life Assur. Soc. of U.S.*, 416 So. 2d 1133, 1142 n. 9 (Fla. 3d DCA 1982) (citation omitted).

therefore, reliance on the common law presumption of domicile – as already incorporated by DOR into its regulation – is appropriate.

DOR alternatively argues that the presumption was sufficiently rebutted by Andonie parents' affidavit, where they state that the subject property was the "permanent residence" of their children.[4] However, it is not the Andonies who determine their children's permanent residence for homestead exemption purposes. Rather, it is the Property Appraiser who makes the determination, pursuant to Section 196.015, Florida Statutes, which provides, "[the i]ntention to establish a permanent residence in this state is a factual determination to be made, in the first instance, by the property appraiser." *See also*, *Mitchell v. Higgs*, 61 So. 3d 1152, 1154 (Fla. 3d DCA 2011) (recognizing the responsibility of the property appraiser to determine permanent residency) and Op. Att'y Gen. Fla. 51-276 (1951) (noting that a property appraiser is not bound to accept statutory statements of domicile "as proof of residence for purposes of claiming homestead exemption.")

Neither the law of domicile nor the general law of ad valorem taxation exemptions supports requiring the property appraiser to accept a taxpayer's mere expression of intent as the sole basis for the granting of homestead exemption. The statutory provision that a domicile, once established, continues until a new one

[4] The statement in Andonies' affidavit regarding their children's "permanent residence" is a legal conclusion that is disputed by the Property Appraiser. It is certainly not "uncontroverted," as described by DOR.

supersedes it, means that the nonresident taxpayer, either for himself or his dependents, must take action to establish the new domicile in Florida in order to qualify for the homestead exemption. *See Snyder v. McLeod*, 971 So. 2d 166, 169-170 (Fla. 5th DCA 2007), which holds that the burden of proof is on party asserting the acquisition of a new domicile to show "*positive overt acts*," along with the "good-faith intention" to establish it.

As applied to the Andonies, the law of domicile fixed their children's domicile at birth in Honduras, the domicile of the parents. Therefore, their parents needed to prove that the presumption of their children's Honduran domicile was rebutted as of the January 1, 2006, taxing date. This they did not do[5], and their mere statement in their affidavit that they intended that Miami be the permanent residence of their children is legally insufficient, because it is unsupported by overt acts effectuating their intent.[6]

Amicus Orange County Property Appraiser properly questions whether it is proper to accept at face value claims that parents intend their children to have different permanent residences from theirs. Florida law evinces great concern for

[5] Counsel for the Andonies confirmed at the oral argument before the Third District that all pertinent factual matters as of the January 1, 2006 taxing date are contained in the Andonies' affidavit.

[6] For instance, there are numerous statutes available to parents in the Andonies' situation that enable a court to appoint guardians, should circumstances dictate, including Chapter 751, Florida Statutes (temporary custody of minor children by family members) and Section 744.3046, Florida Statutes (appointment of a preneed guardian of a minor).

the interests and protection of minors. It is consistent with the law to require that parents who would leave their children to live in Florida without them ensure that the children's domicile has been established in Florida, along with the appointment of an adult who is given custodial authority to make necessary decisions for them. This formality is no more than is required, for instance, in custody decisions. Such actions, for homestead exemption purposes, would effectively rebut the presumption of the initial domicile by birth, but would also address the State's concern that minors be cared for by a competent adult.

Property Appraiser is well aware that the Andonies have characterized his position as interfering with their constitutional right to raise their children. This is a specious argument. The Property Appraiser has no intention of interfering with the Andonies' right to raise their children wherever and however they please, subject to the requirements of state law that impose upon all parents certain obligations regarding the general welfare of their children. Moreover, as the First District recognized in *Reinish v. Clark*, 765 So. 2d 197, 208 (Fla. 1st DCA 2000), there is nothing in the permanent residency requirements of the homestead exemption statute that impacts a property owner's ability to acquire, hold or dispose of residential property; therefore, there is no threat to the Andonie family's presence on the subject property. The only issue for the Property Appraiser is

whether the Andonies are entitled to the exemption from taxation of a portion of the value of their condominium.

The Property Appraiser's duty is to consistently and correctly administer the ad valorem taxation laws. Contrary to the assertions of the Third District and Respondents, Property Appraiser has *never* taken the position that the owner of the property must always live on the property in order to qualify for the homestead exemption. The homestead exemption laws, read in conjunction with DOR regulations in Fla. Admin. Code 12D-7.007, make it clear that there are situations – for instance, with respect to absentee owners – where the homestead exemption is appropriate even though the owner may not be present on the property. It is such instances which give meaning to the disjunctive language in the constitutional provision, requiring that the property be the permanent residence of the owner *or* his dependents.

However, the homestead exemption laws *do* contemplate that either the owner or the qualifying dependent will be a "permanent resident." To say that *no one* associated with residential property need be a "permanent resident" in order to receive a homestead exemption flies in the face of laws which are to be narrowly and strictly construed, as most recently noted in *Willens v. Garcia*, 53 So. 2d 1113, 1117 (Fla. 3d DCA 2011).

Andonies accuse the Property Appraiser of singling them out because of their immigration status. There is no doubt that property owners who come within the constraints of this Court's decision in *Juarrero v. McNayr*, 157 So. 2d 79, 81 (Fla. 1963), may have a more limited range of actions they can take to qualify for homestead exemption based on their own status. However, Property Appraiser's position is the same whether the parents are domiciled in another country or another state. If the parents are not Florida permanent residents – for whatever reason – the determination then focuses on the domicile of the minor children.

Property Appraiser understands his role. He is responsible for implementing the tax policy of this state, as embodied in its statutes and regulations. He does not make policy; he is not responsible for enacting laws. If following the law leads to a result that the legislature wishes to change, it is that governmental body which has the authority to do so. *See e.g.*, *Mitchell v. Higgs*, 61 So. 3d at 1155-56, where the Third District noted the trial judge's displeasure with the ad valorem statute at issue. The court cautioned, however, that "[t]he remedy lies with the legislature, not the courts."[7]

[7] *See* Amicus Orange County Property Appraiser's discussion of *Judd v. Schooley*, 158 So. 2d 514, 517 (Fla. 1963), which illustrates the manner in which legislative action can alter law previously based on common law presumptions.

II. THE STATUTES AND REGULATIONS WHICH GOVERN THE PROPERTY APPRAISER'S CONSIDERATION OF HOMESTEAD EXEMPTION APPLICATIONS HARMONIOUSLY IMPLEMENT ARTICLE VII, SECTION 6 (a), FLORIDA CONSTITUTION.

Andonies have indicated their agreement with the Third District's characterization of Article VII, Section 6 (a) as "self-executing." The court's conclusion not only conflicts with homestead exemption case law holding otherwise, but also is difficult to reconcile with the provision's express directive that the right to the exemption be established "in the manner prescribed by law." Without this constitutional directive, the exemption could not be implemented, because the constitutional language is couched in undefined terms, such as, *inter alia*, "permanent residence."

This Court noted in *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960), that the legislature should not have the power "…to nullify the will of the people expressed in their constitution." For example, a durational residency requirement cannot be imposed in order to obtain a homestead exemption, where length of residence was not a required element of entitlement to homestead exemption. *See Sparkman v. State ex rel. Scott*, 58 So. 2d 431, 432 (Fla. 1952).

However, as discussed in the Property Appraisers' Association of Florida's amicus brief, Florida's courts have approved many legislative enactments implementing the homestead exemption. *See, e.g. Haddock v. Carmody*, 1 So. 3d 1133, 1136 (Fla. 1st DCA 2009) ("[S]ection 196.061 is the legislature's

establishment of how rental property is to be treated under the homestead exemption law and is not unconstitutional….") and *Prewitt Mgmt. Corp. v. Nikolits*, 795 So. 2d 1001, 1005 (Fla. 4th DCA 2001) (approving Section 196.041, Florida Statutes, which lists types of properties that can be considered "equitably owned" for purposes of the homestead exemption statute.) *See also, Willens v. Garcia,* 53 So. 3d at 1116, where the Third District defined the phrase "legally or naturally dependent" in the context of interrelated constitutional provisions and statutes dealing with the homestead exemption and the related cap on assessed value.

Likewise, the statutes and regulations which govern a property appraiser's determination of an owner or dependent's "permanent residence" are essential legislative exercises. They do not thwart or contradict the intent of the constitutional provision; they give it the necessary context, as required by the Constitution itself.

Additionally, the statutory language in Section 196.031, Florida Statutes, requiring that an owner or his dependent "reside" on his property and "in good faith make the same" his or his dependent's permanent residence does not thwart the constitutional requirement, as reworded in the 1968 amendment of Article VII, Section 6 (a) Florida Constitution, that the property owner "maintain thereon" his or his dependent's permanent residence. The Third District erroneously and on its own initiative invalidated this language.

Whether the "resides thereon" language is valid depends on whether it *significantly* conflicts with the constitutional provision. *See The Florida Bar v. Sibley*, 995 So. 2d 346, 349-350 (Fla. 2008) ("[t]o the extent possible, courts have a duty to construe a statute in such a way as to avoid conflict with the Constitution…."). There is no conflict, significant or otherwise. In fact, the legislature, DOR and the courts have implemented the constitutional and statutory language in a harmonious way since the 1968 amendment.

To illustrate this point, the legislature has on twenty-seven occasions amended Section 196.031, Florida Statutes, without removing the "resides thereon" language. The First District, in *Reinish,* a 2000 decision, refers to Section 196.031 as "the parallel statute" to the constitutional provision. 765 So. 2d at 205. Florida's Attorney General in Op. Att'y Gen. Fla. 79-50 (1979) has stated that

> [Rule 12D-7.007 (1)] employs the term '*to reside thereon* (a certain parcel of land)' *which conveys a meaning that does not materially differ from the meaning of the term 'maintain thereon* (real estate)' as used in s. 6, Art. VII, State Const., i.e., the owner of the real property keeps thereon his permanent residence or makes the same his permanent place of residence.

(emphasis added). Also, Florida Association of Property Appraisers' amicus brief discusses that Fla. Admin. Code Rule 12D-7.007 (1), enacted in 1977, incorporates the constitutional and statutory, as well as common law presumptions.

These provisions all work together to enable the Property Appraiser to make his determinations in a manner consistent with the intent of the exemption, and with

the individual circumstances in each case. This Court is therefore urged to reject the Third District's attempt to invalidate settled homestead exemption law.

CONCLUSION

Based on the arguments above, and as discussed in his Initial Brief and the briefs of the Amici Curiae, Petitioner, Miami-Dade County Property Appraiser, requests that this Court quash the decision of the Third District Court of Appeal and uphold the Property Appraiser's denial of Respondents Andonies' homestead exemption application, as the Andonies cannot, as a matter of law, show that either they or their minor children were "permanent residents" on the 2006 taxing date. Property Appraiser further requests that this Court hold that: a) the permanent residence of minor children is presumed to be that of their parents and b) the presumption can only be rebutted by evidence that, as of the taxing date, formal steps had been taken to establish the children's permanent residence in Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of *Petitioner's Reply Brief on the Merits* was served by Federal Express on November 14, 2011, to the **Florida Supreme Court**, and has been sent by U.S. Mail to the following: **DANIEL A. WEISS, ESQ.**, Tannebaum Weiss, PL, Museum Tower, 150 West Flagler Street, PH 2850, Miami, FL 33130; **KENNETH P. HAZOURI, ESQ.** and **JEFFREY S. ELKINS, ESQ.**, DeBeaubien Knight Simmons, et al., 332 N. Magnolia Avenue, Orlando, FL 32801-1609; **THOMAS M. FINDLEY, ESQ**. and **ROBERT J. TELFER, III, ESQ.**, Messer Caparello & Self, P. O. Box 15579, Tallahassee, FL 32317-5579; **LOREN E. LEVY, ESQ.** and **ANA CRISTINA TORRES, ESQ.,** The Levy Law Firm, 1828 Riggins Lane, Tallahassee, FL 32308-4885; and **JOSEPH C. MELLICHAMP, III, ESQ.**, Office of the Attorney General, 400 S. Monroe St., PL-01, Tallahassee, FL 32399-6536.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Reply Brief has been generated in Times New Roman 14-point font and complies with the font requirements of Fla. R. App. P. 9.210(a).

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