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The primary and salutary result of the legislation herein suggested, by which tax equality with our neighbors will be attained, is the regaining of a valuable tax benefit that has been denied the consumer of gasoline in this state up to this time.

BART L. COHEN

DOWER: REDUCTION BY FAMILY ALLOWANCE
AND OTHER CLAIMS AGAINST THE ESTATE

Florida Statutes §§731.34, 733.20 (Cum. Supp. 1947)

I. DOWER

The family of a deceased husband, at common law, is protected from his caprice and improvidence in the provision for the maintenance of the widow and the support and education of the children by the right of dower. This right consists of a life estate in a third part of all realty of which the husband was seised during coverture and of which any of the widow's children might have been heirs.¹ This dower right attaches upon marriage and is superior to all debts and encumbrances placed on the land by the husband thereafter, and is also superior to his will.² However, there is no dower right in personal property at common law.³

Many states have enacted statutes modifying in varying degrees this common-law dower.⁴ These modifications vary from only slight changes to complete abolition.⁵ Yet most states allow the widow to make an election between taking under the husband's will or taking a statutory substitute for dower.⁶ Some of the states allow, in addition, an election

¹REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA §244 (2d ed. 1946).

²CO. LITT. 32; 2 TIFFANY, REAL PROPERTY 485, 487, 533 (3d ed. 1933).

³Serkissian v. Newman, 85 Fla. 388, 96 So. 378 (1923).

⁴2 TIFFANY, REAL PROPERTY §551 (3d ed. 1933). For an excellent discussion and analysis of dower as it now exists by statute in the various states see SIMES & BASYE, PROBLEMS IN PROBATE LAW, including a Model Probate Code, Appendices to §§31 and 32, pp. 256 *et seq.* (1946); see *Safe Deposit & Trust Co. v. Tait*, 3 F. Supp. 51, 56 (1933).

⁵*Ibid.*

⁶2 TIFFANY, REAL PROPERTY §551 n. 90 (3d ed. 1933); 3 VERNIER, AMERICAN FAMILY LAWS §§188, 189 (1935). Only North Dakota, South Dakota, and the

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between a share under intestate distribution or statutory dower.⁷ In either situation the dower elected is confined generally to an interest in real property, which in most instances is given free of debts of the decedent and charges against his estate.⁸ In personal property, on the other hand, when the widow makes this election to take against the will or intestate distribution, she is often allowed no more than a share prescribed by intestate distribution.⁹ Such share is not given free of the debts and other charges against the decedent's estate and cannot even be calculated until after such debts and charges have first been paid.¹⁰ Each state's elective share must be individually construed.

Florida's statutory substitute for dower¹¹ allows the widow an election both against testate and intestate estates. The statute grants her one-third part in fee simple of the real property owned by the husband at death or which he has before conveyed without her having relinquished her right of dower, and a one-third part absolute of the personal property owned at death. Except for estate taxes and certain liens,¹² the dower not only in real property but also in personal property is given priority over and is absolutely free from all debts of the decedent and all costs, charges and expenses of administration.¹³ This interpretation appears correct when examined in the light of the legislative history and judicial construction of prior dower sections.¹⁴ Thus Florida's dower in personal property is different from that of most jurisdictions.

community property states refuse all statutory dower.

⁷SIMES & BASYE, *op. cit. supra*, note 4, at 258.

⁸2 TIFFANY, REAL PROPERTY §§487, 491 (3d ed. 1933).

⁹SIMES & BASYE, *op. cit. supra*, note 4, at 258 *et seq.*; 3 VERNIER, AMERICAN FAMILY LAWS §189, Table XCV (1935).

¹⁰*Ibid.* These elected shares are somewhat similar to shares under Florida's statute of descent (FLA. STAT. §731.23, Cum. Supp. 1947), which cannot be calculated until all debts and expenses have been paid (FLA. STAT. §734.04, Cum. Supp. 1947).

¹¹FLA. STAT. §731.34 (Cum. Supp. 1947).

¹²*Ibid.* The lien of a person in possession of personalty, or the lien of a duly recorded mortgage executed by husband and wife.

¹³FLA. STAT. §731.34 (Cum. Supp. 1947) provides, ". . . and in all cases the widow's dower shall be free from liability for all debts of the decedent and all costs, charges and expenses of administration, but her dower shall be ratably liable with the remainder of the estate for its proportionate share of the estate and inheritance taxes. . . ."

¹⁴FLA. COMP. GEN. LAWS §5494 (1927), as amended, Fla. Laws 1933, c. 16103, §35, as amended, Fla. Laws 1935, c. 17171, §1, as amended, Fla. Laws 1937, c. 18066, §1, as amended, Fla. Laws 1939, c. 18999, §1, carried forward in FLA. STAT. §731.34

II. FAMILY ALLOWANCES

At common law there also existed in favor of the widow a right of quarantine which allowed her to remain, rent free, in the dwelling house until her dower was assigned.¹⁵ Florida, along with some other states,¹⁶ retained this right until 1931.¹⁷

Many states today allow, in place of or in addition to quarantine, various articles of personal property,¹⁸ homestead rights,¹⁹ or a family allowance of support money,²⁰ all statutory in origin. This family allowance, in many states, consists of an absolute first charge on the estate, given to the widow and children as a matter of right.²¹ Some states also apply the term "family allowance" to the personal articles granted.²² As a whole, there is no uniformity, and the distributive scheme in each state must be considered separately.

Florida, with the enactment of the Probate Act,²³ abandoned quarantine and now makes provisions for the widow which are more liberal than those of most jurisdictions. Besides her exempt dower, in realty and personalty,²⁴ the widow is allowed certain additional articles of

(1941). Decisions that gave effect to specific wording of some of these acts and held dower ratably liable for its pro rata share of costs, charges and expenses of administration, and estate taxes are: *Horney v. Rhea*, 152 Fla. 817, 12 So.2d 302 (1943); *Murphy v. Murphy*, 125 Fla. 855, 170 So. 856 (1936). Comparison of these amendments reveals that the Legislature has varied between granting dower free of everything to making it ratably liable with other distributive shares for all costs, etc., thus indicating that the present wording was used advisedly and for a purpose. See *In re Ratliff's Estate*, 137 Fla. 229, 188 So. 128 (1939).

¹⁵2 TIFFANY, REAL PROPERTY §535 (3d ed. 1933).

¹⁶*Ibid.*

¹⁷FLA. COMP. GEN LAWS §5497 (1927); *Mullan v. Bank of Pasco County*, 101 Fla. 1097, 133 So. 323 (1931).

¹⁸3 VERNIER, AMERICAN FAMILY LAWS §228 (1935).

¹⁹2 TIFFANY, REAL PROPERTY §§576-582 (3d ed. 1933). Homestead rights exist in almost all states.

²⁰SIMES & BASYE, PROBLEMS IN PROBATE LAW, including a Model Probate Code. pp. 80, 556 (1946); 3 VERNIER, AMERICAN FAMILY LAWS 635 (1935).

²¹3 VERNIER, AMERICAN FAMILY LAWS 638, Table CIX (1935).

²²D. C. CODE, tit. 21, §3, and tit. 29, §176 (1929); N. Y. SURREGATE'S COURT ACT §200; PA. STAT., tit. 20, §264 (1936).

²³FLA. STAT., cc. 731-736 (Cum. Supp. 1947).

²⁴FLA. STAT. §731.34 (Cum. Supp. 1947).

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personal property,²⁵ homestead rights,²⁶ and up to \$1,200 of support money—the family allowance.²⁷ This family allowance, however, is not given as a matter of right and as a first charge on the estate but is within the discretion of the judge.²⁸ It is listed under a section of the Probate Act entitled “Order of payment of expenses of administration and claims against the estate”²⁹ as a claim, or debt,³⁰ of the fourth class in priority. This section divides claims into eight categories in the order in which they are to be paid, with three claims prior to family allowance, namely: (1) expenses of administration, (2) funeral expenses, and (3) expenses of the last illness.³¹ These claims must be paid prior to family allowance.³²

III. THE PROBLEM

A recent decision,³³ of first impression in Florida,³⁴ has introduced confusion and uncertainty into this statute concerning the order in which expenses and claims are to be paid, and has raised a serious question as to the freedom of dower from liability for such expenses and charges.

In the case of *In re Gilbert's Estate*,³⁵ the widow applied for the family allowance and, after receiving several payments, elected also to take dower. The circuit court, in reversing the county court, ordered these family allowance payments charged in full against dower in per-

²⁵FLA. STAT. §731.36 (Cum. Supp. 1947).

²⁶FLA. CONST. Art. X, §1 (1885); FLA. STAT. §§731.05, 731.27, 733.01 (Cum. Supp. 1947).

²⁷FLA. STAT. §733.20(1)(d) (Cum. Supp. 1947).

²⁸*Ibid.*

²⁹FLA. STAT. §733.20 (Cum. Supp. 1947).

³⁰FLA. STAT. §733.20(1)(h) (Cum. Supp. 1947) refers to the preceding claims as “debts.”

³¹FLA. STAT. §733.20(1)(a), (b), (c) (Cum. Supp. 1947).

³²FLA. STAT. §733.20(2) (Cum. Supp. 1947).

³³*In re Gilbert's Estate*, 36 So.2d 213 (Fla. 1948).

³⁴In *Carter's Adm'r v. Carter*, 20 Fla. 558, 572 (1884), discussed in 9 FLA. L. J. 384 (1935), the Court charged the support allowance under an old statute (Duvall's Digest §87, Thompson's Digest §186, McClelland's Digest §447, repealed in 1892) against the \$1000 homestead personalty which was free of creditors' claims. This is the only other Florida case even analogous to our problem, and its result is changed by the present family allowance section.

³⁵36 So.2d 213 (Fla. 1948).

sonal property. On appeal, the Florida Supreme Court, with two dissenting opinions, correctly held that the widow's family allowance is "independent of dower"; but in setting out the mathematics involved the Court ordered that the family allowance ". . . should be deducted from the corpus out of which her dower is due and the dower calculated using the remainder after the deduction as a basis."³⁶

The Court states one rule, then proceeds to follow another, apparently without realizing the distinction. This decision results in a compromise between two extremes: (1) having dower bear no part whatsoever of the family allowance or (2) charging it with the whole of the family allowance as was done by the circuit court. Either of the extremes is a more logical result under Florida's statutes than that reached by the Court.³⁷ The mathematics of the decision effect a result which makes dower ratably liable for its proportionate share of the family allowance, although the Court does not expressly use these words. The decision may be a fair one but, while ostensibly based on legislative intent, it fails entirely to account for, or even mention, the dower section of the Probate Act. Furthermore, the premises in the treatise³⁸ and encyclopedia,³⁹ on which the Court relies, are based on cases of other states which often do not allow the widow to elect dower in personal property free from all debts and expenses of administration,⁴⁰ and which also grant a variety of types of family allowances.⁴¹ As has previously been pointed out, the schemes of distribution are so diversified that no broad general statements, such as the court used, can be accurately applied.

³⁶36 So.2d 213, 216 (Fla. 1948).

³⁷*Ex parte Grooms*, 102 Ark. 322, 143 S. W. 1063 (1912) is a rare case in point with (1). No. (2), the circuit court's decision, seems correct from the rule of construction that the specific mention of the one is the exclusion of that not mentioned. FLA. STAT. §731.36 (Cum. Supp. 1947) specifies that certain articles are granted in addition to dower, but does not mention family allowance. FLA. STAT. §733.20(1)(d) (Cum. Supp. 1947) specifies that family allowance is in addition to homestead and exempt personalty but not dower. As the family allowance fulfills the purpose of dower and is not specified in addition thereto, it should be treated as an advance—but only if the dower section is ignored.

³⁸1 WOERNER, THE AMERICAN LAW OF ADMINISTRATION §77 (3d ed. 1923).

³⁹21 AM. JUR., Ex'ts & Adm'ts, §315.

⁴⁰SIMES & BASYE, PROBLEMS IN PROBATE LAW, including a Model Probate Code, 258 (1946); 3 VERNIER, AMERICAN FAMILY LAWS §189, Table XCV (1935).

⁴¹SIMES & BASYE, PROBLEMS IN PROBATE LAW, including a Model Probate Code, pp. 80, 556 (1946); 3 VERNIER, AMERICAN FAMILY LAWS 635, 638, Table CIX (1935).

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Florida does allow an election of dower in personalty specified free from liability⁴² of all debts, costs, charges and expenses of administration, one of which in Florida is family allowance.⁴³ Such dower is to be ratably liable with other distributive shares only for estate taxes and certain liens.⁴⁴ Therefore, dower logically should be calculated prior to deduction of family allowance and granted absolutely free and independent thereof.

The Court's mathematical result thus appears wrong, and one of two questionable and confusing consequences must arise. Either (1) dower is ratably liable not only for family allowance but also for each of the three claims⁴⁵ having priority over the family allowance, if the Court has disregarded the specific words of the dower section;⁴⁶ or (2) family allowance, a claim of priority four, has been removed from the order set by the Legislature in the "Order of payment" section and has been placed in absolute first position, with priority in the estate over everything except possibly estate taxes and certain liens. Under the present situation a personal representative would do well to proceed cautiously in paying claims and expenses of administration when the widow has elected dower, and particularly when the widow is also one of the claimants.⁴⁷ The theory of the Court may be that the words of the dower section are to be disregarded and dower made liable for its share of *all* expenses and claims, or the theory may be that it is unfair for the widow to recover her dower in full if she is also allowed a claim, the family allowance in the principal case, against the estate.

The Court also expressly states that merely by accepting family allowance the widow "will be estopped to complain that the dower is calculated after deduction of such payments to her."⁴⁸ Although the ground for estoppel is not clear, the result is that this compromise theory formulated by the Court has definitely become a settled rule of distribution, because the widow is the only one who would question the decision.

⁴²FLA. STAT. §731.34 (Cum. Supp. 1947).

⁴³FLA. STAT. §733.20 (Cum. Supp. 1947); FLA. STAT. §733.20(1)(h) (Cum. Supp. 1947).

⁴⁴FLA. STAT. §731.34 (Cum. Supp. 1947).

⁴⁵FLA. STAT. §733.20(1) (a), (b), (c) (Cum. Supp. 1947).

⁴⁶FLA. STAT. §731.34 (Cum. Supp. 1947).

⁴⁷Seven claims are listed in FLA. STAT. §733.20(1)(b) through (h) (Cum. Supp. 1947).

⁴⁸36 So.2d 213, 216 (Fla. 1948).