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logical conclusion with this case. This process of gradual incorporation was followed in the series of first amendment cases, and today every first amendment right is protected against state invasion by the appropriate federal standard.[12] In view of this strong and rapid trend and the desire for a uniform standard as expressed in *Malloy*, it seems likely that the ultimate result will be the inclusion of the guarantees of the Bill of Rights into the fourteenth amendment accompanied by federal standards.

While many who fear the growth of the federal government into areas previously dominated by the states will regret the *Malloy* decision, it is unrealistic to believe that the trend in this area will not continue. The states today represent a threat to personal liberty just as the federal government did in 1789. In 1789 the framers of the Constitution feared that individual rights would be abridged by the strong federal government, which they had created. At that time there was little fear of the state governments, which they thought were sufficiently controlled by local opinion to prevent infringement on individual liberty. But today the large size, complexity, and impersonality of our state governments represent just as great a threat to personal liberties as did the federal government in 1789. If we assume that the Bill of Rights was written in part to protect the individual from a powerful sovereign, there is no justification for refusing to protect against infringement of these rights by the states today. The fact that these decisions serve to increase individual freedom and protection makes the result a desirable one in this day of ever-increasing control by all forms of government, federal, state, and local.

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WILLS: EFFECT OF DIVORCE AND REMARRIAGE IN FLORIDA

Bauer v. Reese, 161 So. 2d 678 (1st D.C.A. Fla. 1964)

The decedent Bauer and his widow were first married in September 1955. The decedent executed a will in September 1956, which devised their homestead to his wife and the balance of his sizeable estate to his maternal and paternal relatives. Shortly thereafter the decedent and his widow were divorced. Eight months later they remarried and remained so until the decedent's death on July 10, 1962. There were no children and Bauer's parents predeceased him. The

12. Gitlow v. New York, 368 U.S. 652 (1925) (speech and press); DeJonge v. Oregon, 299 U.S. 353 (1931) (assembly); Cantwell v. Connecticut, 310 U.S. 296 (1940) (religion); Shelton v. Tucker, 364 U.S. 479 (1960) (association).

will was admitted to probate and the widow sought to have it set aside contending she was a pretermitted spouse under Florida Statutes, section 731.10[1] because Florida Statutes, section 731.101[2] invalidated the provisions of the will that pertained to her and thus entitled her to an intestate share.[3] Section 731.101 provides:

> All wills offered for and admitted to probate subsequent to June 11, 1951, made by husband or wife who have been divorced from each other subsequent to the date of said will, shall be null and void by means of said divorce insofar as said will affects the surviving divorced spouse.

The widow contended that the subsequent remarriage did not renew or validate the will.

The probate court, on motion of the executrix of the estate, dismissed the widow's claim with prejudice. On appeal to the First District Court of Appeal of Florida, HELD, divorce subsequent to execution of a will operates to make null and void the provisions of the will that affect the divorced spouse and subsequent remarriage to the same person does not revitalize those provisions. Judgment reversed and remanded, Justice Rawls dissenting.

The decision is in conflict with Florida statutory[4] and case[5] law, which declare wills to be ambulatory in that they become effective only at the time of the testator's death. The court apparently ignores the language of section 731.101: "said will, shall be made null and void . . . as said will affects the surviving divorced spouse" because it cannot be determined until the testator's death who, if anyone, is a *surviving divorced spouse.* In the instant case there was no surviving divorced spouse because of the subsequent remarriage, thus section 731.101 by its own language would not appear to be applicable.

Before passage of section 731.101 the prevailing common law position,[6] accepted in Florida,[7] was that divorce alone was not a

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1. "When a person marries after making a will and the spouse survives the testator, such surviving spouse shall receive a share in the estate of the testator equal in value to that which such surviving spouse would have received if the testator had died intestate, unless provision has been made for such spouse by marriage contract or unless such spouse is provided for in the will. . . ." FLA. STAT. §731.10 (1963).

2. FLA. STAT. §731.101 (1963).

3. "The real and personal property of an intestate shall descend and be distributed as follows . . . (2) if there are no lineal descendants, to the surviving spouse." FLA. STAT. §731.23 (1963).

4. FLA. STAT. §731.05 (2) (1963).

5. Schaefer v. Voyle, 88 Fla. 170, 102 So. 7 (1924); Colcord v. Conroy, 40 Fla. 97, 23 So. 561 (1898).

6. *In re* Brown's Estate, 139 Iowa 219, 117 N.W. 260 (1908).

7. Davis v. Davis, 57 So. 2d 8 (Fla. 1952).

sufficient change of circumstance to revoke a will.[8] By statute, Florida[9] and numerous other states[10] have attempted to protect those divorced testators who have forgotten to change wills made prior to divorce.[11] Any statutory change of the common law in Florida should be extended no further than is expressly declared[12] or is clearly necessary to effectuate the policy of the statute.[13] The decision in the instant case seems to be an extension beyond that which is expressly declared by section 731.101 or is clearly necessary to effectuate the policy of the statute.

It has been held that, in the absence of clear legislative mandate, the courts will not create or destroy a testamentary disposition because strong public policy favors free alienation of property by will.[14] The divorced spouse statute[15] does not clearly settle the problem of subsequent remarriage. If the legislature considered the possibility of remarriage it settled that eventuality with the language, "surviving divorced spouse." If, as the court speculates, remarriage was not contemplated by the legislature, the court should not have extended this statute, which is in derogation of the common law, to cover divorce and remarriage.

The court uses section 731.101 to invalidate the provisions of the will that apply to the surviving spouse, thus allowing her to claim as a pretermitted spouse under Florida Statutes, section 731.10.[16] It is not clear why the court finds it necessary to consider whether section 731.101 applied. The court could have decided the case under section 731.10 without considering section 731.101. Under the Florida Constitution,[17] statutes,[18] and case law[19] a husband cannot lawfully make testamentary disposition of his homestead when his widow survives him. The homestead would have gone to the widow in fee simple

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8. Ireland v. Terwilliger, 54 So. 2d 52 (Fla. 1951).

9. FLA. STAT. §731.101 (1963).

10. *E.g.*, KAN. GEN. STAT. ANN. §59-510 (1959); MINN. STAT. §525.191 (1961); PA. STAT. ANN. tit. 20, §180.7 (2) (1963).

11. PA. STAT. ANN. tit. 20, §180.7 (2) (1963).

12. Bryan v. Landis, 106 Fla. 19, 142 So. 650 (1932).

13. *Ex parte* Amos, 93 Fla. 5, 112 So. 289 (1927).

14. Rogers v. Rogers, 152 So. 2d 183 (Fla. 1963).

15. FLA. STAT. §731.101 (1963).

16. FLA. STAT. §731.10 (1963). See note 1 *supra* for text of statute.

17. FLA. CONST. art. X, §4.

18. "(1) . . . 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." FLA. STAT. §731.05 (1963).

19. Morgan v. Bailey, 90 Fla. 47, 105 So. 143 (1925).

under Florida Statutes, section 731.27[20] regardless of the provision in the will because there were no lineal descendants. Therefore the devise was illusory and void and should not have been considered a sufficient testamentary gift to make the pretermitted spouse statute[21] inapplicable to the widow. By deciding the case under section 731.101 the court construed the statutory language to cover a situation that probably was never contemplated by the legislature.

Extra-legal factors favoring the widow may explain, in part, the court's decision. Because there are no children, when the case is returned for a new trial the widow will, by taking her intestate share as a pretermitted spouse, take the testator's entire estate. It is interesting to note that if the testator had remained married the widow would have been entitled to no more than dower; if he had not remarried her, she would have received nothing; but the act of remarriage alone gives her the entire estate. If a desire to protect the widow motivated the court, subsequent application of the statute as construed in this case may well force a hardship on widows in situations in which the testator leaves surviving lineal descendants. Based on the decision in the instant case anyone with standing to sue may challenge a will made prior to divorce and remarriage of the testator. The provisions of the will applicable to her will be declared void and the widow will elect dower in the property that is covered by the valid provisions of the will. She can then elect dower or her intestate share in that part of the estate originally devised to her. In situations in which the testator devises a greater portion of his estate to his widow than she is entitled to under the dower or intestacy statutes the voiding of the will would operate to decrease her share of the estate. In view of the possible harsh results in subsequent cases, section 731.101 should not have been construed to apply to a divorce and subsequent remarriage.

It is often said that hard cases make bad law and undeniably this was a hard case. A decision on whether this case is good or bad law must wait further applications to other fact situations. If the analysis of the *Bauer* decision made in this comment is correct, legislative action to correct the construction of Florida Statutes, section 731.101 may be appropriate.

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20. "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 descendant." FLA. STAT. §731.27 (1963).

21. FLA. STAT. §731.10 (1963).