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NOTES

DISINHERTING A MURDERER OF AN ANCESTOR

The problem arising when a murderer kills his "ancestor" has been handled in several ways by the various states. In the absence of statute, some courts have allowed the murderer to inherit, on the theory that it is within the domain of the legislature to provide in the statute of descent and distribution how such matters shall be handled. Having failed to do so, these courts say they will not invade the legislature's share of action, but will allow the murderer to inherit under the existing laws.[1] Other courts regard it as inequitable to permit the murder to inherit from his victim, and base their ruling on the common law maxim that no one shall be allowed to profit by his own wrong.[2]

1. Hagan v. Cone, 21 Ga. App. 416, 94 S.E. 602 (1917); Eversole v. Eversole, 169 Ky. 793, 185 S.W. 487, L.R.A. 1916E, 593 (1916); Murchison v. Murchison, ... Tex. Civ. App. ....., 203 S.W. 423 (1918).
2. Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y. Supp. 173 (1918); Re Estate of Anna L. Tylor, 140 Wash. 679, 250 Pac. 456, 51 A.L.R. 1088 (1926); Re Santourian, 125 Misc. 668, 212 N.Y. Supp. 116 (1925).

About half of the states[3] have provided statutes disinheriting the murderer of an "ancestor". Wyoming has a statute of this type which provides that no one who "feloniously takes, or causes or procures another so to take, the life of another, shall inherit from said person, or take by devise or legacy from such deceased person, any portion of his or her estate; and no beneficiary of any policy of life or accident insurance, . . . shall take the proceeds of such policy or certificate, but in every instance mentioned in this section, all benefits that would accrue to any such person upon the death of the person whose life is thus taken, shall become subject to distribution among the other heirs of such deceased person according to the rules of descent and distribution. . . ."[4]

A felony is defined by statute as an offense which may be punished by death, or by imprisonment in the penitentiary.[5] Under this definition, murder in the first and second degree, and voluntary and involuntary manslaughter would be included.

Most of the states having statutes disinheriting the murderer of the ancestor expressly require a conviction. Wyoming's statute, along with those of three other states,[6] either purposely or through oversight, fails to mention anything about what procedure shall be followed in determining whether a person has "feloniously" taken the life of another. This omission poses the problem with which this article is concerned.

Only one case[7] has arisen in Wyoming in which the statute in question was involved. A wife was accused of murdering her husband to obtain the insurance proceeds. However, since the wife, her natural son by a former marriage and adopted son of the deceased, and another adopted son of the deceased, were the sole heirs at law, and since the wife assigned her interest in the proceeds to the adopted children of the deceased, and then committed suicide, the necessity of her conviction remained an open question.

Therefore, we must look to the above mentioned states, i.e., Iowa, Oregon and Minnesota, for decisions which might be used to influence the Wyoming Courts.

The Iowa statute providing for disinheritance was held not to apply in what in effect appeared to be a joint tenancy situation.[8] A father left all of the rents, issues, and profits of his property and business to his wife and son to be equally divided between them. In the event of the wife predeceasing the son, the son was to take all of the property. In the event of the son dying without leaving living issue, the wife was to take all, if

3. Wade, A Statutory Solution, 49 Harv. L. Rev. 715 (1936).
4. Wyo. Comp. Stat. 1945, sec. 6-2518.
5. Wyo. Comp. Stat. 1945, sec. 9-102.
6. Code of Iowa, 1946 c. 636 sec. 636.47 (Ore.) O.C.L.A., 1939 sec. 16-203. Minn. Stat., 1949 sec. 525.87.
7 Metropolitan Life Insurance Co. v. Banion, 106 F.2d 561, 84 L. Ed. 1033 (10th Cir. 1939), cert. dismissed per stipulation 309 U.S. 691.
8. Boyer v. Emerson et al., 191 Iowa 900, 183 N.W. 327 (1921).

she was predeceased. The son murdered his mother and was convicted. The latter committed suicide. The court held that the son was not precluded from inheriting because his inheritance was from his father, not his mother; therefore, the statute providing "no person who feloniously takes the life of another shall inherit from such person," did not apply. The court reasoned that it would have to read into the statute something which was not included by the Legislature, and, since in effect it was a penal statute, it must be strictly construed.

The court here did not consider the remedy which was applied in the case of *Vesey v. Vesey*, 237 Minn. 295 54 N.W.2d 385, 32 A.L.R.2d 1090 (1952). In that case a wife feloniously killed her husband, with whom she held jointly a "joint and several" bank account. The court held that the statute providing no one shall inherit from another whose life he has feloniously taken did not apply, as the surviving joint owner took by virtue of the contract of deposit, not by inheritance. However, the court went on to find that the survivor held the deposits under a constructive trust for the benefit of the deceased's children by a previous marriage.

The constructive trust has been applied in several cases[9] where the court has recognized that it would be contrary to the common law regarding the right of survivorship by tenants of the entirety. The courts, in these cases, have been bothered with how much of the estate should be held in constructive trust, i.e., all of the estate or just the half that deceased would have held had it not been for the wrongful action of the survivor.

An Oregon case[10] involving an estate by the entirety followed the common law doctrine of allowing the surviving spouse to take the whole estate. The husband of the deceased had been committed to the insane asylum in April, 1933, but was paroled (not discharged) in June, 1933. On the evening of December 3, 1935, he murdered his wife, and then committed suicide. Since an estate by the entirety is not one of inheritance, but of survivorship, the court construed the Oregon statute which provides that "no person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person, or receive any interest whatsoever in the estate of the decendent as surving spouse . . . ",[11] not to apply to the above situation. The court did not apply the constructive trust as applied in the case of *Vesey v. Vesey* (supra), but said that it felt any change in the established rules of tenancy by the entirety should be made by the Legislature. In an opinion concurring with the result, but not the reason, it was said by the judge that he could not concur with the narrow construction given the statute by the majority opinion; feeling that the statute was intended to apply to the estate by entirety situation. He con-

9. Colton v. Wade, ... Del. Ch. ....., 80 A.2d 923 (1951); Barnett v. Couey, 224 Mo. App. 913, 27 S.W.2d 757 (1930); Neiman v. Hurff, 11 N.J. 55, 93 A.2d 345 (1952); Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188, 51 A.L.R. 1100 (1927).
10. Wenker v. Landon, 161 Ore. 265, 88 P.2d 971 (1939).
11. See note 6 supra.

curred in the result because he felt there was some evidence to show that the murderer had been incapable of entertaining a felonious intent at the time of the killing.

An Iowa case[12] decided while Sec. 3386[13] of the Code of Iowa was still in effect, held that a woman convicted of killing her husband was not precluded from inheriting her statutory dower share, as this share was a matter of right, and not of inheritance. The case is interesting from the Wyoming standpoint since our present statute is the same as Iowa's Sec. 3386, in its wording. The case might have some precedent where the Wyoming statute providing for homestead exemption[14] is concerned, should a spouse with minor children feloniously kill his mate, and the children attempt to deprive him of his homestead right.

The holding in the case of *Johnston v. Johnston,* 220 Iowa 328, 261 N.W. 908 (1935), appears to be the most informative of the Iowa decisions on how their courts proceed in these probate matters. The defendant was convicted in a criminal action for the manslaughter of her husband. Thereafter she applied for an allowance from the estate of the deceased. The administrator of the estate, in a civil action, filed a resistance to the application. The resistance recited the conviction of the defendant in a criminal action, and also quoted the Iowa statute pertaining to disinheritance for felonious assault in taking the life of another. However, the administrator neglected to allege that the defendant had feloniously taken the decedent's life. Defendant moved to strike the allegation of her conviction and the statute quotation from the resistance, and said motion was sustained. On appeal to the Supreme Court the decision of the lower court allowing the widow's application was affirmed. The Court took judicial cognizance of the statute, making the pleading of it unnecessary. As to the allegation of her conviction: "the fact of her conviction was not even admissable to the district court, except possibly to prove there had been a judgment, but to prove none of the facts back of it."[15] The court quoted the following from 34 C.J. p. 970, Sec. 1387: "By the great weight of authority, and in the absence of any statute to the contrary, a judgment or sentence in a criminal prosecution is neither a bar to subsequent civil proceeding founded on the same facts nor is it proof of anything in such civil proceeding, except the mere fact of its rendition. So where the same acts or transactions constitute a crime and also give a right of action for damages or for a penalty, the acquittal of defendant when tried for the criminal offense is no bar to the prosecution of the civil action against him, nor is it evidence of his innocence in such action." The Court, with approval, also quoted the following from a Law Review Article,[16] "Thus, the Iowa statute which contains nothing pertaining to requirement of conviction, apparently per-

12. Long v. Kuhn, 125 Iowa 449 ,101 N.W. 151 (1904).
13. Forerunner of Iowa's present statute, see note 6 supra.
14. Wyo. Comp. Stat. 1945, sec. 6-1504.
15. Johnston v. Johnston, 220 Iowa 328, 261 N.W. 908, at p. 911 (1935).
16. 20 Iowa Law Review 524, at p. 526.

mits the civil courts to determine the question of guilt or innocence for the purpose of distributing the property of the victim." Going on in the opinion the Court said, "If a finding of 'not guilty' in a prosecution is not conclusive evidence in such a hearing as this, the finding of 'guilty' is not conclusive. In other words, the civil court determines the question on the record before it."[17] The Supreme Court, being a court for the correction of errors in the record only, could not look past the record at the merits of the case, and, on the basis of the record, affirmed the decision of the trial court.

A Minnesota case[18] held that the probate court had original jurisdiction over whether a person is disqualified under statute from inheriting from a deceased. The Court said in this regard, "it is immaterial that Sec. 525.87 is silent as to the procedure to be followed in litigating the issue as to the alleged felonious taking of life as a prerequisite to a determination of lawful heirs of the decedent's estate. . . . In the absence of specific statutory procedure, the issue of whether decendent's life was feloniously taken is to be determined in the same manner as any other issue of fact; and, for this purpose, the probate court is possessed of an exclusive jurisdiction and all the means necessary for its effective exercise."[19]

An interesting interpretation of the Oregon statute was made in the U.S. District Court for the District of Oregon in a recent case.[20] The husband, in drunken rage, fell on a knife held by the wife as self protection to keep him from hitting her. She was indicted by the District Attorney for Multnomah County for manslaughter, but she later pleaded guilty of "assault with a dangerous weapon," which is a felony. She was put on probation for three years. She was successful in an action to recover insurance proceeds on the decedent from the defendant insurance company. The court said, "Plaintiff's act, which I have adjudged to be manslaughter, would not have forfeited her rights to her husband's insurance by the decisions preceding the era of statutes. Only one who slayed intentionally and wrongfully was barred. Does the statute compel a different result? Because plaintiff committed a statutory felony, was her conduct 'felonious', within the meaning of the disinheritance statute? . . . Would the Oregon courts hold that a son whose reckless driving caused his parent's death, could not inherit from the parents? I think not. . . . I hold then, that the plaintiff's homicide of her husband, though wrongful, and a felony under the Oregon Criminal Code, did not constitute 'felonious taking' of her husband's life, within the meaning of the Disinheritance and Forfeiture statute."[21]

In re Norton's Estate[22] the Oregon Court held that the son of a con-

17. Johnston v. Johnston, 220 Iowa 328, 261 N.W. 908, at p. 910 (1935).
18. Vesey v. Vesey, 237 Minn. 10, 53 N.W.2d 809 (1952).
19. Id. at 813.
20. Hatcher v. Aetna Life Insurance Co. et al., 105 F. Supp. 808 (Ore. 1952).
21. Id. at 810, 811, 105 F. Supp. 808.
22. State Land Board et al. v. Nortin et al., 177 Ore. 342, 162 P.2d 379 (1945).

victed murderer, who was still living, was barred from inheriting through him. The murderer was convicted of the felonious killing of his mother. The son of the murderer, i.e., the grandson of the deceased, brought an action claiming the estate of the deceased, basing his contention on the fact that his father was precluded by statute from inheriting, and that he was the rightful heir. The Court said, "Other lineal descendants are so appointed only in case there is no child of the intestate living at the time of her death. Despite the serious charge against him, decedent's son was living at the time of decendent's death, hence other lineal descendants are not appointed by law to succeed to her real estate."[23] The Court ruled that the grandson was disqualified from inheriting, and permitted the sister of the deceased to take instead.

Those statutes with a provision for the conviction of a murderer are not without pitfalls.[24] For example, a Kansas case[25] held that a verdict by the coroner's jury that the deceased had been killed by her husband, was not a conviction within the contemplation of the Kansas statute. Since the killer had committed suicide before the trial, there could be no conviction. Consequently, the wife's property was inherited by the husband, and, at his death, went to his heirs.

The interpretation of the statutes by our three sister states would indicate a negative answer to our topic question, i.e., does the Wyoming statute require a conviction. None of the states in making their rulings in the probate court, have held themselves bound by the fact that there was a conviction of the murderer, and all seem to follow the construction that without express legislation on how to proceed in the matter, they will decide the cases on the merits.

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TRANSFER OF POSSESSION AS A TAXABLE SALE

A large number of states have enacted legislation assessing a tax upon retail sales. Most, if not all, of the laws governing such tax have incorporated in them a definition of the term sale. This article is concerned with those laws that define the term sale, as does Wyoming's,[1] as including a "transfer of possession of tangible personal property for a consideration." The courts have recognized that this is an extremely broad definition of the term and have by court decision, qualified it to a greater or lesser degree. The purpose of this paper is to point out some of the more common "tests" the courts have applied in determining if a transfer of possession is such as to constitute a taxable retail sale.

23. Id. at 380, 162 P.2d 379.
24. Wade, supra note 3, at 723.
25. Hogg v. Whitham, 120 Kan. 341, 242 Pac. 1021 (1926).

1. Wyo. Comp Stat. 1945, Sec. 32-2502.