TRUSTS AND SUCCESSION
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Although many significant developments have taken place in the Florida law of trusts and successions, many shortcomings still remain. Ambiguities, deficiencies and over-aged statutory provisions continue to confuse and annoy particularly those whose rights are affected. It is the purpose of this article to analyze some of the recent developments in the Florida law on trusts and succession in the light of their justification, effect and shortcomings.

AFFECT OF WRONGFUL CONDUCT UPON RIGHT OF SURVIVORSHIP IN ESTATE BY ENTIRETIES.

In 1951, the Florida Supreme Court was first confronted with the problem of who succeeds to an estate by the entirety when one spouse murders the other. This question was raised in the case of Ashwood v. Patterson¹ wherein Albert Ashwood murdered his wife and then committed suicide. No children were born of the marriage, however, each of the parties had issue by former marriages. The heirs of Mrs. Ashwood contended that they were entitled to the estate since under the Florida law² a murderer is not permitted to inherit from the decedent or to take any portion of the estate as a devisee or legatee. In answer to this contention, the Florida Supreme Court declared:³

Upon the death of one spouse, the other does not ‘inherit’ the interest of the other in such estate, but merely comes into the full beneficial enjoyment of such estate, which is said to vest by operation of law in the surviving spouse.

While the court did acknowledge and subscribe to the equitable principle that no one shall be permitted to profit by his own wrongdoing, it was also concerned with the modern principles opposed to forfeiture of estates by the commission of a felony. After examining the holdings of other jurisdictions,⁴ the court subscribed to the Missouri view⁵ which

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¹ 49 So.2d 848 (1951).
² F.L.A. STAT. § 731.31 (1951).
³ 49 So.2d 848, 849 (Fla. 1951).
⁴ Sherman v. Weber, 113 N.J. Eq. 451, 167 Atl. 517 (1933) (murdering husband declared a constructive trustee of the value of the murdered wife’s net income during her life expectancy for benefit of wife’s heirs); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y. Supp. 173 (Sup. Ct. 1918) (although murdered wife predeceased murdering husband, her heirs succeeded to the entire estate held by the entireties); Bryan v. Bryant, 193 N.C. 372, 137 S. E. 188 (1927) (murdering husband entitled to life estate and upon his death, entire estate to heirs of murdered wife).
⁵ Barnett v. Coney, 224 Mo. App. 913, 27 S.W.2d 757 (1930).
destroys the fiction of unity of estates and creates a tenancy in common thereby permitting one half of the estate to go to the heirs of the murdering spouse and one half to the heirs of the murdered spouse. In this respect, the Florida Supreme Court regards the murder of one spouse by the other with the same affect as divorce. In the language of the court:

\[...\] where the husband by his wilful, felonious act dissolves the marital relationship, and as a consequence there is a severance of the estate by the entirety, such property may well be treated as held by tenants in common.

ADOPTION

Although the institution of adoption was unknown at the common law, it is today very generally recognized and jealously protected by virtue of the humanitarian concept of providing a home for the homeless and an heir for the childless. The extent of this motivating concept is readily discernible from the extent of inheritance conferred upon an adopted child by legislative act. The majority of states have statutes permitting the adoptee to inherit from the adopter and conversely, the adopter from the adoptee. Such provisions are apparently justified on the ground that by virtue of adoption, the parent-child relationship is created. This rationale is further fortified by the fact that provision is generally made precluding an adopted child from sharing in the estate of his natural parents.

In this respect, somewhat of an anomaly is created by the prevailing view preventing an adopted child from inheriting “through” his adopting parents, i.e., from the ancestors of his adopting parents. The reason generally subscribed as justification for such a holding was aptly quoted in the case of In re Hewett’s Estate

The ancestors of the adopter are presumed to know their relatives by blood, and to have them in mind in the distribution of their estates, either by will or descent, but they cannot be expected to keep informed as to adoption proceedings in the probate courts of the counties of this state; and to allow an adopted child to inherit from the ancestors of the adoptee would often put property into the hands of unheard of adopted children, contrary to the wishes and expectations of such ancestors.

The Florida Statute conferring the right of inheritance by adopted children is similar to that in the majority of jurisdictions insofar as the adoptee has the right to inherit from the adopter, and the adopter inherits from the adopted child. However, in other respects, the Florida position

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6. 49 So.2d 848, 850 (Fla. 1951).
7. 13 So.2d 904, 907 (Fla. 1943).
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shows a greater partiality toward the adopted child and is inclined toward the classification of advanced legislation. In addition to inheriting from his adopting parents, the adoptee inherits from his natural parents. Any effort to justify such a provision would be purely conjectural since the basis for such a holding has not been evinced either judicially or legislatively. If the natural parent-child relationship is severed by virtue of adoption by another, the child would be deprived of any right of inheritance from the natural parents, since the parties would then be regarded as strangers. If, on the other hand, the statement "once of blood, always of blood" is applied, the adopted child and natural parents would have the right to inherit from one another which is not the case. Of course, the provision could always be justified on the basis of the deeply entrenched public policy favoring the institution of adoption and the desire to confer greater benefits upon the child. Is any greater justification required?

The most advanced type of legislation regards the adopted child as a natural child of his adopter for all purposes including inheritance thereby permitting the adoptee to inherit "through" his adopting parents. It appears that such legislation has been long overdue particularly, since in all other respects, emphasis is continually placed upon the removal of any distinctions existing between adopted and natural child.

In 1953, the Florida legislature took an important step forward by enacting legislation which provides:

The adopted child shall be regarded as the natural brother or sister of the natural children and other adopted children of the adopting parents for the purpose of inheritance for or by them.

Although such legislation serves to grant to the adopted child, for purposes of inheritance, the status of natural brother or sister to other children of the adopting parents, it falls short, from the most desirable point, of establishing an adopted child as a natural child for all purposes, including inheritance. The courts are powerless—it is up to the legislature to complete the story to its logical conclusion.

DOWER

At the common law, a surviving widow was granted a lower right in her husband's estate consisting of a life estate in one third of the lands which her husband owned during coverture. This common law concept of dower has been generally retained, however, greatly modified in order to afford a surviving widow greater assurance against destitution.

In Florida dower now consists of a one third part in fee simple of the lands which the husband owned during coverture and to which

9. Ibid.
10. ATKINSON, WILLS, 104 (2d ed. 1953).
the wife did not relinquish her dower, plus one third absolute interest in the personality the husband owned at the time of his death. By virtue of amendment enacted in 1951, this dower right is exempt from the debts and obligations of the husband, however, it remains ratably liable for the payment of inheritance taxes. Since dower was originally designed to afford a surviving widow a degree of protection from destitution, its creation and continuance is conditioned upon the husband-wife relationship. Thus it is generally held that the right of dower stands or falls as a result of a decree which denies or grants a divorce.

While a husband cannot deprive his surviving widow of dower by testamentary disposition, he can require her to elect dower or a provision made in her favor by express language to that effect. In fact, under Florida law and contrary to the common law, a provision in favor of a surviving widow is presumed to be in lieu of dower, thereby requiring an election.

In general, the right of election is personal unto the surviving wife, however, since 1951 the right of election has been extended to the guardian of an incompetent widow and to the beneficiaries of the widow's estate when she dies prior to exercising her election. In each case where the election is exercised by one other than the widow, it is subject to the approval of the County Judge motivated by the best interest of those entitled to share. Insofar as the Florida position permits the election to be exercised by the beneficiaries of the widow upon her death, a radical departure from the prevailing view has been taken without any realistic justification. If dower was originally founded on the concept of protecting a widow from destitution, why should it be permitted to inure to the benefit of possible strangers under any circumstances? While the discretion accorded the County Judge will undoubtedly prevent the perpetration of many inequities, it cannot, consistent with the legislative intent, prevent some inequities made possible by the enactment.

Time for election.—Whether the right of election is exercised by the surviving widow, her guardian or beneficiaries, it must be made within nine (9) months from the first publication of notice to creditors. Although this time limit is imposed in the public interest by expediting the administration of estates, it can create hardships insofar as the surviving widow is concerned. For example, suppose the will of a husband is contested and the contest extends beyond the nine month period from

14. Ibid.
the time of first publication of notice to creditors. If the surviving widow exercises her right of election before the validity of the will is determined, she may be prejudiced by the final adjudication. Or if she waits until after the final determination of the will's validity, the period within which her election was to have been made will have expired. In such a case, she will be deemed to have waived her right to elect. In order to avoid these inequities, a provision should be made extending the time for a widow to exercise her right of election in the case of a will contest and where a will is discovered after intestate administration has been commenced. Delay in the administration process will not be occasioned by such extension of time since the delay is attributed to the contest of the will's validity or the added time necessary upon discovery of a will after intestate proceedings have commenced.

**Objections to Claims Filed Against an Estate**

A personal representative or other interested party objecting to a claim filed against an estate is, by virtue of 1953 Amendment, obligated to serve a copy of such objection by registered mail or personal service on the creditor to whose claim the objection is made. This mandatory requirement appears to have created an ambiguity in the statute relating to the time within which a creditor must bring an appropriate suit, action or proceeding in order to establish his claim to which an objection had been filed.

Prior to 1953, the period within which such proceeding had to be brought was twelve calendar months from the date of first publication of notice to creditors. However, since that date the period for bringing suit is left in doubt.

One provision of the pertinent statute provides:

The claimant shall have twelve calendar months from the first publication of notice to creditors in which to bring appropriate suit, action or proceeding upon such claim.

An additional provision in the same statute provides:

In such event, (the filing of objection to claim) the claimant shall be limited to two calendar months from the date of such service within which to bring appropriate suit, action or proceeding upon such claim. (Parenthesis added).

The query is immediately raised—does the creditor have twelve calendar months in which to institute proceedings for the enforcement of his claim? If the answer is in the affirmative, then of what effect is the provision requiring the creditor to institute proceedings within two calendar

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months from the date of service of objections? It is a well recognized rule of statutory construction, that every word contained in a statute is designed to accomplish a particular purpose. Consequently, the provision granting the creditor twelve calendar months from date of first publication of notice to creditors in which to institute proceedings is assumed to be included for a particular purpose. Further, the provision requiring the creditor to file a suit for enforcement of his claim within two calendar months from service of objection, must also be regarded as included for a particular purpose. Needless to say, both provisions while relating to the same right, are inconsistent. If the provision relating to the service of objection upon the creditor were left discretionary with the objector, as was the case prior to 1953, there would be no problem. In such event the literal meaning of the statute would incline one to believe that if objections were served upon the creditor by registered mail or personal service, then, and in that event, the creditor would have two months from date of such service in which to institute the proceedings. However, if the personal representative or other interested party did not serve such objections upon the creditor, the creditor would then have twelve months from the date of first publication of notice to creditors in which to institute his proceedings.

This result may have been intended by the legislature. However, it appears that by changing a single word in the statute from "may" to "shall" the legislature has created an ambiguous situation that must be clarified either by decision or a statutory amendment.

LIMITATION OF CLAIMS AGAINST THE ESTATE

Non-claim statutes lose their efficacy as an aid in expediting the settlement of estates unless they are assisted by a statutory limitation for the satisfaction of claims which have been filed. On many occasions claims are filed against the state of a decedent within the time limitation provided by the non-claim statute and these claims remain unsatisfied for one reason or another, although no objections have been filed against them. The 1953 legislature recognized the problem by enacting a provision which bars the enforcement of all claims which have been properly filed and to which no objections have been filed if no proceedings are commenced within three years from the date of their filing.

Expressly excepted from the operation of this provision are duly recorded mortgages or liens on personal property held by any person in possession. This statute expressly provides for duly recorded mortgages as an exception from its operation. The query is immediately raised, what about valid but unrecorded mortgages? If the statute is to be interpreted literally, it is reasonable to assume that unrecorded mortgages

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although valid in all respects would not be included as an exception under the statute, and consequently would be barred after three years from the date of filing of the claim. If the purpose of recording a mortgage is merely to give bona fide purchasers for value notice and to determine the priority of creditors, why should the act of recordation be given such an effect? Certainly the filing of an unrecorded mortgage claim has the effect of giving to the personal representative notice of the existence of the claim and should suffice to preserve the mortgage as a lien upon the property upon which it is imposed.

**Revocation of Will by Divorce**

It is generally agreed and held that in the absence of statutes to the contrary, divorce in and of itself is insufficient to revoke any provision contained in the will in favor of the divorced spouse. However, it is equally agreed that divorce plus a property settlement do have the effect of revoking a provision in the will in favor of the divorced spouse.

Prior to 1951, and by virtue of the Supreme Court's decision Florida refused to recognize the majority holding that divorce plus property settlement constituted a revocation of a provision in the will in favor of a divorced spouse. In arriving at this conclusion, the Florida Supreme Court subscribed to the view announced in an Illinois case:

It is only fair to assume that if the legislature had intended that a divorce should effect a revocation of a will it would have so expressly provided. The action of the legislature, in expressly providing the means for effecting a revocation of a will precludes the application of the doctrine of implied revocation in case of divorce.

In 1951 the Florida view was changed from one extreme to the other by virtue of legislative act which now provides, that a divorce in and of itself constitutes a revocation of a provision contained in a will in favor of the divorced spouse.

**Qualification and Supervision of Testamentary Trustees**

In 1951, the Florida legislature enacted a provision which broadly undertakes to grant to the circuit courts authority to supervise the acts of testamentary trustees as a cautionary and preventative measure. By its terms, a testamentary trustee is required to file a petition in the circuit court of the county in which either he or the deceased is domiciled for the purpose of establishing his qualifications before receiving the trust res.
If the trustee fails or refuses to file such petition within 60 days after notification from the executor that he is ready to make distribution of the trust res, a similar petition may be filed by any one of several beneficiaries or the executor.\textsuperscript{23}

The effect of this provision is commendably threefold: first, the beneficiary is more adequately apprised of the nature and extent of the trust res; second, the circuit court is granted the opportunity to examine the capabilities and moral qualifications of the testamentary trustee before he receives the trust corpus; third, the circuit court is granted supervisory jurisdiction over the testamentary trustee.

It thus appears that from the standpoint of regulation and supervision, a testamentary trustee is treated similar to an executor and administrator. He is now required to qualify and file annual returns in order to apprise the court of his activities performed for the benefit of others. At long last the beneficiaries under a testamentary trust have the right to feel reasonably secured in the knowledge that their interests are being protected by the watchful eye of the judiciary.

\textsuperscript{23} Fla. Stat. § 737.04 (1951).