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Florida Constitutional Law: A New Inherent Right to Devise?

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This holding, in concert with the concept of a civil action for damages, has enormous implications in the field of environmental protection. If a developer knows he will bear the expense of restoring the area desecrated by his illegal activities, either by mandatory injunction or suit for damages, he may be more likely to observe statutory procedures. In cases where this prospect does not deter the developer, a suit for damages appears to be the more adequate remedy. This would provide competent restoration immediately as opposed to the slower injunctive process evidenced in the instant case.[64]

The instant decision indicates that violators of dredge and fill permit procedures are no longer risking only a token fine or an order to cease and desist. Even if restoration will not return shorelands to their natural state, the deterrent effect of the new remedy will provide greater environmental protection than current criminal sanctions.

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FLORIDA CONSTITUTIONAL LAW: A NEW INHERENT RIGHT TO DEVISE?

In re Estate of McGinty, 258 So. 2d 450 (Fla. 1971)

Appellant, daughter of a deceased homestead property owner, was to receive decedent's residence under his will. The trial court held the devise invalid under Florida Statutes, section 731.05 (1), which prohibits devise of homestead property if the owner is survived by lineal descendants.[1] The court found the statute not to be in conflict with the 1968 Florida constitution, article X, section 4 (c), which prohibits devise of homestead if the owner is survived by minor children.[2] The Florida supreme court reversed and HELD, the statutory prohibition was inconsistent with the constitutional prohibition and therefore unconstitutional.[3]

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64. *See* note 54 *supra.*

1. FLA. STAT. §731.05 (1969) provides: "Any property, real or personal, held by any title, legal or equitable, with or without actual seisin, may be devised or bequeathed by will; provided, however, that whenever a person who is head of a family, residing in this state and having a homestead therein, dies and leaves either a *widow or lineal descendants* or both surviving him, the homestead shall not be the subject of devise, but shall descend as otherwise provided in this law for the descent of homesteads." (Emphasis added.)

2. FLA. CONST. art. X, §4 (c) provides in part: "The homestead shall not be subject to devise if the owner is survived by *spouse or minor child.*" (Emphasis added.)

3. 258 So. 2d at 451.

Restraints on the devise of homestead property[4] have operated historically as a corollary to the homestead exemption from forced sale. This exemption, first adopted by the 1868 Florida constitution,[5] was designed to protect the family from financial adversity by freeing the homestead from forced sale by creditors.[6] Although the 1868 constitution did not prohibit testamentary disposition of homestead property, Florida courts subsequently afforded the family this additional security by exempting the homestead from devise[7] and requiring its descent to the heirs of the owner, subject to the widow's dower right.[8]

In accord with this judicial mandate, the 1885 constitution impliedly prohibited devise of the homestead where the holder was survived by "children."[9] Thereafter, the legislature enacted the predecessor[10] of Florida Statutes, section 731.05 (1),[11] which expanded the constitutional prohibition[12] by expressly disallowing devise if the owner were survived by a widow. In

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4. *See* FLA. CONST. art. X, 64 (a) (1). For an analysis of the changing nature of homestead property *see* Weiss v. Stone, 220 So. 2d 403 (3d D.C.A. Fla. 1969); White v. Posick, 150 So. 2d 263 (2d D.C.A. Fla. 1963). *See also* 1 D. REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA 448-51 (4th ed. 1971); Crosby & Miller, *Our Legal Chameleon, The Florida Homestead Exemption*, 2 U. FLA. L. REV. 11, 29-31, 37-52 (1949).

5. FLA. CONST. art. IX, §3 (1868). For an historical development of Florida homestead law prior to its adoption by the constitution *see* Shapo, *Restraints on Alienation and Devise of Homestead: Monsters Unfettered from Florida's Past*, 19 U. MIAMI L. REV. 72, 81-84 (1964).

6. *See, e.g., In re* Noble's Estate, 73 So. 2d 873, 874 (Fla. 1954); Collins v. Collins, 150 Fla. 374, 377, 8 So. 2d 443, 444 (1942); *In re* Van Meter's Estate, 214 So. 2d 639, 642 (2d D.C.A. Fla. 1968).

7. Wilson v. Fridenburg, 19 Fla. 461, 469 (1882). This prohibition was grounded upon the language of article IX of the 1868 constitution, which provided that the homestead "shall not be alienable without the joint consent of husband and wife when that relation exists." The court found this provision operated to prevent testamentary as well as *inter vivos* disposition. The court, however, justified this restriction of devise by its conclusion that the authorities in point prohibited the husband from devising the homestead. *Id.* at 469-70. *See also* Brokaw v. McDougall, 20 Fla. 212 (1883).

8. Brokaw v. McDougall, 20 Fla. 212, 226 (1883).

9. FLA. CONST. art. X, §4 (1885) provided: "Nothing in this Article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists; *nor if the holder be without children to prevent him or her from disposing of his or her homestead by will in a manner prescribed by law.*" (Emphasis added.)

10. Fla. Laws 1899, ch. 4730, at 119-20 provided: "Whenever a person who is the head of a family residing in this state and having his homestead herein, shall die and leave a widow surviving him, but no children, the homestead shall descend to the widow and shall not be the subject of devise by last will and testament . . . ."

11. Fla. Laws 1899, ch. 4730 dealt with the "descent of homesteads" whereas FLA. STAT. §731.05 (1969) deals with "property which may be devised." However, the prohibition against devise of the homestead was contained in the descent statute until 1933 when it was placed in §731.05. *See* Fla. Laws 1933, ch. 16103, §6, at 545-46.

12. Although the 1885 constitution implied a restriction on devise only when the owner was survived by "children," the courts interpreted the provision as an absolute prohibition. *See* Caro v. Caro, 45 Fla. 203, 207, 34 So. 309, 310 (1903); De Cottes v. Clarkson, 43 Fla. 1, 10, 29 So. 442, 444 (1901).

Thomas v. Williamson[13] the Florida supreme court upheld this enactment on the ground that the state constitution was a limitation on power, not a grant of power.[14] Since the 1885 constitution neither prohibited nor permitted the devise of the homestead where the owner was without children, the legislature was free to impose the additional prohibition against devise if the owner were survived by a widow.[15]

The statute's wording remained unchanged[16] until enactment of the Florida Probate Code[17] in 1933. Section 731.05(1) of the code incorporated the former constitutional and statutory restraints by restricting devise if the homestead owner was survived by "widow or lineal descendants or both."[18] Although the term "lineal descendants" further restricted devise, the statute was again held to be constitutional.[19]

Constitutional and statutory restraints against the devise of homestead property have often been misapplied.[20] Even when correctly applied, the results have often been inequitable and contrary to the concept of homestead law.[21] Unjust results originally stemmed from the courts' distorted interpretation of the term "children."[22] Two early cases[23] held that a mother could not devise her homestead to her adult daughters who remained at home to care for her, since such a devise would exclude other surviving children.[24] In sustaining this position the court rejected the contention that "children" meant "minor children."[25] Although this statutory language may have been

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13. 51 Fla. 332, 40 So. 831 (1906). *See also* Jackson v. Jackson, 90 Fla. 563, 107 So. 244 (1925); Saxon v. Rawls, 51 Fla. 555, 41 So. 594 (1906).

14. 51 Fla. at 341, 40 So. at 833. This doctrine of constitutional interpretation is still in force. *See, e.g.*, Monington v. Turner, 251 So. 2d 872 (Fla. 1971); State *ex rel.* Jones v. Wiseheart, 245 So. 2d 849 (Fla. 1971).

15. 51 Fla. at 341-42, 40 So. at 833-34.

16. The statute was contained in the following provisions: Fla. Laws 1899, ch. 4730; Fla. Stat. §2297 (1906); Fla. Stat. §3620 (1920); Fla. Comp. Gen. Laws §5484 (1927).

17. FLA. STAT. chs. 731-34 (1969). *See* Fla. Laws 1933, ch. 16103, §6, at 545-46.

18. FLA. STAT. §731.05 (1) (1969). For exact statutory language, see note 1 *supra*.

19. The constitutionality of the statute was upheld in a case in which the Florida supreme court denied a challenge that claimed the children had vested remainders under the constitution. Nesmith v. Nesmith, 155 Fla. 823, 21 So. 2d 789 (1945).

20. The courts have historically confused article X, §2 of the 1885 constitution, which provided that the exemption "inure to the widow and heirs" upon the death of the homestead owner, and article X, §4, which restricted devise. *See, e.g.*, Shone v. Bellmore, 75 Fla. 515, 78 So. 605 (1918); Palmer v. Palmer, 47 Fla. 200, 35 So. 983 (1904); Marsh v. Hartley, 109 So. 2d 34, 37 (2d D.C.A. Fla. 1959). For an extensive discussion of this confusion *see* Crosby & Miller, *supra* note 4; Shapo, *supra* note 5.

21. The purpose of homestead law, as stated earlier in this comment, is to provide protection for the family. *See* text accompanying note 6 *supra*. Prohibiting the devise of the homestead where only adult lineal descendants survive and requiring them to share in its descent does not seem to be in consonance with this concept.

22. FLA. CONST. art. X, §4 (1885) ("nor if the holder be without *children*"). (Emphasis added.)

23. Caro v. Caro, 45 Fla. 203, 34 So. 309 (1903); De Cottes v. Clarkson, 43 Fla. 1, 29 So. 442 (1901).

24. Caro v. Caro, 45 Fla. 203, 207, 34 So. 309, 310 (1903); De Cottes v. Clarkson, 43 Fla. 2, 8-10, 29 So. 442, 444 (1901).

25. De Cottes v. Clarkson, 43 Fla. 1, 10, 29 So. 442, 444 (1901).

correctly interpreted, it fostered a situation in which adult children who still resided with the family were required to share with those who no longer lived at home. Under Florida Statutes, section 731.05 (1), the courts continued to enforce these harsh restrictions. In *Moorefield v. Byrne*[26] the court applied this section to nullify a deceased father's will conveying the homestead to his second wife. The court ruled in favor of the decedent's adult children by a prior marriage because the children were "lineal descendants in being at the time of the death of the decedent."[27]

The Florida Constitutional Revision Commission attempted to remedy this situation[28] by proposing the 1968 constitution, article X, section 4 (c), which in contrast to the 1885 constitution[29] restricts devise of homestead only where the owner is survived by "spouse or minor child."[30]

If the meaning of a constitutional provision is not discernible on its face, courts may look behind the constitution to ascertain the intent of the framers.[31] The records of the Hearings of the Constitutional Revision Commission indicate that the drafters of the 1968 constitution intended to permit devise of homestead in all cases except when the owner[32] is survived by spouse or minor children.[33] Therefore, the court in the instant case could have found an implied prohibition against any further legislative restriction. If the 1968 constitution's article X, section 4 (c) is read as such a prohibition, the statutory class of "lineal descendants" is unconstitutionally restrictive.

While the instant court may have given effect to the drafters' intent, its decision was not based upon that ground. Instead, the court found that, since the class of persons legislatively designated as "lineal descendants" was inconsistent with the class of persons designated as "minor children," the constitutional classification controlled.[34] Moreover, the court stated: "The restraint on the right of an individual to devise his property at death should

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26. 140 So. 2d 876 (3d D.C.A. Fla. 1962).

27. *Id.* at 877 (*quoting from* FLA. STAT. §731.27) (1969).

28. 68 FLORIDA CONSTITUTIONAL REVISION COMM'N, HEARINGS 258-92 (1966). The record reveals that a major reason for amending the 1885 constitution, art. X, §4, was to permit homestead owners to devise if only adult children survive. *Id.*

29. FLA. CONST. art. X, §4 (1885). *See* note 9 *supra* for the text of this provision.

30. FLA. CONST. art. X, §4 (c). *See* note 2 *supra* for the text of this provision.

31. *See* Hayek v. Lee County, 231 So. 2d 214 (Fla. 1970); Gray v. Bryant, 125 So. 2d 846, 852 (Fla. 1960).

32. FLA. CONST. art. X, §1 (a) uses the term "head of the family" in creating the homestead exemption whereas article X, §4 (c) uses the term "owner" in restricting devise. However, the owner must also be the head of the family. *See, e.g.*, Vandiver v. Vincent, 139 So. 2d 704 (2d D.C.A. Fla. 1962); Abernathy v. Gruppo, 119 So. 2d 398 (3d D.C.A. Fla. 1960). For a discussion of the requirements and relationships necessary for an owner to qualify as head of the family *see* 1 D. REDFEARN, *supra* note 4, at 444-48; Comment, *Homestead: Family Headship*, 7 U. FLA. L. REV. 102 (1954). *See also In re* Wilder's Estate, 240 So. 2d 514 (1st D.C.A. Fla. 1970); *In re* Van Meter's Estate, 214 So. 2d 639 (2d D.C.A. Fla. 1968).

33. 68 FLORIDA CONSTITUTIONAL REVISION COMM'N, HEARINGS 258-92 (1966).

34. 258 So. 2d at 451.

not be extended beyond that expressly allowed by the Constitution."[35] This statement implies that the constitution is a grant of power or that the right to devise property is thus inherent in ownership. Neither proposition, however, is supportable. The right to devise property is not an inherent right,[36] but rather is subject to legislative discretion.[37] Because the state constitution is clearly a limitation on power rather than a grant of power,[38] this legislative discretion may be restricted only by express or implied prohibitions in the constitution. The term "lineal descendants" is not inconsistent per se with the term "minor child," since the class of persons designated as "lineal descendants" includes minor children and therefore satisfies the constitution's express prohibition that the homestead shall be subject to devise if minor children survive. As noted in Justice Adkins' dissenting opinion in the instant case, "the Legislature may prescribe any method for succession or devise of homestead subject only to the prohibition that a homestead is not subject to devise if the owner is survived by spouse or minor child."[39]

Accepting the court's reasoning at face value, a revolutionary concept emerges in probate law: The right to devise is inherent in the ownership of property.[40] The court's interpretation of article X, section 4(c) as a prohibition against inconsistent legislative enactments implies that homestead property may be denied except as expressly forbidden by the constitution. Since the legislature can no longer restrict homestead devise except as permitted by the constitution, any additional restraints can only be imposed by constitutional amendment. Thus, whatever reasoning is used to justify the holding in the instant case, the result implicitly contradicts the concept that the right to devise is purely statutory.

The instant case also invites speculation about the validity of section 731.27 of the Florida Statutes.[41] The invalidation of section 731.05 casts

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35. *Id.*

36. The right to devise or inherit property is not mentioned in the United States Constitution. The right is purely statutory, and the legislature is restricted only by state constitutional limitations. *See, e.g., In re* Olsen's Estate, 181 So. 2d 642 (Fla. 1966); Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615 (1944), *appeal dismissed,* 323 U.S. 666 (1944).

37. The right to devise is granted by FLA. STAT. §731.05 (1969).

38. *See, e.g.,* Monington v. Turner, 251 So. 2d 872 (Fla. 1971); State *ex rel.* Jones v. Wiseheart, 245 So. 2d 849 (Fla. 1971).

39. 258 So. 2d at 452 (dissenting opinion).

40. Arguably, the constitution might be the source of this new right to devise. However, not only does this view contradict the concept that the state constitution does not grant power, but also finds no support in the constitution itself. The consitution nowhere expressly permits the devise of property, but only expressly prohibits the devise of homestead property in certain situations. Therefore, since the court found that the constitution prohibited any further legislative restraint on the right of an individual to devise his property, it must have viewed the right to devise as existing independently of the constitution or statute. *See* 258 So. 2d at 451.

41. FLA. STAT. §731.27 (1969) provides: "The homestead shall descend as other property; provided, however, that if the decedent is survived by a *widow and lineal descendants,* the widow shall take a life estate in the homestead, with vested remainder to the lineal descendants in being at the time of the death of the decedent." (Emphasis added.)

doubt on the continued viability of section 731.27 because the statutes share a common origin.[42]

While section 731.27 prohibits devise of the homestead if the owner is survived by a widow, the constitution prohibits devise if the owner is survived by a spouse. The constitution thus provides a widower the same protection as a widow. Article X, section 5 provides that married women and married men are to be treated equally in the disposition of their property.[43] Thus, this provision strongly suggests that section 731.27 creates an unconstitutional distinction between husband and wife[44] because it provides different treatment for descent and distribution of homestead property, depending upon the sex of the deceased homestead owner.[45]

The problem dealt with in the instant case and the concomitant problem presented by section 731.27 have been anticipated by the legislature, but remedial action has been delayed.[46] One proposal would amend the constitution to delete all restrictions on the transfer of homestead property, thus leaving any restrictions entirely to legislative discretion.[47] However, in view of the instant decisions's implied holding that the right to devise is an inherent right, which should not be restricted except as expressly allowed by the constitution, this grant of legislative discretion would be invalid. Since only the law relating to devise of the homestead has been brought within the intent of the constitution, it still remains for the unequal treatment of a married man's homestead under section 731.27 to be reconciled with the constitution. One proposal has been to amend section 731.27 to allow either surviving spouse an election to take a life estate in the homestead in addition to an intestate share.[48]

Although the instant decision was not sufficiently justified by the court's opinion, it provided long-needed reform in the area of homestead devise by effectuating the intent of the new constitutional provision. Homestead owners are no longer prohibited from devising the homestead if only adult

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42. *See* text accompanying notes 11, 16 *supra*. *See also* Fla. Laws 1933, ch. 16103, §§6, 28; Fla. Comp. Gen. Laws §§5477 (2), 5480 (5) (1936); Fla. Laws 1945, ch. 22783, §1, at 501-02, 507.

43. FLA. CONST. art. X, §5.

44. FLA. CONST. art. X, §5 provides: "There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or courtesy may be established and regulated by law."

45. For example, if the husband owns the property and dies leaving a "widow and lineal descendants," his widow takes a life estate with vested remainder in the lineal descendants. FLA. STAT. §731.27 (1969). But if the wife dies as owner of the homestead the widower is required to take a share of the property as one of the lineal descendants. FLA. STAT. §731.23 (1969).

46. *See* FLORIDA LEGISLATURE, HISTORY OF LEGISLATION 109 (Reg. Sess. 1971).

47. Fla. S. J. Res. 554 called for an amendment to the constitution to provide that alienation of homestead be left to the legislature. *Id.*

48. FLORIDA LEGISLATURE, *supra* note 48. Fla. S. 555 called for an amendment to §§731.05 (1), .27 to conform to the constitution. *Id.* For the full text of the proposed change *see* FLORIDA LAW REVISION COMM'N, ANNUAL REPORT AND RECOMMENDATIONS 55 (1970-1971).