

December 2019

## Effect of Statutory Election by a Surviving Spouse

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### Recommended Citation

Kenneth W. Keldsen, *Effect of Statutory Election by a Surviving Spouse*, 3 Wyo. L.J. 71 (1948)  
Available at: <https://scholarship.law.uwyo.edu/wlj/vol3/iss2/3>

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# WYOMING LAW JOURNAL

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VOL. 3

WINTER, 1948

NO. 2

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## NOTES

### EFFECT OF STATUTORY ELECTION BY A SURVIVING SPOUSE

In Wyoming, if a testator or testatrix deprives the surviving spouse by will of more than one-half of the estate, or three-fourths of it in case there is a second marriage and children or descendants of such children by a previous marriage, the surviving spouse may elect to accept the conditions of the will or take one-half or one-fourth of the estate, real and personal.<sup>1</sup> Dower and curtesy do not exist in this state<sup>2</sup> and today the deceased may will away all of his property as he pleases<sup>3</sup> except for the above limitation and the right of homestead in the widow and minor children.

Upon an election by the surviving spouse to take against the will, the problem arises as to what property the surviving spouse shall take and also as to the effect of the taking upon the other legacies and devises. The Wyoming statute gives the surviving spouse the right to elect to take a fractional part of the estate, real and personal. A determination of the surviving spouse's share depends upon the interpretation placed on these words. There are two possible interpretations: first, that they mean an undivided interest in each and every part and parcel of the estate or, secondly, that they refer to a fraction of the value of the estate. As yet, the Supreme Court has not construed this provision; so decisions in other states must be resorted to and the words construed in the light of the legislative intent and their logical relationship to the total statutory scheme. The decisions in the states retaining dower are not applicable, nor are those of the community property states, for the reason that the nature of the property given to the surviving spouse in these states is determined by quite different property concepts.

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1. Wyo. Comp. Stat. 1945 sec. 6-301.

2. Wyo. Comp. Stat. 1945 sec. 6-2501.

3. Naab v. Smith, 55 Wyo. 192, 97 P. (2d) 677 (1940).

In Mississippi, if the husband does not make satisfactory provisions for his wife in his will, she may elect to take "such part of his estate, real and personal, as she would have been entitled to if he had died intestate."<sup>4</sup> In construing the election statute the Supreme Court of Mississippi has held that upon her election against the will the widow became a co-tenant with the devisee in each and every parcel of real estate specifically devised by her deceased husband.<sup>5</sup> In Oklahoma a testator cannot by his will so deprive his surviving spouse as to leave her an estate less in value than she would receive through succession by law.<sup>6</sup> At the widow's election, she may take under the will or under the law of succession.<sup>7</sup> In New York the surviving spouse has a right of election "to take his or her share of the estate as in intestacy",<sup>8</sup> and under this provision the New York Court has held that the widow is a "tenant in common to the extent of one-third in all the property of the decedent."<sup>9</sup> The court reasoned that since the surviving spouse receives an intestate share, the property "devolves as intestate, and her rights are measured by this conception."<sup>10</sup> Thus in three states, Mississippi, New York and Oklahoma, the widow's share is determined by a direct reference to the statute of descent and distribution; and generally under descent statutes the widow takes an undivided interest in the intestate property.<sup>11</sup>

In Colorado, under a very similar statute to that in Wyoming, the testator or testatrix cannot devise or bequeath away from the surviving spouse more than one-half of his property; and if the surviving spouse is deprived of more than one-half she can elect to take "one-half of the property or estate, both real and personal."<sup>12</sup> Under this statute it was held that the widow's half might "encroach" upon a devise to a son when the estate property outside of the devise and a legacy to a daughter was not sufficient to pay the widow's half in full.<sup>13</sup> This indicates that if the estate was of a sufficient amount outside of the devises and bequests the widow's half could be paid out of the residuary fund and thus that the one-half refers to values and not to an undivided interest in each and every part.

In Wyoming there are no express references made in the election statute to the statute of descent and distribution. The two statutes are distinct and separate; the election provisions being part of the will statute under Article 3 of the Probate Code, and the statute of descent and distribution being part of Article 25 of the

4. Miss. Code Ann. 1930 sec. 3561.

5. *Gordon v. James*, 86 Miss. 719, 39 So. 18 (1905).

6. Okla. Stat. 1931 sec. 1539. Quoted and construed in *Dixon v. Dixon*, 191 Okla. 139, 126 P. (2d) 1020 (1942).

7. *Dixon v. Dixon*, supra note 6. In re *Carother's Estate*, 196 Okla. 640, 167 P. (2d) 899 (1946); *Appeal of Sim's Estate*, 162 Okla. 35, 18 P. (2d) 1077 (1933).

8. *McKinney's Consolidated Laws of New York*, 1939 c. 13, sec. 18 (1); In re *Wishart's Estate*, 149 Misc. 343, 267 N. Y. Supp. 391 (1933); In re *Devine's Estate*, 147 Misc. 273, 263 N. Y. Supp. 670 (1933); In re *Byrnes' Estate*, 149 Misc. 449, 267 N. Y. Supp. 627 (1933); In re *Collins' Estate*, 156 Misc. 783, 282 N. Y. Supp. 728 (1935); In re *Mancinelli's Estate*, 158 Misc. 605, 286 N. Y. Supp. 122 (1936); In re *Fisher's Estate*, 159 Misc. 190, 287 N. Y. Supp. 252 (1936); and In re *Bommer's Estate*, 159 Misc. 511, 288 N. Y. Supp. 419 (1936).

9. In re *Topazio's Estate*, 175 Misc. 132, 22 N. Y. Supp. (2d) 847, 851 (1940); See *Matter of Curley's Estate*, 160 Misc. 844, 290 N. Y. Supp. 822 (1936).

10. In re *Topazio's Estate*, supra note 9.

11. 2 *Tiffany, Real Property*, sec. 427 (3d ed. 1939).

12. *Colorado Statutes Annotated* (1935) c. 176, sec. 37.

13. *Hart v. Hart*, 95 Colo. 471, 37 P. (2d) 754 (1934).

Probate Code. It is clear that the surviving spouse in Wyoming does not take under the statute of descent nor a share as in the case of intestacy but only what the statute governing wills gives her. The only way, therefore, that the surviving spouse can take is by purchase<sup>14</sup> under the will.

The phrase, "one-half of the estate, real and personal," surely ought to be interpreted in the light of the purpose to be effected. The purpose of giving the surviving spouse a right to elect to take against the testator's will would seem to be to insure the spouse a sufficient share and to guard against being disinherited as a result of the broad powers of disposition by will given to the testator. Yet along with this purpose the policy of giving the utmost effect to the testator's wishes should be recognized.<sup>15</sup> It is submitted that a testator's scheme is less subject to disruption by giving the surviving spouse a share in terms of value rather than an undivided interest in each and every part and parcel of the estate. Where there is a surplus or a residuary estate which is of sufficient value to provide for the spouse's election, this fund can be resorted to without disturbing the general and specific devises and bequests. But if the statute is construed to give an undivided interest to the surviving spouse, it is probable that each and every devise and bequest will have to be altered; and probably partitioning will result. When a testator makes a specific devise or legacy, it is assumed that he wanted a certain person to have the specific property,<sup>16</sup> and the spouse should not complain as long as she get more than was given by the will, and there is no persuasive reason why she should be entitled to an interest in every part of the estate. By giving the spouse a share in value, the purpose of the election statute is carried out and at the same time the testator's scheme is disturbed to the least possible degree.

In determining whether or not the surviving spouse has been deprived of one-half or one-fourth "of the estate, real and personal" the value of the entire net estate is computed.<sup>17</sup> The value of all the property to the devisees must be included in determining the value of the surviving spouse's statutory share.<sup>18</sup> When the surviving spouse elects to take against the will, the rights of other devisees and legatees will have to be adjusted unless there is sufficient intestate property to cover the deficiency.<sup>19</sup> Although the intention of the testator is defeated in part, the courts attempt to carry out his primary intention with the least disturbance to the general plan.<sup>20</sup> It has been held that the deficiency must be made up out of the residuary estate, and that the surviving spouse cannot encroach on property specifically devised unless the property not specifically devised is insufficient to give

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14. The word "purchase" is used here in contradistinction to the acquisition of property by descent. In *Kelley v. Southworth*, 38 Wyo. 414, 267 Pac. 691 (1928), the Wyoming Supreme Court makes the distinction in these words, "The word 'purchase' in its technical and broader meaning relative to land is generally held to mean the acquisition of real estate by any means whatever except by descent."

15. In re matter of Curley's Estate, *supra* note 9.

16. 3 Woerner, *The American Law of Administration*, sec. 452 (3d ed. 1923).

17. Proceeds from life insurance policies and the value of realty in foreign countries are generally excluded from this computation, 69 C. J. 1141; *Decker v. Vreeland*, 220 N. Y. 326, 115 N. E. 989 (1917).

18. *Farmer's Loan & Trust Co. v. McCarty*, 100 Conn. 367, 124 Atl. 40 (1924).

19. 4 Page on Wills, sec. 1389 (3rd ed. 1941).

20. *Ibid*; *Shannon v. Eno*, 120 Conn. 77, 179 Atl. 479 (1935); *Pittman v. Pittman*, 81 Kan. 643, 107 Pac. 235, 27 L. R. A. (N. S.) 602 (1910).

her the statutory share.<sup>21</sup> Unless there is a contrary preference given in the will, the courts will generally cause the estate to be taken in the following order: residuary intestate property, residuary legacies, general legacies, and specific legacies.<sup>22</sup> All legacies abate before devises of realty.<sup>23</sup> To the extent that it is necessary, the members of each class must contribute pro-rata to make up the deficiency.<sup>24</sup> In New York, however, the above system of abatement is not followed, instead all other beneficiaries, regardless of class, contribute in proportion to the property received by them.<sup>25</sup> Apparently the New York courts take the view that such an adjustment will upset the testator's scheme of disposition the least.<sup>26</sup>

At common law the devise or bequest which is relinquished by the spouse upon election became intestate property and went to the heirs. Today, however, the courts of equity will sequester the repudiated devise or bequest and distribute it to the disappointed devisees and legatees.<sup>27</sup> Thus where a residuary legatee has been deprived of his legacy by the election, the benefit intended for the spouse will be sequestered to compensate him.<sup>28</sup>

KENNETH W. KELDEN

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#### OWNERSHIP OF WYOMING MINERALS UNDER FAULTY FEDERAL PATENTS USED IN RAILWAY LAND GRANTS

Landowners in Wyoming holding deeds to lands patented prior to December 10, 1903 under federal land grants may be the nescient recipients of a mineral windfall. This may be the present effect of a decision of the United States Supreme Court delivered June 22, 1914 in the case of *Burke v. Southern Pacific Railroad Company*.<sup>1</sup>

This possibility arises by virtue of the court's determination that a patent clause reserving mineral lands was void. The clause was contained as standard nomenclature in patents issued by the Land Department under the provisions of the railway land grant acts, and was included from 1866 until omitted by order

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21. *Dunlap v. McCloud*, 84 Ohio St. 272, 95 N. E. 774 (1911).
  22. 3 *Woerner*, op. cit. supra note 16, sec. 452; 4 *Page*, op. cit. supra note 19, secs. 1497, 1498, 1500; *Baker v. Baker*, 319 Ill. 320, 150 N. E. 284, 42 A. L. R. 1514 (1925); *Ballinger's Devises v. Ballinger's Adm'r.*, 251 Ky. 405, 65 S. W. (2d) 49 (1933); *Rexford v. Bacon*, 195 Ill. 70, 62 N. E. 936 (1902); *Lonerger's Estate*, 303 Pa. 142, 154 Atl. 387 (1931).
  23. 4 *Page*, op. cit. supra note 19, sec. 1508. *Page* also states in the same section that by statute in some states the devises abate pro rata with the legacies of the same class.
  24. 4 *Page*, op. cit. supra note 19, sec. 1496; with the exception that a legacy for value has priority over other legacies, 4 *Page*, op. cit. supra note 19, sec. 1501.
  25. *In re Byrnes Estate*, supra note 8.
  26. 47 *Harv. L. Rev.* 889.
  27. 2 *Pomeroy's Equity Jurisprudence*, sec. 519 (5th ed. 1941); See also *Merchants Nat. Bank v. Hubbard*, 222 Ala. 556, 133 So. 723, 74 A. L. R. 657 (1931); 1 *Woerner*, op. cit. supra note 16, sec. 119 at p. 406.
  28. *Trustees of Kenyon College v. Cleveland Trust Company*, 130 Ohio St. 107, 196 N. E. 784, 99 A. L. R. 224 (1935).
  1. 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527 (1914).