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CASE COMMENTS

Constitutional Law — STATE CONSTITUTIONS — PROVISIONS FOR HOMESTEAD DEVISE IN 1968 FLORIDA CONSTITUTION CONFLICT WITH AND REPEAL PREVIOUSLY EXISTING STATUTE REGULATING SUCH DEVISES. — In re *Estate of McGinty,* 258 So. 2d 450 (Fla. 1971).

Thomas J. McGinty, a widower, died in 1970, survived by several adult children. He had devised his homestead to one of them. The devise was challenged by the other children on the ground that it violated section 731.05(1) of the Florida Statutes,[1] which prohibits a devise of the homestead when the owner leaves "either a widow or lineal descendants or both surviving him." At trial it was argued by the devisee that this statute had been repealed by section 4(c), article X, of the 1968 Revised Constitution,[2] which states in relevant part that "[t]he homestead shall not be subject to devise if the owner is survived by spouse or minor child." The trial court rejected this contention and invalidated the devise.[3] On appeal, the Florida Supreme Court reversed.

In an opinion by Justice Boyd the court ruled that the "class of persons designated as 'minor children' is substantially different from and inconsistent with, 'lineal descendants.' "[4] Stating that "[t]he restraint on the right of an individual to devise his property at death should not be extended beyond that expressly allowed by the Constitution,"[5] the court concluded that the inconsistent statutory provision had been repealed by the adoption of the 1968 Constitution.

Justice Adkins, dissenting, read the language in the new constitution differently. He would have found that it prohibited the devise

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1. FLA. STAT. § 731.05 (1) (1971) 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.

2. FLA. CONST. art. X, § 4 (c) provides:

The homestead shall not be subject to devise if the owner is survived by spouse or minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

3. *In re* Estate of McGinty, No. 29965 (Palm Beach County J. Ct., Oct. 14, 1970).

4. 258 So. 2d at 451. FLA. CONST. art. XII, § 6 (a) provides that "[a]ll laws in effect upon the adoption of this revision, to the extent not *inconsistent* with it, shall remain in force until they expire by their terms or are repealed." (Emphasis added.)

5. 258 So. 2d at 451.

of the homestead in only those cases in which a spouse or minor child survived, without the added implication that the legislature could not restrict the devise in other cases if it chose to do so.[6] Such an implication he found contrary both to the settled principle that the state constitution is a limitation upon power and to the legislature's prerogative to regulate descent and distribution.[7]

Despite the majority's apparent lack of difficulty with it, the language of the new homestead provision is not unambiguous.[8] The statement that "the homestead shall not be subject to devise if the owner is survived by spouse or minor child" does not necessarily imply that the homestead shall be subject to devise in all other instances. As Justice Adkins noted, the legislature is ordinarily free to act unless express or implied limitations within the constitution prohibit it from doing so.[9] In a doubtful case, regard for this basic concept of state constitutionalism would seem to compel an interpretation that left to the legislature some measure of authority in the regulation of homestead devises.[10] It is certainly clear that the majority's construc-

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6. *Id.* at 452.

7. *Id.*

8. Indeed, one commentator had predicted that the dissent's construction, reconciling the statute with the new constitution, would prevail. Speaking to a hypothetical situation identical with the one before the court in the *McGinty* case, Boyer concluded:

> If the homestead owner were survived by adult children only and no spouse, under the new Constitution he is not prohibited from devising the homestead. Under the statute, however, he is. On the basis that the legislature is empowered to determine laws of succession (not in conflict with the Constitution, of course), it would seem that the additional legislative restriction would be valid. Only if the constitutional provision were construed as a grant of power to devise in the particular case, which seemingly it is not, would the additional legislative restriction be invalid. Thus, in this situation where the homestead owner is survived by adult children only, the children would necessarily take a fee simple as tenants in common.

1 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS, ¶ 21.03(3), at 474.19-.20 (1971) (footnotes omitted).

9. *See, e.g.,* Monington v. Turner, 251 So. 2d 872, 875 (Fla. 1971); State *ex rel.* Collier Land Investment Corp. v. Dickinson, 188 So. 2d 781, 783 (Fla. 1966); Peters v. Meeks, 163 So. 2d 753, 755 (Fla. 1964). This approach to state constitutions contrasts with the grant-of-power treatment which is given the federal constitution. In Railroad Co. v. County of Otoe, 83 U.S. (16 Wall.) 667, 672-73 (1872), the Court said:

> It is true that, in construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the construction of a State constitution. The legislature of a State may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution. This is a principle that has never been called in question.

10. Furthermore, two constructional principles militate against the majority's reading of the constitutional provision in question. First, the implied repeal of a preexisting statute is disfavored. *See, e.g., In re* Advisory Opinion to the Governor, 132 So. 2d 163, 169 (Fla. 1961), in which the court said that

tion effectively places the subject beyond the purview of legislative action.[11]

The 1885 Constitution provided that the homestead could be devised except when the owner was survived by children.[12] This language was, in form, more nearly an absolute statement of the right to devise than that of the new constitution, in which the right must be implied; and it could plausibly have been argued that under the 1885 language the legislature was without authority to impose any further restrictions on homestead devise. But in 1899 and again in 1933, statutes were enacted which prohibited the devise of the homestead if the owner was survived, respectively, by a widow[13] or by lineal descendants.[14] And, in a series of decisions, the court either ex-

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[i]mplied repeals of statutes by later constitutional provisions is [*sic*] not favored and the courts require that in order to produce a repeal by implication the repugnancy between the statute and the Constitution must be obvious or necessary. Pursuant to this rule, if by any fair course of reasoning the statute can be harmonized or reconciled with the new constitutional provision, then it is the duty of the courts to do so.

Secondly, the homestead laws have traditionally been construed to promote family cohesion, not to maximize the owner's freedom to dispose of his property. *Cf.* Olesky v. Nicholas, 82 So. 2d 510, 512 (Fla. 1955); White v. Posick, 150 So. 2d 263, 265-66 (Fla. 2d Dist. Ct. App. 1963); Marsh v. Hartley, 109 So. 2d 34, 38 (Fla. 2d Dist. Ct. App. 1959) ("The constitutional and statutory provisions concerning homesteads should be interpreted in the liberal and beneficent spirit in which they were conceived and enacted in the interest of the family home.").

11. The legislature is presumably still capable of defining "children," for example, to include adopted or bastard children, and of setting the age limits which distinguish a minor from an adult. Likewise, it may specify which individual is to be deemed the "spouse" for homestead purposes, in the event that the owner was married more than once during his lifetime. But no authority remains to enlarge the *classes* of survivors protected against disinheritance.

12. 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.

In DeCottes v. Clarkson, 43 Fla. 1, 10, 29 So. 442, 444 (1901), the Florida Supreme Court refused to restrict the meaning of the word "children" in this constitution to "minor children."

13. Fla. Laws 1899, ch. 4730 (repealed in 1933 by FLA. STAT. § 731.05) imposed restraints on homestead devise in the widow's favor:

> 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; but if there be any child or children surviving him, then the widow shall be entitled to dower or a child's part in such homestead as she may elect . . . .

14. FLA. STAT. § 731.05(1) was first enacted in 1933. The original wording is identical with that of the statute invalidated in the *McGinty* decision, except that its verb form was "shall die" rather than "dies." *See* note 1 *supra*.

pressly upheld[15] or simply assumed[16] the legislature's power to impose these additional restrictions. Yet in *McGinty,* on the basis of language facially much less restrictive of the legislature's power, the court took a diametrically opposed position by adopting a construction precluding the legislature from prohibiting homestead devises if there were survivors other than spouse or minor child.

Of course the very magnitude of the change made by the 1968 revision of the homestead devise provision may have convinced the court that the change was intended by the framers[17] to displace the interpretative gloss surrounding the 1885 language. Nothing in the history of the constitutional revision process[18] would contradict this conclusion. The present language was submitted to the legislature by the Florida Constitution Revision Commission, and in turn was sub-

15. Thomas v. Williamson, 51 Fla. 332, 341-42, 40 So. 831, 833-34 (1906). The court sustained the statute in the face of the contention that it conflicted with art. X, § 4 of the 1885 Constitution, stating that "[o]ur State Constitution is a limitation upon power; and unless legislation duly passed be clearly contrary to some express or implied prohibition contained in the Constitution, the courts have no authority to pronounce it invalid."

16. *See* Efstathion v. Saucer, 158 Fla. 422, 29 So. 2d 304 (1947); Crosby v. Wartmann, 133 Fla. 383, 183 So. 32 (1938). A similar result obtained in lower appellate courts. *See In re* Estate of Wilder, 240 So. 2d 514 (Fla. 1st Dist. Ct. App. 1970); Moorefield v. Byrne, 140 So. 2d 876 (Fla. 3d Dist. Ct. App. 1962).

17. Although the court did not do so in *McGinty,* it has on a number of prior occasions looked to the intent of the framers and of the voting public in construing doubtful constitutional language. *See, e.g.,* State v. City of St. Augustine, 235 So. 2d 1 (Fla. 1970); State *ex rel.* Dade County v. Dickinson, 230 So. 2d 130 (Fla. 1969); *In re* Advisory Opinion to the Governor, 223 So. 2d 35 (Fla. 1969); Gray v. Bryant, 125 So. 2d 846 (Fla. 1960). In State v. City of St. Augustine, *supra,* the court ruled that a Florida statute imposing stricter requirements for holding local bond elections than those specified in the new constitution was no longer valid. But in doing so, the court went to great pains to explain its holding by reference to the history of the framing of art. VII, § 12 of the 1968 Constitution, governing local bond elections. 235 So. 2d at 4-5 n.7.

18. The first tentative draft of the 1968 Revised Constitution was prepared by the Florida Constitution Revision Commission, a thirty-seven member body comprising gubernatorial appointees, appointees of the Florida Bar, legislators, and members of the judiciary. The Commission was created by Fla. Laws 1965, ch. 65-561 and was charged with the responsibility of drafting and submitting to the legislature a proposed revision of the 1885 Constitution. Working in committees, the Commission prepared an initial draft, released on June 30, 1966, for use at state-wide public hearings. As a result of the hearings, the Commission made various changes which were incorporated in the preliminary draft released Nov. 10, 1966. The Commission then met as a body in Tallahassee from Nov. 28 through Dec. 16, 1966, and, after further deliberations, prepared a final draft which was submitted to the legislature. Further revisions of parts of this draft were made by both houses of the legislature. The final version was completed on July 20, 1968, and was submitted to and ratified by the voters on Nov. 5, 1968.

Information concerning the drafting of the 1968 Constitution by the Florida Constitution Revision Commission and by the legislature was drawn from a collection of documents on file at the Florida Supreme Court Library.

mitted by the legislature without change to the voters and ratified by them.[19] The recorded proceedings of the Commission reflect discussion of the homestead devise language principally in terms of enabling an owner to devise the homestead to one of several children.[20] But the debates are inconclusive and evidence no consensus as to this or any other purpose which the new language might have been intended to serve.

The *McGinty* court offered no reason in support of the meaning which it ascribed to the new constitutional language, except for its brief allusion to the undesirability of restricting the right to devise homestead beyond that allowed by the constitution. If this statement is to be taken as an expression of philosophical orientation on the part of the court, it might have been more plainly put. Or if the court regarded the language as too clear to admit of construction, it might have said so.[21] The opinion is a poor guide to methods of constitutional interpretation and seems painfully brief in light of the fact that this was the first case to arise under the new homestead provision. But the result which the court reached seems consistent with the diminished need today for the protection which homestead

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19. Attempting to ascertain the "intent of the framers and voters" from the composite process which generated the 1968 Constitution is hazardous at best. *See generally* 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 124-27, 142-44 (8th ed. W. Carrington 1927). Where, as in the case of the homestead devise provision, the language proposed by the Florida Constitution Revision Commission was unchanged by the legislature without recorded debate and ratified by the people, the only source extrinsic to the words themselves from which the intent of the framers can be inferred is the record of the Commission's proceedings. This record consists of verbatim transcripts of the Commission's deliberations in Tallahassee in 1966 and is a part of the collection of documents on file at the Florida Supreme Court Library.

20. *Transcript of Proceedings before the Florida Constitution Revision Commission,* vol. 7, at 132-72 (1966). Chief Justice Roberts of the Florida Supreme Court was a member of the Commission and chairman of the Human Rights Committee, a select committee which was instrumental in formulating the homestead devise provisions for the Commission's draft. In proposing a revised version of the 1885 language, Chief Justice Roberts expressed the following concern:

> And I tell you what the committee discussed. Ofttimes as we know there will be a family of say eight or nine, ten children. Somewhere in the deal one child gets caught with looking after Papa and Mama during their last 15 or 20 years. The other children live their own lives, and maybe it's a daughter or son, but they stay there day after day, they look after Papa's needs and Mama's needs. Then in the sunset years of their life, if that old couple wants to leave their little home to that child, who has sustained them in their greatest hour of need, we question the right in good conscience for the other children to come in and claim that it is an unlawful disinheritance.
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> . . . [I]t was our thought that the owners of a homestead should have the freedom of disposition in that manner if they saw fit.

Id. at 137. This view was concurred in by a majority of the other members of the Commission who expressed an opinion.

21. *Compare* State v. City of St. Augustine, 235 So. 2d 1, 6-7 (Fla. 1970).

devise restrictions were designed to afford. Previous homestead provisions were characterized as insuring for dependent family members a shelter and refuge from want.[22] The increased mobility of individuals, however, has had a scattering effect on the household[23] with the consequence that fewer persons look to the homestead for subsistence. Moreover, a number of developments have taken place which lessen the need for the economic security homestead devise restraints guaranteed in the past. Social security and other welfare laws, life insurance, and enhanced employment opportunities have all contributed to the declining importance of homestead laws. Given these developments, it is doubtful today that anyone other than the spouse or minor child requires homestead protection.

Constitutional Law — EQUAL PROTECTION OF THE LAWS — DURATIONAL RESIDENCE REQUIREMENTS FOR VOTING ABRIDGE RIGHT TO VOTE AND PENALIZE RIGHT TO TRAVEL.—*Dunn v. Blumstein*, 405 U.S. 330 (1972).

Three weeks after moving to Tennessee, James F. Blumstein was refused registration as a voter on the ground that state law[1] required a year's residence in the state and three months' residence in the county as prerequisites to voting. After exhausting his state remedies, Blumstein brought an action in federal district court challenging the constitutionality of these provisions. A three-judge court held that the durational residence requirements were unnecessary to further any compelling interest of Tennessee's and, so tested, were unconstitutional under the equal protection clause of the fourteenth amendment.[2] On appeal, the Supreme Court affirmed on substantially similar grounds.

In an opinion by Mr. Justice Marshall,[3] the Court first held that

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22. *See, e.g.*, Beall v. Pinckney, 150 F.2d 467 (5th Cir. 1945); Collins v. Collins, 150 Fla. 374, 7 So. 2d 443 (1942).

23. As of 1960 less than 3% of the rural farm households had a grandchild present; 40.6% had a child present, 83% of the children being under the age of 18. Among the urban households, 34.7% had children present, 89% of these children being under the age of 18. U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1960, VOL. 1, CHARACTERISTICS OF THE POPULATION pt. 11, at 353-57.

1. *See* TENN. CONST. art. IV, § 1; TENN. CODE ANN. § 2-201 (1971).

2. Blumstein v. Ellington, 337 F. Supp. 323 (M.D. Tenn. 1970).

3. Mr. Justice Marshall wrote for himself and four other members of the Court. Mr. Justice Blackmun concurred in the result, and the Chief Justice dissented. Justices Rehnquist and Powell took no part in the consideration or decision of the case.