Milam v. Davis

Fla.
123 So. 668 (Fla. 1929) · 1929-05-28

Whitfield, J.

In a suit brought by the appellees as complainants to have determined the rights of the parties under a will, it appears that D. P. Davis, having two minor children, on May 25, 1925, made a will, after which he married, and 1926 died leaving his wife and the two minor children surviving. The will (1) directed that the testator's debts be paid; (2) made a bequest of $25,000.00 to the Children's Home Society of Florida; (3) designated a guardian of the persons and estates of the two minor children; and (4) devised and bequeathed to named trustees, "all the rest and residue of the property of every kind and nature whatsoever, and wheresoever situated, belonging to me at the time of my death, or in which I have any interest, including policies of insurance on my life, ' ' with directions as to the disposition and uses of such residuary bequest, the testator's two minor children^being among the chief beneficiaries. No mention of a wife or widow or of the dower or other rights or interests of the wife or widow of the testator is made in the will. The testator was unmarried when he executed the will, but subsequently married. The real contest is as to the proceeds of the policies of insurance on the tes ***920** tator's life, amounting to $201,135.39. The life insurance policies were severally made payable "to the insured," "to the estate of the insured" and "to the executors, administrators and assigns of the insured," and had not been assigned or the beneficiaries changed prior to the testator's death, except as provided in the will.

The decree adjudicated that the proceeds of the life insurance policies were not subject to the debts of the testator, or to the dower or other rights of the widow, or to the legacy to the Children's Home Society of Florida, and that the proceeds of the life insurance policies should be used by the trustees as provided in the will. The executors and trustees, the widow, the Children's Home Society of Florida, the creditors, and the testator's father, who is a beneficiary under the residuary bequest, appealed, the minor children of the testator and their guardian being the appellees.

In the absence of a statute providing otherwise, the proceeds of life insurance policies payable to the insured or to his executors, administrators or assigns are subject to dower rights like other personal estate of the insured. See Act November 7, 1828; See. 3630, Rev. Gen. Stats. 1920; Woodberry v. Matherson, 19 Fla. 778; Smith v. Hines, 10 Fla. 258. See also Burdett v. Burdett, 26 Okla. 416, 109 Pac. R. 922; 35 L. R. A. 964; Sec. 5494, Comp. Gen. Laws 1927.

The following statutory provisions are to be considered:

"Every person of the age of twenty-one years, being of sound mind, shall have power by last will and testament in writing, to devise and dispose of his lands, tenements and hereditaments, of his estate, right, title, interests in the same in possession, remainder dr revision, and of personal property." Act November 20, 1828; Sec. 1792, Rev. Stats. 1892; Sec. 3592, Rev. Gen. Stats. 1920; Sec. 5457, Comp. Gen. Laws 1927; See. 2269, Gen. Stats. 1906.

"When a husband shall die intestate, or shall make his ***921** last will and testament and not make provisions therein for his wife, as expressed in Sec. 5493, she shall be entitled to a share in the personal estate in the following manner, to-wit: If there be no children, or if there be but one child, she shall be entitled to one-half; but if there be more than one child, she shall be entitled to one-third part in fee simple, and such claim shall have preference over all others, and the said share shall be free from all liability for the debts of the decedent. ' ' Act November 7, 1828. The last 16 words of the statute were added by the enactment of Sec. 1831, Rev. Stats. 1892.

"In all cases in which'the widow of a deceased person shall be entitled to dower, she may elect to take in lieu thereof a child's part.

' ' Such election shall be made within twelve months after the probate of the will or granting letters of administration or she shall be confined to her dower.

'"If a widow take dower she shall be entitled only to a life estate in the real property, to return at her death to the estate of her deceased husband for distribution; if she takes a child's part, she shall have in the property set apart to her a fee simple estate in the real property, and an absolute right to the personal property set apart to her, with power to control or dispose of same by will, deed or otherwise." Act February 8, 1838.

See Sec. 2, page 86, Secs. 1 and 2, page 87, Duval's Compilation ; Secs. 2, 3 and 4, page 185, Thompson's Digest and notes on Territorial decisions; Secs. 2, 3 and 4, page 476, McClellan's Digest; Secs. 1831,1833, Rev. Stats. 1892; Secs. 2307, 2309, Gen. Stats. 1906; Secs. 2307, 2309, Florida Compiled Laws 1914; Secs. 3630, 3632, Rev. Gen. Stats. 1920; Secs. 5494, 5496, Comp. Gen. Laws 1927.

"Whenever any person shall die in this State leaving insurance upon his or her life, the said insurance shall inure ***922** exclusively to tbe benefit of Ms or her child or children, husband or wife, in equal portions, or to any other person or persons for whose use and benefit said insurance is declared in the policy; and the proceeds thereof shall in no case be liable to attachment, garnishment, or any legal process by any creditor or creditors of the person whose life was so insured, unless said policy declares that said insurance was effected for the benefit of such creditor or creditors." Chap. 1864, Acts 1872. See Sec. 22, page 534, McClellan's Digest; Sec. 2347, Rev. Stats. 1892.

The amendment added in 1897 is as follows:

"Provided, That when the insurance is for the benefit of the estate of the insured, or payable to said estate, the proceeds of the insurance may be bequeathed and devised by the insured to any person or persons, or for any uses, in like manner as he may devise any other property or effects of which he may be possessed, other than his homestead." Chapter 4555,Acts 1897.

The proviso to the section was amended in 1903 so as to read as follows:

"Provided, however, That whenever the insurance is for the benefit of the estate of the insured or is payable to the estate or to the insured, his or her executors, administrators or assigns, the proceeds of the insurance may be bequeathed by the insured to any person or persons whatsoever or for any uses in like manner as he or she may bequeath or devise any other property or effects of which he or she may be possessed and which shall be subject to disposition by last will and testament. ' ' Chap. 5165, Acts 1903.

See Sec. 3154, Gen. Stats. 1906; Sec. 3154, Florida Comp. Laws, 1914; Sec. 4977, Rev. Gen. Stats. 1920; Sec. 7065, Comp. Gen. Laws 1927. A proviso in a statute may contain additional legislation and not merely limit the scope of pre ***923** ceding' provisions. See Burlingham v. Crouse, 228 U. S. 459.

The Act of 1872 and the amendments of 1897 and 1903 afford alternative provisions for the disposition of the proceeds of life insurance policies that are made payable to ,the insured or to his estate. One provision of the statute operates if the policies are not bequeathed and the other provision operates if the policies are bequeathed. In either case the policies are not subject to the debts of the insured.

Under the Act of 1872, being the first part of the present statute, insurance policies made payable to the insured or to his estate, if left so payable at the death of the insured, would inure to his wife and children in equal portions, but under the amendments of 1897 and 1903, policies of insurance payable to the insured or to his estate may be bequeathed as "other property or. effects," that are subject to testamentary dispositions, and if so bequeathed, the first part of the statute, or the original Act of 1872, has no application because policies payable as here when bequeathed as permitted by the statute, pass under the will and not under the statute. If they pass under the will, they are like "other property or effects" of a married man, subject to the dower rights of his wife even as against his last will and testament if she duly asserts her dower rights.

Under the Acts of 1872, which is the first -part of the present statute, policies of insurance that are made payable to the insured or to his estate, if left so payable at his death, would inure to his wife and children in equal portions, and such policies so payable could not be bequeathed by the insured if he be a married man with a child or children. The manifest and only purpose of the amendments to the statute which constitute the proviso, is to authorize life insurance policies payable to the insured ***924** or to liis estate to be bequeathed by the insured. If such policies are bequeathed under the proviso of the statute, they cannot then "inure" to the wife and children of the insured under the preceding provision of the statute, and such preceding provision is not and cannot be made applicable to the policies. This is necessarily the intent, of the proviso, otherwise the proviso would be wholly ineffectual to accomplish its obvious purpose. If the policies are bequeathed as the statute expressly authorizes, they necessarily pass under the will and cannot "inure" under the statute. The wife of the insured cannot claim dower rights in insurance policies on the husbands' life that are payable to the insured or to his estate, if a statute provides otherwise; but the wife can claim dower rights in such insurance as against the husband's testamentary disposition of the insurance policies, and under the proviso of the statute, such policies may be bequeathed by the insured, thereby 'making inoperative the preceding provision of the statute that such policies shall "inure" to the wife and children of the insured.

While under the Act of 1828, insurance on the life of a husband for the benefit of his estate was like his other personal estate, subject to the statutory dower rights of his widow, the Act of 1872 exempted such insurance from debts of the insured and made it inure to his widow and children in equal portions, thereby securing to the widow an equal portion with each child of the insured as a substitute for her dower interest in such -insurance. The purpose of the Act was to secure such insurance to the widow and children.

The provisos added to the Act in 1897 and 1903, permit the insured to bequeath the insurance, when it is payable to him or to his estate, in like manner as he may bequeath his other property or effects that are subject to testamen ***925** tary disposition. These amendments released such insurance from the absolute requirement of the Act of 1872 that it shall inure to the widow and children of the insured in equal portions, by authorizing the insured to bequeath such insurance in like manner as he may bequeath "any other property or effects," "which shall be subject to disposition by last will and testament." If the insurance payable as in this case is not bequeathed it inures to the -widow and children in equal portions under the first portion of the statute. If the insured bequeaths his life insurance as authorized by the proviso of the statute, it must be done in like manner as he may bequeath any other property or effects which shall be subject to his last will. The insurance is then subject to the laws relative to wills of personal estate; and under the Act of 1828, Sec. 3630, Rev. Gen. Stats. 1920, Sec. 5494, Comp. Gen. Laws 1927, if the widow dissents from the disposition made of such insurance by will, she may have her dower of one-third therein; or under the Act of 1838, Sec. 3632, Rev. Gen. Stats. 1920, Sec. 5496, Comp. Gen. Laws 1927, she may take a child's part as defined by the statute, in lieu of dower. Under the Act of 1872 as amended, Sec. 4977, Rev. Gen. Stats. 1920, Sec. 7Q65, Comp. Gen. Laws 1927, such insurance is not subject to debts of the insured unless - it is expressly made payable to creditors. The statutes intend that whenever a husband shall die in this State having insurance upon his life payable to the insured or to his estate and leaving a widow and children, the widow shall share in such insurance equally with the children of the insured if the insurance is not bequeathed, and if it is bequeathed, but the disposition is not satisfactory to the widow, she may claim dower therein even against the will; and that in lieu of dower the widow may elect to take a child's part as defined in the statute.' In ***926** this case there being a bequest of the insurance and two children of the insured, the widow should take a third of the insurance proceeds payable as here, whether she takes dower or a child's part. If the widow takes a child's part instead of dower in her husband's personal estate except his homestead exemptions and his life insurance, it would be subject to the husband's debts. Benedict v. Wilmarth, 46 Fla. 535, 35 So. R. 84; Thompson's Digest of Florida Statutes, page 185 notes. But by the terms of the statute of 1872, life insurance is not subject to creditors of the insured unless the policies so provide. See Section 4977, Rev. Gen. Stats. 1920; Sec. 7065, Comp. Gen. Laws 1927; Chapter 1864, Acts 1872; Pace v. Pace, 19 Fla. 438; Pittman v. Milton, 69 Fla. 304, 68 So. R. 658; Eppinger v. Canepa, 20 Fla. 262; Gilchrist v. Jeffcoat, 64 Fla. 79, 59 So. R. 243.

The first part of the statute, Sec. 7065, Comp. Gen. Laws 1927, makes life insurance policies that are payable to the insured or to his estate, inure exclusively to the wife and children of the insured if the policies are left undisposed of at the death of the insured; and it is expressly provided that such policies shall not be subject to the claims of creditors o£ the insured, unless the insurance "was effected for the benefit of such creditors." Under the proviso of the statute, life insurance policies that are payable to the insured or to his estate or to his legal representatives, may be bequeathed by the insured in like manner as he may bequeath his other property or effects that may be disposed of by last will and testament. When policies so payable are bequeathed, they cannot inure to the widow and children under the statute; but being bequeathed in like manner as his other property or effects, they are subject to the statutes defining the dower rights of the widow as other property or effects of the insured ***927** would be. The provision that such policies may be bequeathed "to any person whatsoever or for any uses in like manner as" "any other property or effects * * * which shall be subject to disposition by last will and testament," shows an intent that such bequest shall be subject to applicable laws regulating the right to dispose of property by last will and testament; and under the statute a husband cannot by will deprive his widow of her dower rights in his property or effects. Besides this, Sec. 7065 is intended to secure insurance policies to the widow as well as to children of the insured. Statutes do not protect the children against their ancestor's last will and testament; and ordinarily the right to inherit may be cut off by will, but dower cannot be cut off by a will. The statute is designed (1) to secure policies of life insurance to the consort and children of the insured where the policies are for the benefit of the estate of the insured and are so left at the death of the insured; (2) to exclude creditors unless they are the beneficiaries of the policies; (3)'where the policies are payable to the insured or to his estate or legal representatives, to permit the insured to bequeath the policies in like manner as other property or effects of the insured that are subject to testamentary disposition, may be bequeathed. The last provision is designed to meet the varying conditions of the family and estate of the insured, subject to provisions of law that control the bequest of the property or effects of the insured. The dower statute gives the widow her dower rights in all of the personal estate of the husband that is left at his death; and under the statute such dower right if duly asserted must be satisfied even against the husband’s last will and testament, and the dower right is superior to the rights of creditors. The statute permitting life insurance policies payable as here, to be bequeathed, does not expressly or ***928** impliedly exclude the operation of the dower statute, but on the contrary permits such policies to be bequeathed only in like manner as other property or effects of the insured may be bequeathed, and property or effects cannot be bequeathed as against dower rights.

At common law, marriage alone did not cause a revocation by operation of law of a prenuptial will of a man, the wife having her dower rights notwithstanding the will. The widow may claim her dower rights as against the husband’s will, whether he left a child, or not, and whether the will was executed before or after the marriage. A will cannot exclude a widow from her statutory rights in her husband’s estate; but an heir may be excluded by will from participating in a testator’s estate other than his homestead real estate. See Herzog v. Trust Company, 67 Fla. 54, 64 So. R. 426.

Where several coexisting statutes relate to rights in the same species or classes of property, each shall be given its appropriate intended effect upon the property even though neither statute refers to any other and each is framed in general comprehensive language. For example the statutes relating to wills, dower, descent, administration, homestead and other exemptions, taxes, assessments, debts, penalties, forfeitures, bankruptcy, etc.

Under Sec. 4977, Rev. Gen. Stats. 1920, Sec. 7065, Comp. Gen. Laws 1927, if a testator “shall die in this State leaving insurance on his life, the said insurance shall inure exclusively to the benefit of ’ ’ his children and wife in equal portions, or to any person or persons for whose benefit such insurance is declared in the policy. But by the same statute whenever the insurance is for the benefit of the estate of the insured or is payable to the estate of the insured or to the insured, his or her executors, administrators or assigns, the proceeds of the insurance may be bequeathed by the insured to any persons whatsoever “in ***929** like manner as lie may bequeath or devise any other property or effects of which he may be possessed, and which shall be subject to disposition by last will and testament.”

The words “in like manner” have reference to the disposition of the insurance as “any other property or efi fects,” and not to the form of executing a will. The statute deals with property and not with the form of wills.

Under Sec. 3630, Rev. Gen. Stats. 1920, Sec. 5494, Comp. Gen. Laws 1927, a testator cannot bequeath his property against his widow’s dower rights without her consent or acquiescence. See Godwin v. King, 31 Fla. 525, 13 So. R. 108; Serkissian v. Newman, 85 Fla. 388, 96 So. R. 378. Where a decedent leaves a wife and more than one child, the widow, even against her husband’s will, is “entitled to one-third part in fee simple,” of “the personal estate” of her deceased husband. As against the children as his heirs at law, a testator may under the Act of November 20, 1828, Sec. 3592, Rev. Gen. Stats. 1920, Sec. 5457, Comp. Gen. Laws 1927, bequeath any of his personal property or effects, and by Sec. 4977, Rev. Gen. Stats. 1920, See. 7065, Comp. Gen. Laws 1927, as against his children as his heirs, he may bequeath the proceeds of insurance on his life that is payable to the insured to his estate or his executors, administrators or assigns, since there is no statute securing rights of children against a testator’s bequest of his personal estate.

When a person dies in this State leaving insurance on his life payable to the insured or to his estate or to his executors, administrators or assigns, such insurance by the terms of the statute inures, immediately upon the death of the insured, to his widow and children in equal portions, unless the insured under the statute makes a valid bequest of such insurance. When such insurance is not bequeathed by will, it “inures” to the widow and chil ***930** dren of tlie insured under the statute, and it does not, at the death of the insured, become a part of the personal property of the estate of the insured for administration and distribution subject to the claims of creditors of the insured. See Bradford v. Watson, 65 Fla. 461, 62 So. R. 484.

The statutory rights given the insured where insurance policies are made payable to the insured or to his estate or to his executors, administrators or assigns, to, in effect, change the statutory beneficiaries of the policies, not by assignment, transfer or otherwise made effective in the life time of the insured, but by bequeathing the proceeds in like manner as he may bequeath any other property or effects that are subject to disposition by will, does not affect the operation of the statute which gives dower rights to the widow of the insured, since the statutes authorizing wills do not supersede statutes securing dower rights, and Sec. 4977, Rev. Gen. Stats. 1920, See. 7065, Comp. Gen. Laws 1927, is intended to be beneficial and not detrimental to the widow of the insured. See Castle v. Castle, 267 Fed. 521; Burdett v. Burdett, 26 Okla. 416, 109 Pac. R. 922, 35 L. R. A. (N. S.) 964. The beneficiaries of the policies under the will take as legatees and not by contract and the widow is entitled to dower as in “other property or effects” of the testator.

■ The beneficiaries were not named in the insurance policies as in Central Bank v. Hume, 128 U. S. 195, and under the statute the insurance does not “inure” to the wife and children of the insured until his death; and it does not then “inure” to them if a valid testamentary disposition is made of the insurance by the insured, though the insured may not bequeath such insurance against his widow’s dower rights duly asserted.

***931** Statutory provisions for dower are not repealed or superseded or modified by implication even if there were any such implication in Section 4977, Rev. Gen. Stats. 1920; See. 7065, Comp. Gen. Laws 1927. See Godwin v. King, 31 Fla. 525, 13 So. R. 108.

In this case if the insured had not bequeathed the proceeds of the insurance on his life, which he left at his death, the statute would make such proceeds “inure .exclusively to the benefit of” his two children and his wife “in equal portions,” even though, the insurance policies were issued and the bequest was made before the insured was married to the present widow, because the statute refers to the time when the insured “shall die in this State leaving insurance on his life,” and makes the insurance proceeds when payable as in this case, inure, at the death of the insured, to the benefit of the wife as well as the children. The right of the insured under the statute to bequeath the proceeds of the insurance on his life in like manner as he may bequeath or devise any other property or effects of which he may be possessed, is restricted by the provision in the sentence, that such proceeds may be bequeathed as he may bequeath or devise any other property or effects “which shall be subject to disposition by last will and testament.” When the insured undertook to exercise his statutory right to bequeath the proceeds of the insurance policies, it could be done only as he could bequeath his “other property or effects” that were subject to disposition by last will, and his “property or effects,” were not “subject to disposition by last will and testament,” as against the dower rights of his surviving wife. The insurance policies on the husband’s life, payable as herein stated, were left so payable at his death, and under Section 4977, Rev. Gen. Stats. 1920, Sec. 7065, Comp. Gen.

Laws 1927, such insurance, would “inure exclusively ***932** to the benefit of” his wife and his tw.o children “in equal portions, ’ ’ but for the will made by the insured under the statute which authorized him to bequeath such proceeds “in like manner” as “other property or effects” of the insured that are “subject to disposition by last will and testament” of the insured husband. The insured could under the statute of wills, Act of November 20, 1828, See. 3592, Rev. Gen. Stats. 1920’ See. 5457, Comp. Gen. Laws 1927, bequeath his property or effects as against his children as his heirs, but he could not' bequeath his wife’s dower interest in his “property or effects” as against her claim of dower rights therein. See Act November 7, 1828; Sec. 3630, Rev. Gen. Stats. 1920; Sec. 5494, Comp. Gen. Laws 1927. The same rule is applicable to Sec. 4977, Rev. Gen. Stats. 1920; Sec. 7065, Comp. Gen. Laws 1927, regulating rights in policies of insurance on the lives of persons who die in this State. Assuming that the testator could have changed the beneficiaries of the insurance policies by transfer, assignment or otherwise during his life so as to deprive his wife of any dower or other interest therein as in other personal property owned by him, yet he could not do so iy will under the statutes as against the widow’s dower rights. See Smith v. Hines, 10 Fla. 258.

The last clause of Sec. 4977, Rev. Gen. Stats. 1920, Sec. 7065, Comp. Gen. Laws 1927, should be given its appropriate intended effect as well as all the other provisions of the statute. The statute was intended to benefit the widow of an insured; and proceeds of the insurance policies payable aá here may under the statute be bequeathed in like manner as other property or effects, though such proceeds are not “subject to disposition by last will and testament,” as against the widow’s dower rights therein. Such dower rights notwithstanding the testamentary bequest, made under Sec. 4977, Rev. Gen. Stats. 1920, Sec. ***933** 7065, Comp. Gen. Laws 1927, is secured by another statute, Sec. 3630, Rev. Gen. Stats 1920; Sec. 5494, Comp. Gen. Laws 1927; but there is no statute giving the children of the insured an interest in his personal estate as against his testamentary bequest; and Section 4977, Rev. Gen. Stats. 1920, Sec. 7065, Comp. Gen. Laws 1927, itself excludes the creditors where they are not the beneficiaries of the policies. In Gilchrist v. Jeffcoat, 64 Fla. 79, 59 So. R. 243, the insured left no widow or child or will.

By the terms of the will, the legacy to the Children’s Home Society of Florida is to be paid before there can be a “rest and residue” of the testator’s estate “including policies of insurance on my life” that is devised in trust. It clearly was not intended by the testator that the insurance proceeds should be used to pay the legacy to the Children’s Home Society of Florida.

By the terms of the statute the proceeds of the insurance not effected for the benefit of creditors are not liable to the claim of the creditors. Pace v. Pace, 19 Fla. 438; Bradford v. Warson, 65 Fla. 461, 62 So. R. 484. It is contended that the provision of the statute making insurance on the life of a decedent exempt from claims of creditors of the decedent unless the insurance “was effected for the benefit of such creditor or creditors,” violates Sec. 1, Art. X, of the State Constitution in that the organic provision is self executing and limits exemptions to “one thousand dollars’ worth of personal property.” The proceeds of insurance on a decedent’s life where the policies are made and remain payable as in this case, do not since the act of 1812 become a part of the general assets of a decedent’s estate subject to the payment of debts; and it is competent for the legislature to provide that such proceeds being peculiar in their nature, shall not be subject to the claims of creditors without violating the limitations ***934** of the homestead provisions of Sec. 1, Art. X of the Constitution, such organic provisions not being applicable. It is peculiarly appropriate that .proceeds of life insurance policies made payable to the insured or to his estate or to his legal representatives should be by statute -protected from the claim of creditors and secured to the children and consort of the insured with statutory leave to the insured to bequeath such proceeds as the family circumstances require, when the statutory dower rights of the wife are not violated. The Constitution does not forbid such statutory regulations of the disposition of the proceeds of life insurance made payable to the insured or for the benefit of his estate. The will does not contemplate that the testator's debts shall be paid from the policies of insurance on his life, even though he directs that his debts and liabilities shall be paid as soon as practicable after his death. The insurance policies were specifically bequeathed in trust principally for the testator's children. The children as heirs, may have no statutory rights against the father's disposition of his property by a valid will except as to his homestead real estate; but the dower, rights of a wife in any of the testator's property or effects are not subject to testamentary disposition by the husband, if the wife duly asserts her dower rights as widow of the testator.

In McLean v. Fisher, 60 Fla. 331, 53 So. R. 614, the widow claimed as sole heir at law and not a dower right. In Sloan v. Sloan, 73 Fla. 645, 74 So. R. 407, the widow took under the husband's will and did not claim dower. Pace v. Pace, 19 Fla. 438, arose before the proviso to Sec. 4977, Rev. Gen. Stats. 1920, Sec. 7065, Comp. Gen. Laws 1927, was enacted allowing the proceeds of the insurance policies made payable to the insured or to his estate, to be bequeathéd by the insured to any person or persons whatsoever 'in like man ***935** ner as lie may bequeath, or devise any other property or effects of which he may be possessed, and which shall be subject to disposition by last will and testament.

In the Pace case it is held that where an insured dies leaving a policy of insurance payable "for the benefit of the estate of the insured, ' ' under the statute the only child of the insured takes the proceeds of the policy not as heir or distributee but as beneficiary of the policy under the statute, there being no widow. It seems that the beneficiary in that policy has not changed (see Eppinger v. Canepa, 20 Fla. 262), and there being no widow, the statute made the insurance proceeds "inure" to his only child, if the insured "shall die leaving insurance on his life" payable for the benefit of his estate, and it was held that the trustee in bankruptcy of the insured was not entitled to the proceeds. The language of the opinion in the Pace case should be considered in the light of the fact that no question of a bequest of the proceeds of insurance on the decedent's life or of dower rights in such proceeds was involved, because there was no widow of the insured and the proviso to See. 4977, Rev. Gen. Stats. 1920, Sec. 7065, Comp. Gen. Laws 1927, authorizing disposition by will had not been enacted.

The cause will be remanded with directions to reform the decree so as to award the widow her dower rights in the proceeds of the insurance policies. It is so ordered.

Strum and Brown, J. J., and Johnson, Circuit Judge, concur.

Ellis and Buford, J. J., dissent.

Terrell, C. J., disqualified.

Addendum — Whitfield

***969** On Petition for Behearing

Opinion filed July 18, 1929.

Whitfield, J.

A petition for rehearing suggests in effect that, in holding that the proceeds of life insurance policies are covered by and included within the statutes relating to dower, the court failed to distinguish between personal property, which the husband might own, use and enjoy during his life time, that is covered by the dower statute under the phrase ‘ ‘ personal property, ’ ’ and a right existing in contract in favor of other parties who as beneficiaries may collect the proceeds of the insurance after the death of the insured, which proceeds the insured can never collect, use or enjoy for himself; that the court overlooked the effect of the use of the words “devise” and “bequeath” in the amendments to the Act of 1872; and that the court overlooked the effect of the Act of 1872 as amended to exclude the operation of the dower statute.

The statutory dower rights of a widow in the property of the husband have precedence over a devise or a bequest of his real or personal property by the husband. Secs. 3629-3630, Bev. Gen. Stats., 1920, Sections. 5493-5494, Comp. Gen. Laws, 1927. Life insurance is a peculiar species of personal property of the insured; and when it is payable to him or to his estate, it is under the statute payable not for the benefit of the estate of the insured but for the benefit of his wife and children exempt from the claims of his creditors. When life insurance “inures” to the widow and children of the insured under Sec. 7065, Comp. Gen. Laws 1927, it passes to the beneficiaries under that statute, and not under the statute of descents or under the dower statute.

When an insured bequeaths the proceeds of his life insurance, such proceeds pass by will as authorized by the statute, ***970** Sec. 7065, Comp. Gen. Laws 1927, and not by contract. The original Act of 1872 excluded the dower statute by giving the widow of the insured a portion of his life insurance equal to that of each of his children. The amendment of 1903 recognized a property interest of the insured in his life insurance payable as in this case, by authorizing the insured to bequeath the proceeds of such insurance. The amendment took from the widow her absolute right-under the original statute to a share in such proceeds equal to each child of the insured, but the amendment made an authorized bequest of the insurance proceeds subject to the laws that regulate bequests of "any other property or effects” of the insured, and such bequests are subject to the dower statute.

Other petitions for rehearing suggest in effect that in holding the proceeds of life insurance to be property of the insured, subject to dower rights, but that such proceeds are not subject to the debts of the insured, the court denies to creditors of the insured the equal protection of the laws, and deprives creditors of property without due process of law; that the court held that when life insurance is bequeathed it passes by the will and becomes assets of the estate so as to be subject to the widow’s right of dower, yet in denying creditors the right to payment from the balance of the insurance proceeds, the court construes and considers that the insurance passed under the statute; that the exemption portion of the statute is not applicable because the court holds that the insurance passed by will and not by contract and statute; that by bequeathing the insurance the insured waived the exemption features of the statute; that in exempting the life insurance from debts of the insured the organic exemption of $1,000.00 of personal property was exceeded and creditors deprived of property without due process of law; that the statutory exemption of life insurance from debts of the insured is effective only when the ***971** insurance passes under contract or statute and not when the insurance proceeds are made subject to testamentary disposition; “and that the proviso in said statute, enacted and inserted subsequent to the said exemption provision excludes such proceeds from the exemption created by the statute as contained in the original Act of 1872, when testamentary disposition is made affecting such proceeds.”

All “personal property” 'or “personal estate” that is validly bequeathed, whether it be proceeds of life insurance or ‘1 any other property or effects, ’ ’ pass by will as may be authorized by statute, and not by contract or by statute. The holding here is that life insurance payable as in this case is personal property, though of a peculiar nature different from ordinary-personal property or personal estate; that the insured has a property interest in his life insurance payable as in this case; that when life insurance proceeds are bequeathed under the statute, Sec. 7065, Comp. Gen. Laws 1927, such proceeds pass by will and not by statute; that a bequest of the proceeds of life insurance is by the same statute made subject to laws regulating bequests of other property or effects; that the operation of the statute securing dower rights in bequeathed personal estate, Sec. 5494, Comp. Gen. Laws 1927, is contemplated by Sec. 7065, Gomp. Gen. Laws 1927, when by the authority of the latter statute the proceeds of life insurance are bequeathed ; and that the statutory exemption of life insurance proceeds from the claims of creditors, is intended to remain effective though the statutory right to bequeath be exercised and the property passes by will and not by statute, since the main purpose of the statute is provision for the wife and children of the insured. While the statutory authority to bequeath the proceeds of the insurance takes away the widow's absolute right to a child's share, the statute recognizes the property interest of the insured in his life insur ***972** anee, and the statute being designed for the benefit of the wife and children of insured, also contemplates the assertion of dower rights in such bequeathed proceeds if the widow is dissatisfied with the bequest as made, since the bequest must be in like manner as the insured may bequeath "any other property or effects," that are subject to testamentary disposition, and dower rights in property or effects of the insured are not "subject to disposition by last will and testament ' ' of the insured unless the widow acquiesces therein. While a bequest is not subject to the statute of descents, the law assumes that the children of an insured will be provided for in bequests made by him, and the children of the insured are provided for in the bequest of the proceeds of his life insurance by the -insured in this ease.

The statute expressly exempts the proceeds of life insurance from any process in favor of any creditor of the insured, unless the insurance be effected for the benefit of creditors. Such exemption being for the benefit of the wife and children of the insured and the exemption being absolute when the insured leaves a widow or child, it applies when the insurance inures to the widow and children under the statute and also when the proceeds of life insurance payable as here are bequeathed by the insured, at least when the widow shares in the proceeds by the provisions of the will or by the assertion of doAver rights, and the children are beneficiaries of the bequest of the insurance proceeds. The statutory exemption being of the proceeds of life insurance in which the insured has a property interest, but which proceeds are not owned or possessed by the insured in his life time, the organic exemption from the claims of creditors of one thousand dollars' worth of personal property owned by the head of a family, is by its own intendment not to be applied; so the statutory exemption controls, it. not being ***973** in conflict with organic law, and no property right of creditors arising subsequent to the statute being violated.

A life insurance policy is a peculiar species of property, in the nature of a chose in action, that arises out of contract. It is generally not for the use of the insured, and the proceeds of the insurance are usually not payable until after the death of the insured. These and other attributes distinguish life insurance from other species of property. It may be dealt with as property subject to the contract rights and to applicable provisions and rules of law. Controlling laws may justly classify life insurance for separate and appropriate regulation, as to its acquisition, its transfer or assignment, its beneficiaries, its descent or other disposition, and its exemption from the debts of the insured. In view of a father's duty to provide for' his wife and children, the statute enables him to procure insurance on his life payable to him or to his estate which insurance under the statute, at his death, "shall inure exclusively to the benefit of" his wife and children, when not validly bequeathed by the insured. Such insurance is property, of a nature peculiarly suited to meet family exigencies and it is not a part of the general assets of the estate of the insured which the law contemplates may at his death be used for paying debts of - the insured. See Central Bank v. Hume, 128 U. S. 195.

A life insurance policy confers upon duly designated beneficiaries a right to receive the proceeds thereof, viz: a stated sum of money that is usually payable after the death of the insured.

The proviso to Sec. 7065, Comp. Gen. Laws, 1927, is intended to confer additional rights upon an insured, and pot to take from or put any limitation upon, the proceding provisions, except as is done by the terms of the proviso; ***974** and such proviso does not affect the exemption contained in the section.

The Act of 1872 providing that life insurance jmyable as here shall inure exclusively to the wife and children of the insured, and making the insurance proceeds exempt from debts of the insured, are predicated upon a public policy to aid and encourage the making of suitable provision for the family without unduly curtailing the property that is generally subject to the claims of creditors. The original statutory distribution of the proceeds, if the insurance payable as here be left at the death of the insured, was absolute to the widow and children of the insured in equal portions, leaving no right in the insured to so apportion the proceeds as to conserve varying conditions of families. Exigencies of the family might require other and different distributions to best conserve the family welfare.

The insured might have three or more children who do not need an equal share in his insurance money, while his wife might need more than an equal share therein with each child. Or when there is one child the widow might need or be willing to accept in lieu of dower, less than one-half of the insurance proceeds. Other varying family circumstances made expedient and appropriate the amendments to the statute which authorize a testamentary disposition of life insurance proceeds different from that stated in the original statute; but while the amendments take away an absolute right of the widow to a child's part of the husband's life insurance which was given by the statute and was in lieu of dower, such amendments show an intent that other provisions of law regulating the statutory right of testamentary disposition of property in the interest of the family, shall be applicable when the right ***975** to bequeath life insurance proceeds conferred by the amendment is exercised.

The amendment of 1897 applying "When the insurance is for the benefit of the estate of the insured, or payable to said estate," authorized the insured to bequeath the proceeds of his life insurance "in like manner as he may devise any other property or effects of which he may be possessed, other than his homestead. ' ' The word ! ' devise ' ' is technically and more properly applicable to real estate, and the word "bequeath" is more technically ajiplicable to personalty. Neither of the words is always used in its technical sense. The reference in the amendment of 1897 to the "homestead" of the insured, was unnecessary or else not sufficiently comprehensive, since under the Constitution a homestead can not be devised by its owner if he has a child or children. Later, Chap. 4730, Acts of 1899, provided that the homestead "shall not be the subject of devise," if the owner "shall die and leave a widow surviving him, but no children." In this state of the law, the amendment of 1903 to the original Act of 1872 as amended in 1897, was enacted, which provides that "whenever the insurance is for the benefit of the estate of the insured or is payable to the estate or to the insured, his or her executors, administrators or assigns, the proceeds of the insurance may be bequeathed by the insured * * * in like manner as he or she may bequeath or devise any other property or effects of which he or she may be possessed, and which shall be subject to disposition by last will and testament." Under this amendment the.insured can bequeath the proceeds of his life insurance only when it is left at his death payable as stated in the statute and then only "in like manner as he may bequeath or devise any other property or effects * * * which shall be subject to" testamentary disposition. The amendment does ***976** not relate to the manner of executing wills, but confers upon the insured authority to bequeath life insurance which the preceding part of the statute provided should "inure exclusively to the benefit of his or her child or children, and. husband or wife in equal portions."

The intent of the statute as applicable to a married man is to benefit his wife and children; and the amendment of 1903, now in force, is intended to authorize the insured to bequeath to any person or use, the proceeds of his insurance payable as in this case, subject to the laws regulating the bequest or devise of any other property or effects of his. If such proceeds are bequeathed the statutes regulating inheritmce may not apply, but the statutes securing dower rights do apply unless an intent to exclude dower rights is clearly shown. Dower rights cannot be excluded by will, while the right to inherit may be excluded by will. The statutory authority to bequeath the proceeds of life insurance shows no intent to exclude statutory dower rights, but in effect provides that the bequest shall be controlled by laws regulating bequests of other property or effects of the insured.

When life insurance payable as here comes into existence as a peculiar species of property it is in this State controlled as to its disposition by a statute that is appropriate to the nature of the property. The statute regulating the disposition of life insurance proceeds could have excluded the wife of the insured from any dower or other right therein, when the insurance is payable as in this ease; but instead, the original act expressly provided that at the death of the insured such' insurance shall inure exclusively to his wife and children in equal portions, thus showing an intent to make the widow as well as the children of the insured beneficiaries of the insurance, by providing for the widow to ***977** receive a stated portion of the insurance, which of course would be in lien of dower.

While the proceeds of life insurance payable after the death of the insured were not and could not have been in the possession of the insured at his death, and while he did not own the proceeds of the life insurance that were payable only after his death, yet he had a property interest in the insurance on his life that is recognized by the statute and that is primarily for the benefit of his family though payable after his death, and the statute in authorizing the insured to bequeath the proceeds expressly required it to be done in like manner as he may bequeath any other property or effects of which he may be possessed, and which shall be subject to disposition by last will and testament, thereby intending that rights in the proceeds could not be bequeathed, if like rights in "any other property or effects" of the insured could not be bequeathed; and dower rights in other property or effects of the insured are not subject to testamentary disposition.

Sees. 1 and 2, Article IX of the Constitution of 1868, provided for an exemption of homestead real estate and the improvements thereon, "owned by the head of a family residing in this State, ' ' "together with one thousand dollars ' worth of personal property" and also for the exemption of additional property to be selected by the head of a family ' ' to the amount of one thousand dollars,1 ' which constituted greater property exemptions from debts than those contained in Article X of the Constitution of 1885; yet the Act of 1872, Chap. 1864, enacted while the Constitution of 1868 was in force and providing that the proceeds of life insurance shall not be liable to any legal process in favor of any creditor of the insured unless the insurance policy declares that the policy was effected for the benefit of such creditor, was apparently not regarded as being violative of ***978** the exemption article of the Constitution of 1868, even though such proceeds exceed in amount the organic exemptions.

Article X of the Constitution of 1885 provides that "a homestead to the extent of" a stated acreage of real estate and improvements thereon, "owned by the head of a family residing in this State, together with one thousand dollars' worth of personal property * * * shall be exempt from forced sale," with specified exemptions. "The exemptions * =» * shall inure to the widow and heirs of the party entitled to such exemption, and shall apply to all debts except as specified." "The exemptions provided for in the Constitution of 1868, shall apply to all debts contracted and judgments rendered since the adoption thereof and prior to the adoption of this Constitution. ' '

The organic provision of 1885 that "one thousand dollars' worth of personal property * * * shall be exempt" has reference to the personal property owned by the head of a family residing in this State as the ordinary and usual personal assets of his estate, and does not necessarily relate to personal property lawfully acquired for a lawful purpose distinct in its nature and uses from his ordinary or general personal estate. The organic exemption, of course, does not extend to property not owned in a beneficial right; and life insurance in any amount may lawfully be acquired by the head of a family payable after his death for the benefit of his wife and children, which the statute may exempt from the claims of subsequent creditors without violating any right of such creditors, since the organic provision exempting a stated amount of the general personal property of the insured is not exclusive and is not a limitation upon any and all statutory exemptions in property of any kind or nature. The organic exemption was not intended to apply to life insurance acquired and payable as in this ***979** case, for the reason that such insurance is a peculiar species of property payable for the benefit of the family after the death of the insured, and the proceeds collectable after his death, are not a part of the "personal property" owned by the head of a family as contemplated by Article X of the Constitution of 1885. It is not contended that the insurance in this case was obtained in fraud of creditors. But it affirmatively appears that the insurance was obtained by the insured "when he was both solvent and wealthy." The insurance policies had not been assigned as in Eppinger, Russell & Co. v. Canepa, 20 Fla. 262.

When the Constitution of 1885 was promulgated and adopted, Chap. 1864, Acts 1872, exempting life insurance from the claims of creditors of the insured, where such insurance is not effected for or payable to creditors, was in force, and its validity not challenged. It was evidently not the intent of the Constitution of 1885 that the exemptions provided for therein should supersede or limit the amount of the then existing statutory exemption of the proceeds of life insurance policies made payable by the statute not to the estate of the insured but for the benefit of his widow and children.

The provisions of the Constitution of 1885 recognize the rights of creditors that are not inconsistent with lawful exemptions, and command that real and personal property owned by the head of a family residing in this State, to the extent therein stated "shall be exempt;" but such provisions relate to the ordinary classes of personal property and do not expressly or by intendment forbid or limit the exemptions of life insurance proceeds that are payable after the death of the insured, which proceeds were then allowed as exemptions by the Act of 1872 for the benefit not of the insured or his estate but for the benefit of the widow and children of- the insured, such insurance not ***980** having been effected or duly declared to be for the benefit of creditors.

It has been held that the organic provisions relative to those who may be excluded from holding office are not exclusive, and that the maxim expressio unius est exclusio allerius should be applied with great caution to organic provisions. State ex rel. v. Bryan, 50 Fla. 293, 39 So. R. 929. See also State v. Jacksonville Term. Co., 41 Fla. 377, 27 So. R. 225; Thomas v. Williamson, 51 Fla. 332, 40 So. R. 831;

Saxon v. Rawls, 51 Fla. 555, 41 So. R. 594.

In State ex rel. West v. Butler, 70 Fla. 102, 69 So. R. 771, organic provisions relating to the jurisdiction of courts was construed to be strict limitations; but here the organic provisions relate to family welfare and they should be liberally interpreted to conserve the salutary public policy.

The property exemption article of the Constitution should be liberally construed in favor of those for whose benefit it was intended, when the rights of others are not unduly prejudiced. The organic provisions as to exemptions should not be applied to statutory exemptions of the peculiar property of life insurance intended for the benefit of the family of the insured after his death, when such life insurance does not clearly constitute a part of the "personal property" owned by the head of a family, referred to by the Constitution in allowing exemptions from the claims of creditors. Such statutory exemptions do not prejudice the rights of subsequent creditors. See Re Le Blanc, 142 La. 27, 76 So. R. 223, L. R. A. 1917 F. 1137.

After the Act of 1872 creditors of an insured had no interest in or right to expect payment from the debtor's life insurance unless it was effected or made payable for their benefit; and the statute takes nothing from creditors of an insured. Ordinarily exemptions apply to debts incurred after the exemption laws become effective. This accords ***981** with the decision in Bank of Minden v. Clement, 256 U. S. 126.

The family home place and the personal property exemption obviously were, as a matter of public policy, not regarded by the law making power of the state even before the adoption of the Constitution of 1885, as being in all cases sufficient for the needs of widows and children; and it seems entirely appropriate that under Chapter 1864, Acts of 1872, now in force, the insurance on the life of a husband, payable as in this case, being a peculiar species of property having a special intimate personal relation to the family exigencies, should be exempted from- claims of creditors of the insured for the benefit of the surviving widow and children of the insured, when such insurance is payable after the death of the insured and was not ' ' effected for the benefit of such creditors," or for other persons as ' ' declared in the policy. ' '

If when debts are incurred, the creditor has no right to subject particular property of the debtor because it is by law exempt from creditors' claims, such creditors are not injured by the exemption, and they are deprived of no rights because of the exemption.

The amendments of 1897 and 1903 do not change the nature of the life insurance, but expressly confer a statutory right to bequeath the proceeds of insurance policies that had been taken away by the original Act of 1872, wherein the latter act required life insurance payable as in this case and left so payable at the death of the insured, to inure exclusively to the widow and children of the insured in equal portions. But such amendments do not affect the exemption from debts that is contained in the Act amended, or the statutory dower rights when the insurance is bequeathed. The Act as amended, Sec. 7065, Comp. Gen. Laws 1927, retains the exemption from such debts and is ***982** not inconsistent with, the dower rights conferred by the dower Act of 1828, now Sec. 5494, Comp. Gen. LaVs 1927.

In Pace v. Pace, 19 Fla. 438, it was held that under the Act of 1872, a policy of insurance payable "for the benefit of the estate of the insured, ' ' did not pass to- the administrator of the insured, but inured exclusively to his only child, there being no widow of' the insured, and that no interest in the policy passed to the assigns of the insured, who became a bankrupt before he died. Contrary expressions appear in In re D. F. & C. P. Long, 282 Fed. 383; In re Morgan, 282 Fed. 650, and Morgan v. McCaffrey et al., 286 Fed. 922, where Federal Bankruptcy Laws and the cash surrender value of life insurance policies were being considered, upon the theory that the exemption of such life insurance from claims of creditors of the insured does not apply until the death of the insured. See Holden v. Stratton, 198 U. S. 292, 49 L. Ed. 1018, 25 Sup. Ct. 656; 50 L. R. A., 33; Burlingham v. Crouse, 228 U. S. 459, 57 L. Ed. 920, 33 Sup. Ct. 564. Here the insured was not adjudged a bankrupt, but died. Under the statute as amended in 1903, the proceeds of the insurance may be bequeathed by the insured, when payable as here, but pursuant to the statute the insurance remains exempt from the claims of creditors of the insured, it not having been "effected for the benefit of such creditors. ' ' A policy, of insurance payable as in this case becomes a special and peculiar species of property acquired by the insured, which insurance is under the statute, not for the benefit of the insured, or his estate, but for the benefit of the wife and children of the insured to be available after his death; so the organic exemption of "one thousand dollars' worth of personal property," "owned by the head of a family residing in this State," is not applicable.

***983** By authorizing the insured to bequeath insurance on his life when it is payable, as in this case, the amendment to the statute does not change the nature of the insurance as a special and peculiar property for special uses and purposes, but merely permits the insured in order to meet the possible exigencies of the family requirements, to make by will a disposition of the proceeds of the insurance different from that stated in the statute.

The Act of 1872 being valid as a statutory exemption, the authority given by the amendments of 1897 and 1903, to bequeath proceeds of insurance payable as here, does not destroy the exemption that is a part of the amended statute or prevent the operation of the dower statute that controls a bequest of property or effects by a married man. The exercise by the insured of the right to bequeath the proceeds of the insurance does not and cannot waive either the exemption provision of the statute or the widow's dower rights, when the insurance is payable as in this case and the insured leaves a widow and children. The exemption was intended for the benefit not of the insured but of the wife and children of the insured, who under the statute may become entitled to the proceeds of the insurance.

The husband cannot waive the dower rights of the wife. The statute as amended intends that the exemption from debts of the insured contained in the original Act, shall continue in force if the insurance proceeds be bequeathed under the amendment to the statute for the benefit of his children as was done in this case, the widow having her dower rights.

In Talcott v. Bailey, 208 N. W. R. 549, relied on by counsel, the will did not include the insurance policy which the statute required to be "distributed to the heirs" of the insured; and it was held that because of the statute the heirs took by contract and not by descent.

In this case the proceeds of the insurance apparently were ***984** collectable only after the death of the insured, and being payable as above stated, such proceeds were under the statute for the benefit of the wife and children of the insured; and the statute exempted the proceeds from the claims of the creditors of the insured whether the proceeds inured under the statute or are bequeathed. If the policies had not been bequeathed, the insurance being exempted from the claims of creditors would, under the statute, have inured to the widow and two children of the insured in equal portions ; and such beneficiaries would then take, not by dower and descent, but under the statute operating on the policies. The insurance policies were so payable that under the statute the proceeds thereof may be bequeathed in like manner as other property or effects. The policies were left so payable at the death of the insured and they were included in the provisions of the will of the insured. Though not collectable till after the death of the insured, such proceeds passed by the will under Section 7065, Comp. Gen. Laws 1927, in like manner as "any other property or effects” that may be disposed of by last will under Sec. 5457, Comp. Gen. Laws 1927, subject, like other property or effects bequeathed under said Sec. 5457, to the widow’s dower rights under Sec. 5494, Comp. Gen. Laws 1927, but not subject to the debts of the insured, because the statute expressly exempts the proceeds of such insurance so payable from the claims of creditors of the insured, whether such proceeds pass by statute or by bequest, and such statutory exemption, not being in conflict with organic law, is valid and controlling in this case. The statute exempting life insurance from the debts of the insured does not deprive creditors of the insured of- any rights existing when the insurance was acquired by the insured.

Rehearing denied.

***985**

Strum and Brown, J. J., and Johnson, Circuit Judge, concur.

' Ellis and Buford, J. J., dissent.

Terrell, C. J., disqualified.