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Rief: Florida Homestead: A Balancing of Equities Between Two Dependent



# FLORIDA HOMESTEAD: A BALANCING OF EQUITIES BETWEEN TWO DEPENDENT FAMILIES

*Graham v. Azar*, 204 So. 2d 193 (Fla. 1967)

Petitioner sought to have a writ of execution for child support levied upon the personal property of her divorced husband. Following the parties' divorce, petitioner had been awarded custody of their minor child and respondent had been ordered to make monthly support payments, but was substantially in arrears at the time of the suit. Both petitioner and respondent had remarried. The circuit court ordered sale of the property to satisfy the judgment despite the husband's claim of the constitutional exemption of 1,000 dollars worth of personal property.[1] The district court of appeal reversed[2] and granted the husband's claim of exemption. On appeal, the Florida Supreme Court HELD, that where the former husband had remarried and had become head of a family, the 1,000 dollar constitutional exemption immediately attached to his benefit and thereby barred a forced sale to pay back child support.

The present case is of first impression in Florida. In previous factually similar Florida cases, the exemption had never barred a wife's claim for child support. In these cases, however, the husband had not acquired a second family subsequent to the divorce.[3] Under proper circumstances, the court in a divorce suit may require the husband to set aside property as security for payment of alimony or child support.[4] The court may also award the use and possession of the homestead property owned as a tenancy by the entirety to the wife as an incident of its power to grant alimony or child support.[5] In such cases, this power is merely regarded as a charge upon the property to guarantee the obligation.[6]

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1. "A homestead to the extent of one hundred and sixty acres of land, or half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, *together with one thousand dollars worth of personal property*, and the improvements on the real estate, shall be exempt from forced sale under process of any court . . . and no judgment or decree or execution shall be a lien upon the exempted property except as provided in this article." FLA. CONST. art. X, §1 (emphasis added).

2. Azar v. Graham, 194 So. 2d 684 (3d D.C.A. Fla. 1967).

3. Anderson v. Anderson, 44 So. 2d 652 (Fla. 1950); Osceola Fertilizer Co. v. Sauls, 98 Fla. 339, 123 So. 780 (1929).

4. Landy v. Landy, 62 So. 2d 707 (Fla. 1953) (husband had shown a tendency to leave the jurisdiction to avoid payment); McRae v. McRae, 52 So. 2d 908 (Fla. 1951) (it appeared the husband was attempting to convey or conceal property to defeat the claim for support); Thompson v. Thompson, 142 Fla. 643, 195 So. 571 (1940) (father had left the jurisdiction to avoid the service of process and the court enjoined those holding money or property of his from disposing of it so that a judgment in rem might be enforced against the property); Riley v. Riley, 131 So. 2d 491 (1st D.C.A. Fla. 1961) (husband's occupation was hazardous and materially impaired his life expectancy); FLA. STAT. §61.13 (1967).

5. Banks v. Banks, 98 So. 2d 337, 339 (Fla. 1957); McRae v. McRae, 52 So. 2d 908, 909 (1951); Pollack v. Pollack, 159 Fla. 224, 31 So. 2d 253 (1947); Brown v. Brown, 123 So. 2d 298, 300 (3d D.C.A. Fla. 1960); Starling, *The Tenancy by the Entireties in Florida*, 14 U. FLA. L. REV. 111, 128 (1961).

6. Berger v. Berger, 182 So. 2d 279 (4th D.C.A. Fla. 1966).

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The present problem arises when the court has not required security nor made other provisions to guarantee payment and the wife seeks to enforce the judgment against the personalty of her divorced husband. The constitution states[7] and the court has held[8] that the purpose of the exemption[9] is to protect not only the husband but also his family from becoming destitute public charges. There are two situations in which this homestead exemption problem can arise: first, the situation in which there is merely the husband and the divorced wife and child; and second, where there is the divorced wife and child and the ex-husband also has a second dependent family.

In the first of these two situations, the Florida court has based its allowance or disallowance of the exemption on the nature of the claimant and the judgment he was seeking to enforce.[10] In *Osceola Fertilizer v. Sauls*,[11] the court held that a divorced husband living apart from his wife and family was still entitled to the exemption as head of a family against outside creditors. The court based its decision upon the continuing obligations of the husband to furnish support for his wife and child. However, in *Anderson v. Anderson*,[12] where the husband sought the shield of the exemption against his divorced wife's claim for child support, the court declined to follow the *Osceola* reasoning because it would negate the very purpose of the exemption —protection of the family.

No previous Florida cases have considered the situation in which the divorced husband has remarried, but the question has been decided in other jurisdictions.[13] A Nebraska court has stated that no mere rule of law should permit the husband to construct a shield that would protect him against his "marital and domestic recklessness."[14] The husband's remarriage should not relieve him from the duty of supporting children of a former marriage even though he must sell his homestead property. Similarly, an Iowa court has denied the exemption because of the special nature of the obligation for child support.[15] That court said the obligation did not arise out of any business transaction, but was founded upon the legal and moral duty of the

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7. FLA. CONST. art X, §1.

8. *E.g.*, Collins v. Collins, 152 Fla. 374, 7 So. 2d 443 (1942); Anderson Mill & Lumber Co. v. Clements, 101 Fla. 523, 134 So. 588 (1931); Brandeis v. Perry, 39 Fla. 172, 22 So. 268 (1897).

9. *See* Crosby & Miller, *Our Legal Chameleon, the Florida Homestead Exemption* (pts. I-V), 2 U. FLA. L. REV. 12-84, 219-42, 346-90 (1949) for a complete treatment of Florida's homestead exemption.

10. Anderson v. Anderson, 44 So. 2d 652 (Fla. 1950); Osceola Fertilizer Co. v. Sauls, 98 Fla. 339, 123 So. 780 (1929).

11. 98 Fla. 339, 123 So. 780 (1929).

12. 44 So. 2d 652 (Fla. 1950); Comment, *Florida Homestead: Availability of Exemption After Divorce*, 3 U. FLA. L. REV. 242 (1950) (interestingly, the commentator then suggested that the equities and needs should be balanced and that the court should follow a policy designed to minimize the number of public wards — a result opposite to the course taken by the court).

13. Davis v. Davis, 67 N.W.2d 566 (Iowa 1954); Felder v. Felder's Estate, 13 So. 2d 823 (Miss. 1943); Winter v. Winter, 95 Neb. 335, 145 N.W. 709 (1914).

14. Winter v. Winter, 98 Neb. 335, 145 N.W. 709, 713 (1914).

15. Davis v. Davis, 67 N.W.2d 566 (Iowa 1954).

husband to support his wife and child. It was not a debt in the legal sense during marriage and therefore should not be considered such after divorce has dissolved the marriage. In an analogous situation, where the wife was suing her remarried husband for alimony arrearages, a Mississippi court held that the husband could not claim the benefit of the exemption.[16] The court said that a decree for alimony or child support was not a debt in the ordinary sense of the term, but rather was a judgment calling for performance of a duty that has been made specific by the divorce. By reference to these interpretations and the doctrine that the Florida exemption provisions be liberally construed,[17] the Florida court clearly could have held that claims for alimony or child support constituted a special class to which the exemption provisions do not apply.

Apparently, the Florida exemption provision does not contemplate that the husband might be legally obligated to support two or more families, and therefore has provided no priorities among the families. Comparison of the cases from other jurisdictions indicates that a similar result could have been reached in Florida because the relevant constitutional provisions interpreted are substantially identical.[18] In none of the statutes is an exception made for alimony or child support, yet the highest courts of three states have implied an exception to the homestead exemption from the intent of the provision.

The Florida court, however, followed the strict wording of the provision and did not recognize any implied exception, citing as authority a California decision upholding a remarried husband's claim of homestead exemption against a decree of forced sale for back alimony and child support.[19] The California case can be distinguished from the present case, however, because the property in question was community property jointly purchased by the husband and new wife. In the instant case, on the other hand, the exemption was sought for the husband's separate property. The California court expressly refrained from deciding what the result would have been had the property in question been the husband's separate property.[20] However, the California court has gone so far as to allow the former wife to garnish the wages of her remarried ex-husband despite a wage exemption that is similar to the homestead exemption.

Justice Ervin, dissenting in the instant case, suggested that the child's rights to support are in no way affected by the exemption provision because of the special relationship between the child and his father.[21] The court has held on many occasions that the father is responsible for the support

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16. Felder v. Felder's Estate, 13 So. 2d 823 (Miss. 1943); *cf.*, Davis v. Davis, 67 N.W.2d 566 (Iowa 1954).

17. *E.g.*, Olesky v. Nicholas, 82 So. 2d 510 (Fla. 1955); Bessember Properties v. Gamble, 158 Fla. 38, 27 So. 2d 832 (1946); *In re* Livingston's Estate, 161 So. 2d 723 (2d D.C.A. Fla. 1964); White v. Posick, 150 So. 2d 263 (2d D.C.A. Fla. 1963).

18. IOWA CODE ANN. §561 (1954); MISS. CODE ANN. §318 (1943); NEB. REV. STAT. §§8099-8106 (1913), §40-101 (1944).

19. Yager v. Yager, 7 Cal. 2d 213, 60 P.2d 422 (1936).

20. *Id.* at 424.

21. 204 So. 2d 193, 196 (1967) (dissenting opinion Ervin, J.).

Florida Law Review, Vol. 20, Iss. 3 [1968], Art. 13

of his children notwithstanding the fact that he has divorced their mother.[22] The right of the child to support from his father vests at birth, and the divorce court's order merely specifies the father's current obligation.

Under a Florida statute[23] the court retains authority to enforce a decree for child support in the same manner that it could at the time of the divorce, and also by contempt proceedings.[24] There is an implied retention of jurisdiction over all property of the husband to require security if the circumstances warrant. The acquisition of the exemption later by remarriage, therefore, would not cut off the claim by the first wife or her child. The interest of the child would in effect vest at the time of the divorce as suggested by Justice Ervin in his dissent and by the *Anderson* rationale.[25]

In the instant case, under this reasoning, there would be two families each with a separate claim to the otherwise exempt property. This dual claim requires the balancing of the needs and rights of the various parties. According to Justice Ervin, such balancing could be accomplished by exercise of the court's equitable powers to insure that the child of the first marriage did not receive a share disproportionate to that of the second family. A distinction in balancing the rights might be made on the basis whether the arrearage claim had vested prior to the remarriage of the father or after the remarriage. In the former case, the right might have vested absolutely, whereas in the latter instance, the vesting would be relative to the father's ability to support the two families. Here also, allowance must be made for the ability of the divorced wife to support herself and the child. In the case where the wife had remarried, the court should also consider the ability of the wife's new husband to support the family, especially if the ex-husband was less able to support his two families adequately.

The question presented is one in which the need for certainty should be subordinate to the requirements of justice in each particular case. It is unfortunate that the court chose to follow a strict wording of the provision rather than a more liberal interpretation in light of the purpose it was designed to fulfill.

FRANK J. P. RIEF, III

22. Olsen v. Simpson, 39 So. 2d 801 (Fla. 1949). In Pollack v. Pollack, 159 Fla. 224, 31 So. 2d 253 (1947) Justice Terrell stated: "Appellant fails to take account of the well-settled principle that the law imposes upon civilized man the duty to provide food, shelter and raiment for his own. It was one of the conditions upon which Adam was bounced out of the garden, and it has been the law ever since. They [the children] are wards of the court and the chancellor is concerned with their bread and butter, he does not take his cue from Elijah and the ravens, he draws it from the earnings of the father." *Id.* at 254.

23. FLA. STAT. §61.17 (1967).

24. FLA. STAT. §§61.15, .17 (1967).

25. 44 So. 2d 652 (Fla. 1950).