The Cutler *En Banc* Opinion:

Is the Third DCA Eroding the Protection Afforded to Heirs Who Are to Receive Devises of Florida Homestead?

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This article will explore the holding in the recent *en banc* decision of the Florida Third District Court of Appeal in *Cutler v. Cutler, In re: Estate of Edith Alice Cutler*, 33 Fla. L. Weekly D2103a (Fla. 3rd DCA September 3, 2008).

The Florida Third District Court of Appeal, rehearing a decision of that court *en banc,* withdrew the prior opinion of the court and substituted a modified opinion in its stead. The Florida Third District Court of Appeal held that the decedent's homestead was subject to devise, and therefore, the provision in the decedent's Will, which directed that the decedent's debts be satisfied equally from both the decedent's homestead (which was to be distributed to the decedent's daughter) and an adjacent vacant lot (which was to be distributed to the decedent's son), was enforceable, notwithstanding the provisions of Section 4(b) of Article X of the Florida Constitution. The decision of the Florida Third District Court of Appeal sitting *en banc*, in essence, reversed the decision entered by the three judge panel in the court's earlier decision. See *Cutler v. Cutler*, *In re: Estate of Edith Alice Cutler*, 994 So. 2d 341 (Fla. 3d DCA 2008).

> ***"Florida law relating to homestead is one of the more challenging and confusing areas encountered by practitioners."***

In October 2003, Edith Alice Cutler created a land trust for estate planning purposes. The initial trustees of the land trust were Edith and her two adult children, Edward and Cynthia. Edith, a widow, conveyed ownership of her homestead real property and an adjacent vacant lot to the land trust, subject to a life estate which was retained by Edith, individually. The provisions of the land trust agreement directed that the homestead and the adjacent vacant lot were to be distributed, upon the death of Edith, to Edith's estate.

Edith's Will specifically devised her homestead real property to her daughter, Cynthia, and the adjacent vacant lot to her son, Edward. Edith's Will also provided that all claims, charges and allowances against, and costs of administration of, Edith's estate were to be paid out of the residuary portion of Edith's estate. If the assets comprising the residuary estate were not sufficient to satisfy the debts and administration expenses, Edith's Will directed that the balance of such items were to be paid from, and were to reduce equally, the devise of the homestead real property to Edith's daughter, Cynthia, and the devise of Edith's vacant lot to Edith's son, Edward.

After Edith's death on June 6, 2004, the residue of Edith's estate was insufficient to satisfy all of the estate's creditors. Edith's son, Edward, sought to have the homestead and the vacant lot abated, on an equal basis, to obtain the funds needed to pay the balance owed to the creditors of Edith's estate. Edith's daughter, Cynthia, objected to any such abatement on the basis that Section 4(b) of Article X of the Florida Constitution provides that the protection from the claims of creditors available to a decedent inures to the decedent's surviving spouse and heirs. See §4(b), Article X, Florida Constitution.

The holding of the majority in the *Cutler en banc* opinion did not disagree with the conclusion reached by both the trial court and by the three judge panel that the real property devised to Cynthia was Edith's homestead. Rather, the court's departure from the trial court's holding, as well as the holding of the three judge panel in its original decision, revolved around the issue of whether the Florida constitutional exemption from creditor's claims enjoyed by Edith prior to her death inured to the benefit of Edith's daughter, Cynthia, as a result of Edith's death.

The general rule, as clearly set forth in Section 4(b) of Article X of the Florida Constitution, is that the exemption from creditors enjoyed by a Florida resident relative to his or her homestead real property passes to and inures to the benefit of such resident's spouse or heirs upon the death of the resident.

Another provision of the Florida Constitution restricts the ability of a decedent to devise his or her homestead real property at death if such decedent is survived by a spouse or a minor child. See §4(c), Article X, Florida Constitution; §§732.401, 732.4015, Florida Statutes.

Prior cases have consistently held that when a decedent, who is not subject to the restrictions on the devise of homestead set forth in Florida law (Section 4(c), Article X, Florida Constitution and Sections 732.401 and 732.4015, Florida Statutes), directs the sale of homestead real property, the proceeds from such a sale lose their homestead character, become part of the decedent's estate and become subject to administration expenses and the claims of the decedent's creditors. See *Estate of Price v. West Florida Hospital, Inc.*, 513 So. 2d 767 (Fla. 1st DCA 1987); *Knadle v. Estate of Knadle*, 686 So. 2d 631 (Fla. 1st DCA 1967).

Although Edith did not direct that her homestead real property be sold, she did direct, in what the court held was a specific manner, that her homestead be used to satisfy her debts. In the view of the Florida Third District Court of Appeal sitting *en banc*, this specific direction was equivalent to ordering it to be sold.

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Judge Shepherd, joined by Chief Judge Gersten and Judge Lagoa, wrote a dissent that was thirteen pages in length, which was longer than the majority's opinion (which was barely eleven pages in length). The reasons cited in dissenting from the majority decision were as follows:

1. Because the decedent's homestead was specifically devised to the decedent's daughter, title to the homestead passed to the decedent's daughter upon the moment of the decedent's death; it passed outside of the decedent's estate. Note that Florida law does not empower the decedent's personal representative to take possession or control of the decedent's homestead real property. §733.607, Fla. Stat.
2. Because the decedent's homestead is not a part of the decedent's probate estate, Florida's abatement statute (§733.805, Fla. Stat.) does not apply. See §733.607(1), Fla. Stat.; *Thompson v. Laney,* 766 So. 2d 1087 (Fla. 3d DCA 2000).
3. The majority's reliance on the holding in *City National Bank of Florida v. Tescher*, 578 So. 2d 701 (Fla. 1991) is misplaced, as the holding is not applicable to facts of the *Cutler* case. The *Tescher* case involved the validity and enforceability of a provision in a prenuptial agreement by which the decedent's surviving spouse waived his homestead rights under Section 4(c) of Article X of the Florida Constitution. In the *Cutler* case, the decedent's daughter's claim is based on the provisions of Section 4(b) of Article X of the Florida Constitution, and such a right cannot be waived by the decedent. As an heir of the decedent, the decedent's daughter, Cynthia, is a constitutionally protected class member under Section 4(b) of Article X of the Florida Constitution.
4. The cases in which a decedent directed that his or her homestead be sold with the proceeds being distributed to the estate beneficiaries are not applicable in the *Cutler* case because Edith did not, in her Will, direct that her homestead be sold. In both *Estate of Price* and *Knadle*, each decedent specifically directed in their will that the homestead be sold and the proceeds therefrom be distributed to their respective children.

The dissenting opinion also contends that the matters which were to be determined in the *Cutler* case were indistinguishable from those set forth in the decision of the Florida Fourth District Court of Appeal in *Engelke v. Estate of Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006). In *Engelke*, Paul Engelke and his wife, Judy Engelke, each owned, through their separate respective revocable inter vivos trusts, a one-half undivided interest in their homestead property as tenants in common. Paul Engelke and Judy Engelke each waived their respective homestead rights relative to the restrictions placed on the devise of homestead in Section 4(c) of Article X of the Florida Constitution. Paul Engelke's trust agreement provided that, after his death, his spouse, Judy Engelke, would have the right to live in his one-half undivided interest in the homestead during her lifetime, provided that she pay all of the expenses to maintain the homestead. It further provided that upon the death of Judy Engelke, or her removal from the homestead, Paul Engelke's children would receive his one-half undivided interest in the homestead real property through the residuary provisions of his trust agreement.

Upon the death of Paul Engelke, his estate did not have sufficient funds to pay the claims filed against his estate. The Florida Fourth District Court of Appeal held that the protection from creditors inured to Paul's heirs (his children) even though they retained only a remainder interest in the homestead. The *Engelke* court rejected an attempt to treat a direction to pay estate debts and expenses from Paul's trust estate to the extent sufficient assets are not available in Paul's probate estate as a direction to sell the specific homestead.

Both the majority and the dissent in *Cutler* acknowledged the policy under Florida law that the homestead protections of Section 4 of Article X of the Florida Constitution are to be liberally construed.

The majority in *Cutler* seeks to establish and carry out what certainly appears to be the decedent's intent that the decedent's daughter and son bear the financial impact of the decedent's debts on an equal basis. Certainly, Edith, in her Will, sought to allocate her debts equally between her homestead that was specifically devised to her daughter and the adjacent vacant lot that was specifically devised to her son.

The dissent, while not disagreeing with the majority's statement as to what the decedent's intent may have been, took issue with the holding of the majority because the dissent did not believe that the decedent's attempt to, in essence,

allocate debts between the daughter's devise (the decedent's homestead) and the son's devise (the adjacent vacant lot) was effective under the provisions of the Florida Constitution. Rather, the dissent viewed the rationale of the majority as an effort to extend the limited exception arising when the decedent specifically directed that her homestead be sold, which Edith failed to do, to the circumstances existing in *Cutler*.

Although the majority cited the opinion of the Florida Supreme Court in *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2005) in support of its holding, the facts and holding in *Warburton* do not seem to support the result in *Cutler*. In *Warburton*, the decedent's Will made several specific bequests, with the residuary estate passing to heirs. The decedent in *Warburton* was not survived by a spouse or minor children. The only significant asset in *Warburton* was the decedent's homestead. Although the decedent clearly intended to provide some financial benefit to the specific devisees, the Florida Supreme Court held that the decedent's homestead could not be sold to provide funds to satisfy the specific devises, much less to pay the decedent's creditors or expenses of administering the decedent's estate. Therefore, although the decedent's homestead was subject to devise (because the decedent was not survived by a spouse or minor children), the Florida Supreme Court did not hold that the provisions contained in the decedent's Will for the payment of specific devises was sufficient to deny the residuary beneficiaries, as heirs of the decedent, the constitutional protection provided pursuant to the provisions of Section 4(b) of Article X of the Florida Constitution. In *Warburton*, as in *Cutler*, the decedent could have provided that the homestead was to be sold so that the proceeds would be available to pay all or a portion of the decedent's creditors and the specific legatees.

Florida law relating to homestead is one of the more challenging and confusing areas encountered by practitioners. Not only must one tread lightly and carefully when dealing with Florida homestead real property in both the planning and administration environment, one also must be able to predict how a court may rule if more novel issues are presented.

It will be interesting to see if the Florida Supreme Court is afforded an opportunity to weigh in on the issues presented in this case.

Although not directly addressed in the *Cutler* decision, one issue which has not been adequately addressed or resolved in Florida statutory laws or case decisions is whether the trustee of a revocable inter vivos trust, upon the death of the grantor, may sell homestead real property based on the general statutory authority to sell real or personal property, if the trust agreement directs (whether specifically or generally) that the homestead is to be distributed to the decedent's spouse or heirs (or a continuing trust for the benefit of the decedent's spouse or heirs). It is the author's opinion that the provisions of Section 4(b) of Article X of the Florida Constitution preclude the trustee from exercising any such authority unless (i) the homestead was subject to devise (the restrictions of Section 4(c) of Article X of the Florida Constitution not being applicable), and (ii) a specific power directing the sale of the decedent's homestead (albeit owned by the decedent's revocable trust) ala *Price* and *Knadle* is present

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