

2000

Helena Waters, personal representative of the Estate
of Leonard D. Waters v. Darla Jorgenson, Jeanna
Scott, Barbara D. Reynolds, Theodora Ann (Teddi)
Brown, Sherrie M. Allan, and Frederick L. Waters :
Reply Brief

Utah Court of Appeals

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Wynn E. Bartholomew; attorney for appellant.

W. Andrew McCullough; attorney for appellees.

Wynn E. Bartholomew #0233 Plaza I At the Sports Mall 5505 South 900 East #300 Salt Lake City, Utah 84111 Telephone: (801) 263-0569 Attorney for Petitioner/Appellant

W. Andrew McCullough #2170 895 West Center Street Orem, Utah 84057 Telephone: (801) 222-9635 Attorney for Respjondents/Appellees

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**IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH**

IN THE MATTER OF THE ESTATE OF:

LEONARD D. WATERS,
Deceased.

HELENA WATERS, personal
representative of the Estate of Leonard D.
Waters,

Petitioner/Appellant,

vs.

DARLA JORGENSEN, JEANNA
SCOTT, BARBARA D. REYNOLDS,
THEODORA ANN (TEDDI) BROWN,
SHERRIE M. ALLAN, and FREDERICK
L. WATERS,

Respondents/Appellees.

**REPLY BRIEF
OF APPELLANT**

Case No. 20000017-CA

APPEAL FROM TWO INTERLOCUTORY ORDERS
ENTERED DECEMBER 13, 1999 AND MARCH 16, 2000
THIRD DISTRICT COURT, TOOELE COUNTY, STATE OF UTAH
HONORABLE DAVID YOUNG

ARGUMENT PRIORITY CLASSIFICATION 10

Wynn E. Bartholomew #0233
Plaza I At the Sports Mall
5505 South 900 East #300
Salt Lake City, Utah 84111
Telephone: (801) 263-0569

Attorney for Petitioner/Appellant

W. Andrew McCullough #2170
895 West Center Street
Orem, Utah 84057
Telephone: (801) 222-9635

Attorney for Respondents/Appellees

OCT 31
Paulette Stagg
Clerk of the Court

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**IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH**

IN THE MATTER OF THE ESTATE OF:

LEONARD D. WATERS,
Deceased.

HELENA WATERS, personal
representative of the Estate of Leonard D.
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Petitioner/Appellant,

vs.

DARLA JORGENSEN, JEANNA
SCOTT, BARBARA D. REYNOLDS,
THEODORA ANN (TEDDI) BROWN,
SHERRIE M. ALLAN, and FREDERICK
L. WATERS,

Respondents/Appellees.

**REPLY BRIEF
OF APPELLANT**

Case No. 20000017-CA

Petitioner/Appellant, Helena Waters, hereby submits this Reply Brief to the Brief of Respondents/Appellees, Darla Jorgenson, Jeanna Scott, Barbara D. Reynolds, Theodora Ann (Teddi) Brown, Sherrie M. Allan, and Frederick L. Waters.

RESPONSE TO RESPONDENTS' STATEMENT OF FACTS

The Statement of Facts contained in Petitioner's initial brief contains a complete and concise description of the facts of this case and the basis for the appeal. Respondents have accepted Petitioner's Statement of Facts as set forth in her initial brief "except where

specifically controverted herein”. The word “herein” is not defined and there is no statement or list of controverted facts set forth in Respondents’ brief, only allegations in the text of their arguments that are not in the record on appeal. There were not any evidentiary hearings nor any clearly defined findings of fact in the trial court record except as may be reflected in the interlocutory orders which are the subject of this appeal. Consequently, “facts” are limited to documentary exhibits in the record and the Orders of the trial court.

The Respondents’ “Statement of the Case” is a verbatim recitation from their Memorandum in Opposition to Petitioner’s Motions (R.131-136). Unfortunately, that memorandum also did not include a required statement of facts, and many of the representations made therein are inaccurate, incomplete, and, in some cases, false. There is no finding in the record which states that “at the time of his [Decedent’s] death he held title in joint tenancy to a residence in Tooele, with his wife [Helena Waters]”. There is no finding in the record which states that Decedent “had a pension with survivor benefits”. The Honorable L.A. Dever did enter an Order approving the Nevada settlement in which the proceeds of that action were paid into the estate. (R.67-69). Respondents are in error in their assertion that a personal property allowance in the sum of \$5,000.00 and a family allowance were denied by the District Court. The Court found in paragraph 4 of its Order dated March 16, 2000 (R. 219-221) that an evidentiary hearing would be necessary to determine the extent of any personal property allowance “conditioned on the value of the personal property of the estate”. The Court also found that an evidentiary hearing was necessary on the question on whether a family allowance should be awarded to Petitioner as

Decedent's spouse. (R.220). Respondents have taken great license in their brief making representations of fact in the "Statement of the Case" that are not supported by the record.

SUMMARY OF ARGUMENTS

The arguments set forth herein are in specific response to four points made by Respondents in their brief. Although Respondents did not specifically respond in numerical order to the points set forth in Petitioner's brief, Petitioner will address in numerical order the points raised by Respondents. Petitioner will coalesce her arguments against Respondents' first two arguments into one because they are integrally related.

ARGUMENT

POINT I

THE TRIAL COURT WAS UNDER A CLEAR
AND UNEQUIVOCAL DUTY TO ABIDE BY
THE JUNE 22, 1999 ORDER OF JUDGE
DEVER.

Respondents argue that the Trial Court was under no duty to adhere to the June 22, 1999 Interlocutory Order of Judge L.A. Dever. (R. 67-69). Before an examination of the case law regarding the "law of the case" doctrine by Respondents, they assert as fact the following allegations, which allegations are clearly false and can only be assumed to be designed to intentionally misrepresent the issues before this Court.

First, Respondents mischaracterize the language and intent of the stipulation of the parties to the Nevada action. (R.16-17, Exhibit "E"). The stipulation was entered into between the various plaintiffs to allow the net proceeds of the settlement **to be paid to the Decedent's estate for administration pursuant to the Utah laws of descent and**

distribution, not for a subsequent allocation to the various plaintiffs depending on the relative strengths of their positions under the original complaint. **Second, the stipulation was not prepared by counsel for Petitioner**, but was prepared by Bob Benton, the attorney for both Petitioner and Respondents in the Nevada action. Petitioner's attorney in this action had no involvement whatsoever with the preparation of or the wording of the stipulation. Petitioner's attorney did not enter an appearance until April 26, 1999, nine days after the parties had apparently executed the stipulation and after he had been contacted by Bob Benton and Robert Hughes, Petitioner's original attorney for the estate and asked to represent Petitioner. (R.12-13). The stipulations specifically state that the "net proceeds be paid to the estate of Leonard Waters, deceased, to be distributed by the estate now pending in Utah under Utah law of descent and distribution". (R.16).

Third, Respondents further allege in their Argument that **the legal consequences of paying money into the estate in Utah was never explained to them**. Please note the letter of Bob Benton dated April 13, 1990 to his clients (R.168-169), cited in Petitioner's original brief, but cited here again because of the Respondents' apparent refusal to acknowledge its existence.

As I have explained to you all before, Mr. Waters' medical expenses exceeded \$100,000 as a result of his injuries. The suit was brought for his personal injury. That claim survived his death and is being brought by the estate. **Normally this character of a claim is an asset of the estate and is distributed under the laws of distribution of the state in which the deceased was a resident.** In this case, of course, it is Utah. **Please seek local counsel in this respect as I am not competent to advise as to the Utah law in this respect. . . .**

Normally, this claim would require the testimony of the various surviving children and surviving widow as to the individual loss as to society, companionship, affection, as well as pecuniary loss. Obviously, Mrs. Waters has money loss. It is my understanding that none of the children lost money by virtue of Mr. Waters' demise. In this respect, there is a conflict of interest between my various clients. **As a result, I have requested all of you to seek independent legal representation when it comes to distribution of the limited proceeds being generated by this lawsuit. . . .**

I ask the surviving daughters to contact counsel and have the lawyer call me with reference to how to handle the distribution of this small net recovery. Jeanna called and indicated that the surviving daughters all got together and agreed that it should go into the estate and be distributed under Utah law of descent and distribution. I was hoping to get a letter from them confirming their agreement in this respect after having the opportunity to seek legal advice in this respect. (Emphasis added). (R. 168-169).

Respondents further cite paragraph 9 of the June 22, 1999 Order (R. 67-69) for the position that the stipulation was only a "measure of convenience" without a determination as to how the settlement would eventually be distributed. Respondents choose to ignore the clear language of paragraph 8 of that Order, which states:

8. Since the aforementioned settlement did not differentiate between the various claims of the estate and those of the individual plaintiffs, the plaintiffs stipulated and agreed that the net proceeds from the settlement of the aforementioned lawsuit shall be considered an asset of the decedent's estate and shall be distributed to the heirs of the decedent's estate according to the laws of the intestate succession for the State of Utah. (R.168-169).

Respondents seem to now assert that they were unaware that the Probate Code as adopted in Utah dealing in cases of intestate succession prioritizes certain payments of probate estate

assets prior to ultimate distribution to the heirs. Included in this prioritization are the payment of funeral expenses, estate administration expenses, statutory allowances, payment of claims, and other expenses fixed as to priority of payment by statute before any distribution is made to the surviving heirs. Utah Code Ann. §75-3-805 and §§75-2-401 through 404 (pre-1998 law).

The Respondents ignore the various cases cited by Petitioner in support of the “law of the case” doctrine as adopted in Utah. Instead, Respondents attempt to find sole support for their position in a misapplication of the holding in AMS Salt Industries, Inc. v. Mag. Corp. of America, 942 P.2d 315 (Utah 1997), a case also originally cited by Petitioner. In AMS Salt Industries, the Utah Supreme Court supported an exception to the “law of the case” doctrine where issues decided by the first judge were presented to the second judge in a “different light”, specifically in that case where a summary judgment initially denied was subsequently granted after additional evidence was adduced. Id. at 319. There is no such situation in this case. There was no additional evidence adduced, only an apparent change of heart by the Respondents after petitions for statutory allowances were filed by Petitioner.

Respondents argue that they were “trapped” by Petitioner who did not file petitions for homestead, exempt personal property, or family allowances prior to the filing of a petition for adjudication of intestacy and for approval of the Nevada settlement. However, the Respondents choose to ignore the fact that there were no assets in the probate estate to petition for the award of homestead, exempt personal property, or family allowances prior to the receipt of the Nevada settlement. Certainly, had Respondents consulted with counsel,

Respondents would have been advised of the existence of those allowances under Utah Law. Counsel would have also advised Respondents that the allowances were statutorily guaranteed to the surviving spouse, who has a legislatively-recognized closer relationship requiring monetary protection with a deceased spouse than the adult children of any previous marriage. Utah Code Ann. §75-2-102, §75-2-201 et seq., and §75-2-401 et seq. (pre-1998 law).

Respondents further assert that Petitioner, who is also the personal representative of Decedent's estate, now claims that the money from the Nevada settlement is exclusively hers. No where in the record, the pleadings, petitions, motions, orders, or anywhere else has Petitioner made any such claim or assertion, and Respondents offer no citation to the record to support this claim.

Finally, Respondents obfuscate the real issues by arguing that (1) Petitioner is not entitled to a claim for loss of marital consortium under Utah law; (2) Utah law limits wrongful death actions to a claim for the benefit of heirs; (3) interpleader is "the only thing that made sense . . . to compel conflicting complainants to litigate their claims among themselves"; and (4) again, Petitioner and her counsel drafted the stipulation between the parties to intentionally deceive them, which assertion explained earlier, is categorically false.

The causes of action set forth in the Nevada action arose from an auto-pedestrian accident occurring in Nevada, involving a defendant who was a resident of Nevada and a vehicle that was registered in Nevada, and that was filed and litigated in Nevada and settled under Nevada law. Whether or not Utah recognizes a claim for loss of marital consortium

is completely irrelevant. Utah's statutes relating to wrongful death are equally irrelevant. The assertion by Respondents on page 8 that because "the decedent was a resident of the State of Utah . . . [then he] certainly did not have sufficient contacts in Nevada to warrant the use of Nevada law under accepted principles of conflicts of law" is completely unsubstantiated. While Petitioner is not aware of any Utah decisions directly on point, there is ample authority in the decisions of neighboring states. In Lombardo v. Pollock, 521 P.2d 636, 637-8 (Ariz. Ct. App. 1974), the court found in a dispute as to the proceeds of a wrongful death settlement that damages received, whether by action, settlement or compromise, are to be distributed, apportioned or disposed of in accordance with provisions of the law of the state under whose statute the right to recovery accrued or the law of the place where the death-causing injury occurred rather than the law of the decedent's domicile. (A copy of Lombardo is attached at Appendix 7 to this Reply Brief). The same general rule applies in Washington, New Mexico, Kansas, and Oklahoma. See Johnson v. Spider Staging Corp., 555 P.2d 997, 1002 (Wash. 1976); First Nat. Bank v. Benson, 553 P.2d 1288, 1289 (N.M. Ct. App. 1976) *cert denied* 558 P.2d 619; McDaniel v. Sinn, 400 P.2d 1018, 1021 (Kansas 1965); and Cherokee Laboratories, Inc. v. Rogers, 398 P.2d 520, 524 (Okla. 1965).

Furthermore, interpleader was not the appropriate remedy in this case to allow the Petitioner and Respondents to resolve competing claims. This is an action under the Utah Probate Code for the proper administration of a decedent's estate. It is a probate issue to determine whether or not statutory homestead and exempt personal property allowances are absolute. It does not involve questions of fact, but rather the application of law. While a

petition for a family allowance involves evidentiary issues and questions of fact as to the amount, if any, and the duration of such an allowance, the same is not true for homestead and exempt personal property allowances. It is also a function of probate to determine the amounts to be paid for funeral expenses, costs of administration, statutory allowances, and creditor claims, before any distribution to heirs. Neither the trial court nor the Respondents seem to grasp this fact.

POINT II

THE SURVIVING SPOUSE'S ENTITLEMENT TO A HOMESTEAD IS ABSOLUTE IN UTAH UNDER PRIOR LAW.

Respondents argue that the agreement between the parties was “done on the assumption that all of the family members would take something thereunder”. Otherwise, there would have been no agreement. There is absolutely nothing in the stipulation nor in correspondence between the parties supporting this position or contention. There were no discussions between the parties except through their mutual attorney, Bob Benton. There is not any affidavit by the Respondents in the record suggesting that they were misled or mistaken as to the effect of Utah law dealing with intestate succession. Instead, Respondents obfuscate the clear language of Utah Code Ann. §75-2-401(pre-1998 law) with the unrelated homestead exemption statute of Utah Code Ann. §78-3-3. Respondents then try to make an unsupported equitable argument that since Petitioner and the Decedent held a home in joint tenancy which the Petitioner acquired by operation of law upon the Decedent's death, that operation of law bars her claim to a homestead allowance. What

Respondents neglect to state is that said home was purchased many years prior to Decedent's death solely with the assets of Petitioner and that over the years said home had been repeatedly refinanced solely to pay Decedent's continuing child support obligations to his prior wife. Consequently, Petitioner received very little equity in the home as a result of Decedent's death since it had been used to satisfy his ongoing child support obligations. However, those facts, as well as the existence of a joint tenancy, are not in the record and should not, therefore, be considered in this appeal.

Respondents finally argue that "to read the law as suggested by Petitioner is to entirely disinherit the rest of the family". That statement clearly demonstrates an ignorance of the Respondents as to the legislative intent behind the Uniform Probate Code as adopted in Utah and in many other states. That intent was to protect the dependents of a decedent and to provide a minimum "safety net" in the event of the death of a spouse or parent of minor children.

That intent has been expressed in dicta by the Utah Supreme Court. Under a case deciding former law, the Utah Supreme Court clearly stated that since the homestead allowance was a constitutional creation, all laws relating thereto were to be liberally constructed to protect it. In Re Mower's Estate, 73 P.2d 967, 973 (Utah 1937). The Utah Supreme Court said the same thing in In Re Petersen's Estate, 93 P.2d 445, 449 (Utah 1939) and further stated that "the amount of property owned by the person claiming homestead is not material to a determination of whether homestead shall be allowed". Id. at 449. Citing a former law (Section 101-4-6, R.S.U. 1933), the Court also stated that a claimant requires

no showing of dependence on a homestead and no reason appears why we should require such. Id.

The public policy consideration behind the homestead were incorporated into the Uniform Probate Code provisions originally enacted in Utah in 1975. The statute relating to homestead allowance has been amended several times, but those amendments are not germane or instructive to the issue before this Court. The jurisdictions of Idaho and Montana, having identical statutory provisions as Utah, have addressed the issue in a clear and unequivocal manner, and this Court should defer to their precedent.

Respondents attempt to distinguish the Montana case of Matter of Estate of Merkel, 618 P.2d 872 (Mont. 1980) by suggesting the decision was somehow based upon prior Montana law which provided only for a “life estate” as a homestead. If that rationale were true, the Montana court would have reached the exact opposite decision. The finality of a fee allowance, whether in real property or in other assets including cash, flies in the face of an award of a “life estate” or other support of a temporary nature. The Idaho case of Simmons v. Ewing, 529 P. 2d 776 (Idaho 1974) is not even addressed in Respondent’s brief. (Copies of both decisions are attached hereto at Appendix 8 to this Reply Brief).

The Respondents then cite the Colorado case of In re Estate of Robbie J. Dodge, 685 P.2d 260 (Colo. App. 1984) as supporting the proposition that a “homestead exemption” is outdated throwback to the Nineteenth Century and therefore should be disregarded. However, that court awarded a homestead to the decedent’s minor children and reversed the trial court’s awarding of a homestead to her estranged husband (and stepfather to the minor

children) who the decedent had evicted from her solely-owned home one month prior to her death. The Respondents fail to mention that the Colorado statutes dealing with exempt property and allowances (C.R.S. §15-11-401 et seq., a copy of which is attached as Appendix 9 to this Reply Brief) are dramatically different from Utah's pre-1998 statute and the Uniform Probate Code. C.R.S. §15-11-403 provides for the payment of cash or other property of the estate to the surviving spouse of a value of fifteen thousand dollars (\$15,000.00) as allowances. There is no difference between homestead and exempt personal property allowances under the pre-1998 laws between Utah, Idaho, and Montana.

Respondents also cite Estate of Liccardo, 232 Cal.App.3d 962 (Cal. App. 6 Dist.) as support for their proposition that California law requires a homestead be in the form of real estate only. However, Respondents fail to inform the Court in their brief that California law is substantially different from Utah law, and at the time Liccardo was decided, California law also limited homestead allowances to a "life interest". Liccardo primarily stands for the proposition that any allowances or exemptions must come from property in the probate estate, and not from any separate property owned by the surviving spouse, which was what the Respondents asked the trial court to do if a homestead was warranted. Id. at 966.

Finally, Respondents cite Matter of Estate of Wagley, 760 P.2d 316, 318 (Utah 1988) as support for their contention that Utah law bars the award of a homestead allowance if there is not any real property in the probate estate. Respondents argue that because no homestead allowance was ever requested in that case, that absence of or failure to request an allowance constitutes binding authority and persuasive argument why a homestead

allowance is not authorized in this case. Such is the inescapable conclusion Respondents demand this Court follow, and exemplifies the nature of their arguments throughout their brief.

Petitioner submits that the arguments of Respondents are unsupported in law or in fact. This Court is being asked to decide a case of first impression in Utah. Unfortunately, the decision may not have much impact beyond this case. Effective July 1, 1998, the Utah Legislature repealed Utah Code Ann. §§75-2-401 through 404 (pre-1998 law), and enacted a new §§75-2-401 through 405. (Copies of said statutes are attached at Appendix 10 to this Reply Brief). However, since the Decedent died before July 1, 1998, the new statute is not applicable to this case.

Under the statutes in effect in this case, a surviving spouse (of a decedent who died intestate leaving children from a prior marriage) divided the probate estate equally with those children **after** administration of the estate. Utah Code Ann. §75-2-102. Administration included payment of funeral bills, costs of administration, expenses of decedent's last illness, payment of statutory allowances, payment of priority and secured claims, and payment to general unsecured creditors. Utah Code Ann. §75-3-805 (pre-1998 law). The new statute relating to homestead allowance is rendered moot by the adoption of new Utah Code Ann. §75-2-402 (which replaced the old statute 401) and other changes in the Utah Probate Code). Utah Code Ann. §75-2-102 now provides that the surviving spouse of an intestate decedent shall receive the first \$50,000.00 in any estate, plus one-half (½) of the balance, and incorporates the homestead and exempt personal property allowances therein as non-

probate transfers as defined by Utah Code Ann. §75-2-206 (pre-1998 law). The Utah Legislature has therefore resolved any future dispute as to the intent of the former Utah Code Ann. §§75-2-401 through 404 (pre-1998 law) by clearly manifesting an intention to initially provide a safety net of assets for the surviving spouse before any distribution to other heirs, including adult children from a prior marriage, is made.

POINT III

PETITIONER IS ENTITLED TO AN EXEMPT PERSONAL PROPERTY ALLOWANCE UNDER PRIOR LAW.

Contrary to Respondent's contentions, Petitioner clearly addressed the issue of the exempt personal property allowance in her initial brief. The family allowance issue is not an issue on appeal. Without being redundant, the Utah Supreme Court in Matter of Estate of Wagley has resolved the exempt personal property allowance issue in favor of Petitioner. The trial court clearly abused its discretion and erred as a matter of law in making such an allowance conditional upon an evidentiary hearing to determine the extent and value of exempt personal property in which the Decedent had an interest.

CONCLUSION

The trial court Orders dated December 13, 1999 and March 16, 2000 are clearly in error, both in fact and in law. The Orders collectively work a great injustice upon Petitioner, who has been forced to expend limited estate resources to defend against the spurious claims of Respondents. While some ambiguity may have existed as to the clear intent of former Utah Code Ann. §§75-2-401 through 404 (pre-1998 law), there was no ambiguity in the June

22, 1999 Order of Judge Dever, nor is there any ambiguity in the clear intent of the Utah Legislature in the new modifications to the Utah Probate Code. This Court can and should consider subsequent changes of a law to determine legislative intent. Such was the position taken by the Arizona Supreme Court in Lombardo.


It is not inappropriate for this court to look to subsequent changes of the law in support of its own views of the prior act . . . (citations omitted). As stated in the case of City of Mesa v. Killingsworth, 96 Arz. 290, 394 P.2d 410 (1964):

. . . The Legislature has now clearly expressed its intention consistent with the construction which we believe should be placed on the former statutes. An amendment which, in effect, construes and clarifies a prior statute will be accepted as the legislative declaration of the original act. (Citations omitted).

Lombardo at 639 citing City of Mesa at 414.

Petitioner respectfully requests this Court to reverse the December 13, 1999 and March 16, 2000 Orders and remand this matter to the trial court with clear instructions to award Petitioner a statutorily-mandated homestead and exempt personal property allowance.

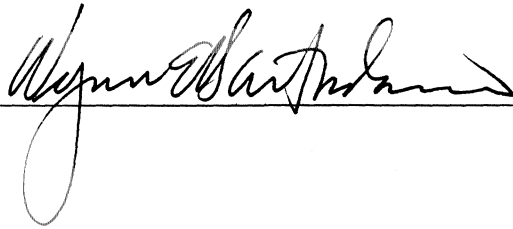
DATED this 27th day of October, 2000.



WYNN E. BARTHOLOMEW
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) copies of the foregoing Reply Brief of Petitioner to W. Andrew McCullough, Attorney for Respondents, 895 West Center Street, Orem, Utah 84057, postage prepaid, this 27th day of October, 2000.



APPENDIX 7

Elaine S. POLLOCK as Guardian of the Estate of Lawrence D. Lombardo, a minor and Hon. Richard N. Royston, as Judge of the Superior Court In and For the County of Pima Arizona, Respondents

No 2 CA-CIV 1612

Court of Appeals of Arizona,
Division 2

April 17 1974

Rehearing Denied May 22, 1974

Review Denied June 11, 1974

Petitioner sought by special action to vacate an order distributing proceeds of a wrongful death settlement. The Court of Appeals, Howard J., held that statutory provision requiring distribution of wrongful death proceeds according to laws of intestacy applies only when action is brought on behalf of estate, and that proceeds of settlement made by deceased's wife on behalf of herself and minor child in wrongful death action were to be distributed to wife and child in proportion to their damages, rather than in equal proportions.

Relief granted, order vacated with directions

1 Death ☞8

There was no reason to look to law of California governing wrongful death to determine distribution of proceeds of wrongful death settlement made in Arizona by California beneficiaries where there was no conflict in result reached whether laws of California or Arizona were applied

2 Death ☞8

Generally damages recovered for wrongful death whether by action settlement or compromise are to be distributed apportioned or disposed of in accordance with provisions of law of state under whose statute right to recovery accrued. *E.g.*, ordinarily, the law of the place where the death causing injury occurred as distinguished from the law of decedent's domicile

3 Statutes ☞205, 223.1

In interpreting statutes and parts of statutes, consistency is of prime importance, courts must harmonize and reconcile laws and adopt construction which will achieve same

4 Executors and Administrators ☞271

Intent of legislature in enacting statute prohibiting recovery in a wrongful death action from being subject to debts or liabilities of deceased unless action is brought on behalf of decedent's estate was to give the parties injured fair and just damages resulting from the wrongful death. A.R.S. § 12-613

5 Death ☞101

Statutory provision requiring distribution of wrongful death proceeds according to laws of intestacy applies only when action is brought on behalf of estate. A.R.S. § 12-612 [C]

6 Death ☞101

Proceeds of settlement made by deceased's wife on behalf of herself and minor child in wrongful death action were to be distributed to wife and child in proportion to their damages, rather than in equal proportions. A.R.S. § 12-612 [C]

Miller, Pitt & Feldman, P.C., by Stanley G. Feldman, Tucson, for petitioner

Browning, Druke & Hawkins, by Carol Wilson Druke, Tucson, for respondent guardian

OPINION

HOWARD, Judge

A superior court order distributing proceeds of a wrongful death settlement is the subject of this special action. We of the opinion that, despite the existence of a remedy by appeal, our obligation "to that essential justice is done" warrants intervention by way of special action. *Caruso v. Superior Court*, 100 Ariz. 412 P.2d 463 (1966)

The undisputed facts are as follows: Petitioner is the surviving spouse of Lawrence Lombardo who died on February 19, 1969. Lawrence D. Lombardo, a minor is the only surviving child. Decedent was a resident of and was domiciled in the State of California, as were his spouse and child. At the time of his death, he was an employee of the Greyhound Bus Line but was present in the State of Arizona for the sole purpose of receiving medical treatment at the Southern Pacific Memorial Hospital, having been referred there from the Southern Pacific Employees' Clinic in Los Angeles.

After her husband's death, petitioner (on behalf of herself and the minor child) filed a wrongful death action against Southern Pacific Memorial Hospital, Inc., and a Tucson doctor, alleging negligence on the part of the defendants. The action was scheduled for trial in June, 1972, and on the day before trial petitioner entered into a settlement agreement with the defendants whereby the defendants agreed to pay \$215,000 in settlement of all claims of all persons entitled to share in the recovery of damages for the death of Mr. Lombardo. Pursuant to court instructions and approval petitioner accepted the \$215,000 in full settlement of all claims and a hearing was conducted relative to distribution of said sum. (Respondent Pollock was appointed guardian of the estate of the minor.) Petitioner requested that the damages be distributed in accordance with the actual loss sustained by each of the beneficiaries entitled to share in the damage settlement and at the court determine and divide the settlement proceeds in accordance with such actual loss.

Evidence was presented to the court as to the actual loss sustained by each beneficiary

In support of her position petitioner relies on § 175 of the Restatement of the Law Second (Conflicts of Laws).

In an action for a wrongful death the local law of the state where the injury occurred determines the rights and liabilities of the parties unless with respect to the particular issue some other state has the more significant relationship under the principles

stated in § 6 to the occurrence and the parties in which event the local law of the other state will be applied. Section 177 provides: "The more selected by application of the rule of § 175 determines how the recovery in an action for wrongful death shall be distributed."

Petitioner contends that since under the California statute a wrongful death recovery is not distributable according to the laws of intestate succession but rather according to the pecuniary loss of each beneficiary see *Changaris v. Marvel*, 231 Cal. App.2d 308, 41 Cal. Rptr. 774 (1964). In re *Ricconi's Estate*, 185 Cal. 458, 197 P. 97 (1921), the subject distribution should also have been apportioned according to the respective losses of the beneficiaries which the lower court found to be 70%-30%.

[1] Although we agree with the petitioner as to the recovery ratio, we find no reason to look to the California wrongful death statute to determine distribution of the wrongful death proceeds because there is no conflict between the result we reach and the result if the California statute were applied.

[2] It is the general rule that damages recovered for wrongful death, whether by action, settlement or compromise, are to be distributed apportioned, or disposed of in accordance with the provisions of the law of the state under whose statute the right

is stated in § 6 to the occurrence and the parties in which event the local law of the other state will be applied. Section 177 provides:

"The more selected by application of the rule of § 175 determines how the recovery in an action for wrongful death shall be distributed."

to recovery accrued, i.e. ordinarily the law of the place where the death causing injury occurred, as distinguished from the law of the decedent's domicile. *Cherokee Laboratories, Inc. v. Rogers*, 398 P.2d 520 (Okla. 1965), see Annot. 92 A.L.R.2d 1129.

A.R.S. § 12-613 provides the measure of damages in an action for wrongful death: "the jury shall give such damages as it deems fair and just with reference to the injury resulting from the death to the surviving parties who may be entitled to recover,"

This statute also protects the recovery from creditors' claims unless the wrongful death action is brought on behalf of the decedent's estate.

A.R.S. § 12-612 as it read at the time of decedent's death, provides in pertinent part:

"A. An action for wrongful death shall be brought by and in the name of the surviving husband or wife or personal representative of the deceased person for and on behalf of the surviving husband or wife, children or parents, or if none of these survive, on behalf of the decedent's estate.

* * * * *

C. The amount recovered in an action for wrongful death shall be distributed to the parties provided for in subsection A and in the proportions provided by law for distribution of personal estate left by persons dying intestate."

In *Salinas v. Kahn*, 2 Ariz. App. 181, 407 P.2d 120 (1965), rehearing denied 2 Ariz. App. 348, 409 P.2d 64 (1966)², we indicated that the provision regarding distribution according to the laws of intestacy is controlling only when the action is brought for the benefit of the estate. We stated:

It seems to this court it may very well be argued that there is an obvious inconsistency between the new provisions for the assessment of damages [A.R.S. § 12-613] and the old provisions for the distribution of damages and that the 1956 Act implicitly amended the old

provisions for distribution in the case when designated beneficiaries survive." 2 Ariz. App. at 194, 407 P.2d at 133.

Arizona's first wrongful death statute was enacted in 1887, Rev. Stat. Ariz. §§ 2145-2155, essentially following the format of Lord Campbell's Act. To recover, it was necessary to allege and prove the existence of survivors and the amount of injuries sustained by them. *Southern Pacific Company v. Wilson*, 10 Ariz. 162, 85 P. 401 (1906). The Revised Statutes of 1901, Rev. Stat. Ariz. Civ. Code §§ 2764-2767, substantially changed the nature of the earlier Act. An action was created for the benefit of the decedent's estate, and the damages recoverable were distributed as assets of the estate according to the laws of intestacy. *Southern Pacific Company v. Wilson* supra. The 1901 Act was subsequently adopted with minor modifications in 1913, 1928, and 1939. In 1956, the Act was changed and provided a right of recovery for the decedent's surviving spouse, children or parents, and if none survived, recovery on behalf of the decedent's estate. Although it provided for assessment of damages according to the loss sustained by the statutory beneficiaries, the old provision for distribution which was adopted in 1901 when the action was for the benefit of the decedent's estate, remained.

[3-5] In interpreting statutes and parts of statutes consistency is of prime importance—courts must harmonize and reconcile laws and adopt the construction which will achieve this. The intent of the legislature in A.R.S. § 12-613 was to give the parties injured fair and just damages resulting from the wrongful death, as evidenced by the provision that such recovery shall not be subject to the debts or liabilities of the deceased unless the action is brought on behalf of the decedent's estate. We therefore hold that A.R.S. § 12-612(C) applies only when the action is brought on behalf of the estate. This is a common sense interpretation of legislative intent and harmonizes § 12-612(C) (1956) with

§ 12-613, which provides that the damages to the injured parties "shall be fair and just to the surviving parties who may be entitled to recovery." Otherwise, there could be parties who were not injured receiving damages when they sustained no pecuniary loss. As was stated at 14 A.L.R. 522:

"If the purpose of the statute that the damages shall be assessed in view of the pecuniary loss to the individuals is taken into consideration, it would seem that the reference to the statutes of distribution as the mode of determining the apportionment of the verdict should be construed as being merely for the purpose of ascertaining the classes of persons who may be entitled to participate, and the manner of distribution when not influenced by any consideration of pecuniary loss to particular beneficiaries, and not as intending absolutely to control with regard to the amount each of the distributees shall receive when considered in connection with the pecuniary loss suffered by them."

We find nothing in *Lueck v. Superior Court, County of Cochise*, 105 Ariz. 583, 469 P.2d 68 (1970) which mandates a contrary holding.³ In *Lueck*, the sole issue was whether parents of a decedent could recover when there also survived a wife and children. The Court relied on language from the case of *In Re Venneman's Estate*, 286 Mich. 368, 282 N.W. 180 (1938) to the effect that the wisdom of a statute is not a matter for judicial consideration but is wholly within the control of the legislature. The Court then held that since parents would take nothing by intestate succession if a wife and children survive, parents had no right to recover in a wrongful death action.

³ We recognize that there are statements in *Lueck* which are contrary to our holding in the case at bench, such statements are mere

In 1973, the legislature amended A.R.S. § 12-612(C) to expressly state what we herein hold:

"C. The amount recovered in an action for wrongful death shall be distributed to the parties provided for in subsection A in proportion to their damages, and if recovery is on behalf of the decedent's estate the amount shall be an asset of the estate."

It is not inappropriate for this court to look to subsequent changes of the law in support of its own views of the prior act. *General Petroleum Corporation of California v. Smith*, 62 Ariz. 239, 157 P.2d 356 (1945), *Neil B. McGinnis Equipment Company v. Henson*, 2 Ariz. App. 59, 406 P.2d 409 (1965). As stated in the case of *City of Mesa v. Killingsworth*, 96 Ariz. 290, 394 P.2d 410 (1964):

"The legislature has now clearly expressed its intention consistent with the construction which we believe should be placed on the former statutes. An amendment which, in effect, construes and clarifies a prior statute will be accepted as the legislative declaration of the original act. [citation omitted]" 96 Ariz. at 297, 394 P.2d at 414.

[6] We hold, therefore, that the \$215,000 is to be distributed to the petitioner and the minor child in proportion to their damages, i.e. 70% to petitioner and 30% to the guardian of the estate of the minor child.

The subject order of distribution is vacated with directions to enter an appropriate order not inconsistent herewith.

HATHAWAY, C. J., and KRUCKER, J., concur.

ly obiter dicta and not binding precedent. *Hernandez v. County of Yuma*, 91 Ariz. 35, 369 P.2d 271 (1962).

APPENDIX 8

goes without saying that had the mother given advance notice, the father's visitation privileges could have been accordingly modified. But when the mother left without first getting the decree modified as to visitation, she forced the father's hand. The only meaningful option he had was to force the issue by seeking a change in custody. Although he was not successful, he at least obtained a change in visitation to reflect the changed geographical distance between himself and his daughter. The trial court ordered that the father have custody for six weeks every summer, during alternate Christmas and Easter holidays and at other times convenient to the father and which would not interfere with the schooling or other activities of the child.

[2, 3] District courts have the means to compel compliance with their orders concerning removal of children from the state. A trial court may assert continued power over domestic matters by requiring a bond conditioned upon a party's compliance with the court order. See *Grimditch v. Grimditch* (1951), 71 Ariz. 237, 226 P.2d 142 (permitting, under the facts, removal without bond); *Wallace v. Wallace* (1932), 92 Mont. 489, 15 P.2d 915, 918 (security can be required to enforce an alimony decree). The trial court may also hold in contempt a parent who violates an order to secure court approval before removing a child from the state. *Ex Parte Sellers* (1948), 250 Ala. 87, 33 So.2d 349; *Benson v. Benson* (1948), 121 Mont. 439, 193 P.2d 827, 829 (dictum); see also *Kramer v. Kramer* (1978), 176 Mont. 362, 578 P.2d 317, 318. We suggest that the trial court, in appropriate cases, employ these alternatives.

[4] The mother contends that this appeal is frivolous and asks us to assess a penalty against the father pursuant to Rule 32, M.R.App.Civ.P., or, alternatively, to award her attorney fees pursuant to section 40-4-110, MCA, because she cannot afford to pay her own attorney. She did not make this request at the trial level, and we are not inclined to act favorably on this request here. We cannot ignore the fact that it was the mother who moved to North Caroli-

na without first getting a change in the visitation privileges, and thus forced the father to initiate the present litigation. Essentially, he had no other choice. Under the circumstances, the mother is not in an equitable position to argue that the father should pay her attorney fees.

The order refusing to grant custody to the father is affirmed.

HASWELL, C. J., and DALY, HARRISON and SHEEHY, JJ., concur.



**In the Matter of the ESTATE of
Herman G. MERKEL, Deceased.**

No. 80-53.

Supreme Court of Montana.

Submitted Sept. 11, 1980.

Decided Oct. 27, 1980.

Personal representative of decedent's estate appealed from an order of the District Court, Eighteenth Judicial District, Gallatin County, Joseph Gary, J., which dismissed a petition for allowance of claims on behalf of the estate. The Supreme Court, Haswell, C. J., held that: (1) the statute which requires a showing of need in order for a protected spouse to claim an elective share in his or her late spouse's estate but which does not impose any such restriction on a competent spouse did not violate the equal protection clauses of the Federal or Montana Constitutions; (2) the sections which provide for a homestead allowance and exempt property contemplate estates in fee and not life estates only; and (3) by surviving her late husband for more than 120 hours, widow and her estate became absolutely entitled to a fee interest in the homestead allowance and exempt property.

Affirmed in part, reversed in part and remanded.

MATTER OF ESTATE OF MERKEL

Cite as, Mont., 618 P.2d 872

1. Constitutional Law ⇨ 225.5

Wills ⇨ 779

Classification embodied in statute governing a surviving spouse's right of election, pursuant to which a competent spouse is not restricted in making the election while a protected spouse must show need before claiming the benefit of an election, did not involve a fundamental right or suspect class and, therefore, statute could survive equal protection challenge provided that the classification was reasonable and not arbitrary and rested on some difference having a fair and substantial relation to the statutory purpose. MCA 72-2-703; U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇨ 48(4)

Party who alleges that a statutory classification violates equal protection has burden to prove that the classification is arbitrary. U.S.C.A.Const. Amend. 14.

3. Wills ⇨ 779

Primary purpose of the elective share statutes is to insure that a surviving spouse's needs are met and that the spouse is not left penniless. MCA 72-2-703.

4. Constitutional Law ⇨ 225.5

Wills ⇨ 779

The statute which requires a showing of need in order for a protected spouse to claim an elective share against his or her deceased spouse's estate but which does not impose such requirement on a competent spouse was reasonable and not arbitrary when considered in light of the court's traditional role with respect to incompetent persons and of the statutory purpose to insure that surviving spouses' needs are met and, therefore, statute did not violate the equal protection clauses of the Federal or the Montana Constitutions. MCA 72-2-703; Const. Art. 2, § 4; U.S.C.A.Const. Amend. 14.

5. Executors and Administrators ⇨ 173

The primary purpose of the homestead allowance is to protect the decedent's family. MCA 72-2-801, 72-2-802.

6. Executors and Administrators ⇨ 180

The statutes which create a homestead allowance and a surviving spouse's entitlement to value not exceeding \$3,500 from the deceased spouse's estate contemplate an interest which does not terminate at the surviving spouse's death, so long as the spouse survives the decedent for the required 120 hours. MCA 72-2-205, 72-2-801, 72-2-802.

7. Executors and Administrators ⇨ 174

Where, though the statutes creating the homestead allowance and exempt property continued the tradition of making statutory rights available to a surviving spouse, the legislature chose not to identify either of these interests as life estates and where the former homestead provision explicitly indicated that the homestead was a life estate only, it was proper to assume that the legislature deliberately omitted the "life estate" limitation and the Supreme Court would not imply that limitation. MCA 72-2-801, 72-2-802; R.C.M.1947, § 91-2405 (Repealed).

8. Executors and Administrators ⇨ 181

The statutory homestead allowance is no longer an interest just in land but is an allowance which may be satisfied in any type of property. MCA 72-2-801.

9. Internal Revenue ⇨ 1008.1

Legislative intent was that the homestead allowance and the exempt property allowance qualify for the marital deduction under federal estate tax law. MCA 72-1-102, 72-2-803; 26 U.S.C.A. (I.R.C.1954) § 2056.

10. Executors and Administrators ⇨ 180

Where widow survived her husband for at least 120 hours, widow and her estate became absolutely entitled to a fee interest in the homestead allowance and in statutorily exempt property. MCA 72-2-801, 72-2-802.

Steven D. Nelson argued, Bozeman, for appellant.

Moore, Rice, O'Connell & Refling, Perry J. Moore argued, Bozeman, for respondent.

HASWELL, Chief Justice.

The personal representative of the Estate of Celia J. Merkel appeals from an order entered in the District Court, Eighteenth Judicial District, dismissing a petition for allowance of claims on behalf of the estate of Celia J. Merkel. In his ruling, the district judge denied the claims for the homestead allowance, exempt property, and an elective share. We affirm in part and reverse in part.

The facts giving rise to this decision are important, particularly with respect to the time sequence involved. In 1967, Herman G. Merkel and Celia J. Merkel married, both of them over 70 years old at the time. In October 1977, Sterling Hunter was appointed guardian of Celia Merkel by a Montana court. Herman Merkel died in December 1978, having executed a will earlier which left nothing to his wife Celia. On June 4, 1979, Celia Merkel, through her guardian, filed a claim for exempt property and homestead allowance, and filed a petition for an elective share. Celia died 9 days later on June 13, 1979.

On August 6, 1979, Sterling Hunter, the personal representative of the estate of Celia J. Merkel, filed a petition for allowance of the same claims on behalf of the estate of Celia Merkel. The personal representative of Herman Merkel's estate moved to dismiss the petition, asserting that Celia's failure to survive extinguished her claims, and that her estate had no valid claims. The district judge granted the motion, ruling that the homestead allowance and exempt property were life estates only. The district judge also denied Celia Merkel's petition for an elective share, because a court order had not been entered in which a finding was made that the election was necessary to support Celia Merkel as a protected person.

The appellant brings two issues before this Court:

(1) Whether section 72-2-703, MCA, requiring a showing of need in order for a protected spouse to claim an elective share, is violative of the equal protection clauses of the United States Constitution and the Montana Constitution?

(2) Whether sections 72-2-801 and 72-2-802, MCA, providing for a homestead allowance and exempt property, contemplate life estates only or rather estates in fee for which a surviving spouse's estate can bring claim?

[1] Appellant's first contention is that section 72-2-703 is unconstitutional. That statute describes who may exercise the right of election:

"Right of election personal to surviving spouse. The right of election of the surviving spouse may be exercised only by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy."

As the statute indicates, a competent spouse is not restricted in any way in making the election, but a protected spouse has to pass the hurdle of showing need before claiming the possible benefits of an election. Clearly, the statute sets up a classification—a classification which appellant contends denies equal protection to protected spouses.

The legislature is empowered to classify persons for purposes of legislation, *State v. Craig* (1976), 169 Mont. 150, 156, 545 P.2d 649, 653, and in reviewing a statute, this Court presumes that the statute is constitutional. *Great Falls Nat. Bk. v. McCormick* (1968), 152 Mont. 319, 323, 448 P.2d 991, 993. Appellant admits that this classification does not involve a "fundamental right" or a "suspect class", which would require a finding by this Court of a compelling state interest in order to uphold the class. *State v. Jack* (1975), 167 Mont. 456, 461, 539 P.2d 726, 729. Rather, this Court need only determine that the "classification [is] reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly cir-

MATTER OF ESTATE OF MERKEL

Cite as, Mont., 618 P.2d 872

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cumstances shall be treated alike..." *State v. Craig*, supra, 169 Mont. at 156, 545 P.2d at 653.

[2] The appellant has the burden of proving that the classification is arbitrary, *State v. Jack*, supra, 167 Mont. at 461, 539 P.2d at 729, a burden which appellant has not sustained here.

We note at the outset that the State legislatures have traditionally set apart the class which is involved here, delegating the care of incompetent persons to the State. The Colorado Supreme Court stated in the early case of *Shapter v. Pillar* (1900), 28 Colo. 209, 63 P. 302, 304, "It falls to the State to take care of those who, by reason of mental incapacity, cannot take care of themselves."

This tradition of delegating care of incompetent persons to the State was the basis of a recent Colorado Supreme Court decision which upheld the constitutionality of the Colorado code section which corresponds to section 72-2-703, MCA. See *Sweeney v. Summers* (1977), 194 Colo. 149, 571 P.2d 1067. That court noted that the entire statutory scheme pertaining to incompetent persons has placed their care ultimately with the State. *Sweeney*, supra, 571 P.2d at 1069. See sections 72-5-401 et seq., MCA. Additionally, pre-Uniform Probate Code law in most states gave to a court of competent jurisdiction the responsibility for making the decision of whether or not the incompetent spouse should elect against the decedent's will, 80 Am.Jur.2d Wills §§ 1614-1615, Annot., 3 A.L.R.3d 6, § 3, a decision which was based primarily on the needs of the incompetent spouse.

[3] The primary purpose of the elective share statutes is to insure that the surviving spouse's needs are met, and that the spouse is not left penniless. Annot., 3 A.L.R.3d 6, § 3. Presumably, in making the decision whether to elect or not, the competent spouse would consider many factors, with need being the most persuasive. Because of the statute in question, the court is required to make the election decision for the incompetent solely on the basis of need. Section 72-2-703, MCA.

This statute clearly deprives the incompetent spouse of a choice, and further deprives the incompetent of any excess property to pass on to heirs, to invest, or to use for unneccessaries. However, providing funds for these purposes is not the primary aim of the statute and is merely an incidental benefit, available only if the decedent's estate happens to be large enough to allow these extras.

By being subject to a protective order, the incompetent has already been deprived of the right to make choices in regard to property. Additionally, the court has before it, by virtue of the protective proceedings, all of the information necessary to determine what is in the best interests of the protected spouse. The statute insures that the spouse will be adequately cared for, thus fulfilling the ultimate purpose of the statute, while denying the spouse only the discretionary income.

[4] We find this statute to be reasonable and not arbitrary when considered in light of the traditional role of the court with respect to incompetent persons and when considered in light of the purpose of the statute. The district judge acted properly in denying the petition for an elective share.

The second issue which appellant brings before this Court involves a determination of the nature of the interest created by the homestead allowance and exempt property statutes. Those statutes provide in part:

"Homestead allowance. (1) A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of \$20,000.

"(2) The homestead allowance is exempt from and has priority over all claims against the estate.

"(3) Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share." Section 72-2-801, MCA.

"Exempt property. (1) In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding \$3,500..." Section 72-2-802, MCA.

Neither of the statutes indicates what type of interest is created, i. e., whether it is a fee interest in the surviving spouse, or a life estate only which is extinguished by the spouse's death. Celia Merkel attempted to claim these benefits as a surviving spouse, but she died before receiving them. Appellant contends that Celia Merkel's estate is entitled to these benefits because she was a surviving spouse at the time she attempted to claim them.

The courts of other states which have enacted the Uniform Probate Code (UPC) have not considered this question, nor do the Commission comments specifically address this issue. Pre-code law in Montana indicates that the homestead was a life estate only. The purpose of the homestead was to preserve the fee interest for the heirs of the decedent, while setting aside a life estate, safe from creditors, for the spouse and family of the decedent. *Kerlee v. Smith* (1912), 46 Mont. 19, 22, 124 P. 777; 40 Am.Jur.2d, Homestead, § 4. The early cases, however, were based on a Montana statute which specifically mandated that the homestead was a life estate, a statute that was repealed with the adoption of the UPC:

"... If the property set apart be a homestead, selected from the separate property of the deceased, the court or judge can only set it apart for a limited period, to be designated in the order, *which shall be a life estate to husband or wife*, and the title vests in the heirs of the deceased, subject to such order." Section 91-2405, R.C.M.1947. (Emphasis added.)

In determining that the two new interests created by the UPC were intended to be life estates, the district judge relied on this traditional view of the homestead, and on a 1960 Missouri case, interpreting the Missouri Homestead Allowance Statute (not UPC). See *Schubel v. Bonacker* (Mo.1960),

331 S.W.2d 552. The Missouri court discussed the origins of the homestead, noting that neither the former homestead nor dower survived the death of the surviving spouse. The object of the homestead to protect the family would not "be served by the payment of the homestead allowance to the estate of a surviving spouse." *Schubel*, 331 S.W.2d at 554, *supra*.

[5, 6] This Court agrees with the district judge that the primary purpose of the homestead allowance and exempt property is to protect the family of the decedent. However, we find that sections 72-2-801 and 72-2-802, MCA, giving these rights to a surviving spouse, contemplate an interest which does not terminate at the surviving spouse's death, so long as the spouse survives the decedent for the required 120 hours, section 72-2-205, MCA.

Appellant argues that the 120-hour provision in itself establishes a fee interest in a surviving spouse, and that by surviving Herman Merkel for nearly six months, Celia Merkel's estate was entitled to these benefits. Section 72-2-205, MCA, provides in part:

"Requirement that heir survive decedent by one hundred twenty hours. Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly."

Celia Merkel clearly qualifies as a surviving spouse under this statute, but this statute does not define the nature of the interest created in the survivor, as to whether it is terminated upon the survivor's death.

[7] Although the homestead allowance and exempt property continue the tradition of making statutory rights available to a surviving spouse, the Montana legislature chose not to identify either of these interests as life estates. Since this was explicit in the language of section 91-2405, R.C.M. 1947, the former homestead provision, we assume that the legislature purposely omitted the "life estate" limitation and we will

not imply it. See C. Sands, Sutherland Statutory Construction, § 45.12 (4th ed. 1972). In so construing the statute, we rely on the rule of statutory construction which provides:

"[W]hen a statute is revised, some part being omitted, the omitted parts are not readily to be supplied by construction, but are ordinarily to be construed as annulled." *State v. Richardson* (1953), 174 Kan. 382, 256 P.2d 135, 139.

The new statutes appear clear on their face. The respondent has not brought before the Court sufficient evidence to overcome the presumption that in passing new legislation, the legislature intended to make a change in existing law. *Mont. Dept. of Rev. v. Am. Smelting & Refining* (1977), 173 Mont. 316, 325, 567 P.2d 901, 906.

[8] The appellant raises other arguments which indicate to this Court that the drafters of the UPC did not intend to limit these interests to life estates. The present homestead allowance is no longer an interest just in land, but is an allowance which may be satisfied in any type of property. Terming these interests life estates would appear to undercut one of the expressed purposes of the UPC, that is "to simplify the law concerning the affairs of decedents." Section 72-1-102, MCA. Court involvement could drag on for years in order to insure the transfer of the property to the remaindermen, and the courts could be called upon to hear suits for waste against the life tenant. Too, with the possibility of satisfying the statutory allowance in money or personal property, the courts would be in a position of having to determine the use which a life tenant could make of the property. See 51 Am.Jur.2d, Life Tenants, §§ 34-36.

[9] One other point merits attention. The provision in the Uniform Probate Code providing for a *Family allowance* specifically states that "the death of any person entitled to family allowance terminates his right to allowances not yet paid." Section 72-2-803, MCA. The comments to that section provide that "... the allowance provided by this section does not qualify for

the marital deduction under the Federal Estate Tax Act because the interest is terminable." This is the only statute in the "Family Protection" section of the UPC with such a provision. This omission implies that the homestead allowance and exempt property were meant to qualify for the marital deduction. If so, the interests created cannot be terminable interests. See section 2056, I.R.C. (1954).

In 1979 the legislature of Nebraska added a provision to its version of the UPC in order to assure that the homestead allowance and exempt property would qualify for the marital deduction. See § 30-2325, R.S.N. 1943, reissue of 1979, which provides in part that

"[t]he homestead allowance, the exempt property shall vest in the surviving spouse as of the date of decedent's death, as a vested indefeasible right of property, shall survive as an asset of the surviving spouse's estate if unpaid on the death of such surviving spouse, and shall not terminate upon the death or remarriage of the surviving spouse."

[10] We find that such a provision is not necessary. It appears clear to us from the wording of the statute itself, as well as from the expressed purposes of the UPC, that the drafters intended that the surviving spouse should take a fee interest in the homestead allowance and exempt property. By surviving the decedent for 120 hours, Celia Merkel and her estate became entitled to those benefits absolutely. The district judge erred in denying those claims on behalf of Celia Merkel's estate.

This case is remanded to the District Court for entry of judgment in accordance with this opinion.

DALY, HARRISON, SHEA and SHEEHY, JJ, concur.



The question then becomes Does the record support the Industrial Commission's findings that Clay left his employment voluntarily without good cause? The Industrial Commission made the following finding of fact in this regard

FINDING OF FACT II

" When he [Clay] was employed in 1971, he discussed with the employer the possibility of devoting some of his time to research and development at the employer's shop No specific agreement was reached, but the employer acknowledged the possibility that arrangements could be made eventually so that the claimant could spend part of his time on research and continue to receive his regular salary " (Tr pp 18-19)

Based upon this and other findings of fact, the Industrial Commission made the following conclusion of law

CONCLUSION OF LAW II

" The claimant and the employer never had a definite agreement to the effect that the claimant would eventually be allowed to do research and development work [T]he failure to arrive at such an agreement did not constitute a breach of the employment agreement by the employer, [and] the claimant's reason for leaving his employment was not of such a compelling nature as to cause a reasonable person to voluntarily choose to become unemployed " (Tr p 20)

[2,3] This finding of fact and conclusion of law cannot be upheld as supported by substantial, competent evidence if only Clay's live testimony before the commission is considered However, IC § 72-1368(g) provides that when the commission is hearing appeals from the Department of Employment appeals examiner that "[t]he record of the proceedings before the appeals examiner shall become part of the record of the proceedings before the board with respect to the evidence ad-

mitted into testimony received before the appeals examiner " And while this Court is not bound by the view of the testimony taken by the Industrial Commission where they have not observed the witnesses themselves but are merely reviewing the record of the appeals examiner, Phipps v Boise Street Car Co, 61 Idaho 740, 107 P2d 148 (1940), nevertheless, considering the testimony given before the appeals examiner there is substantial, competent evidence to support both his conclusion that Clay had no specific agreement with Crooks about doing research and development work and thus left work without good cause, and the Industrial Commission's affirmance of the appeals examiner's conclusion Accordingly, where there is substantial evidence to support it, the finding of the Industrial Commission and the order based upon it will not be disturbed on appeal Levesque v Hi Boy Meats, Inc, 95 Idaho 808, 520 P2d 549 (1974)

Order affirmed

SHEPARD, C J, and DONALDSON
McQUADE and McFADDEN, JJ, concur



96 Idaho 380

Betty SIMMONS, Personal representative
of the Estate of Irene H Ewing, Deceased, Plaintiff-Appellant,

v.

Thomas G EWING, Surviving Spouse
Defendant-Respondent

No 11627

Supreme Court of Idaho
Dec 20, 1974

Proceeding on personal representatives' application for informal probate The District Court, Second Judicial District, Nez Perce County, John H May, J, entered orders which granted homestead and exempt property allowances to sur-

ving spouse from deceased's separate property, and plaintiff appealed The Supreme Court, Donaldson, J, held that statutes involved were not void for vagueness that awards did not defeat intention of testatrix, and that allowances were properly granted

Affirmed

1. Wills ⇨782(10, 13)

Grant of homestead and exempt property allowances to surviving spouse from deceased's separate property was not objectionable as defeating intentions of testatrix who executed will which was drafted with aid of an attorney after effective date of Uniform Probate Code but failed to include a clause in such manner as to require surviving spouse to elect between benefits of statutory allowances and whatever rights may accrue under provisions of will IC §§ 15-2-206(b), 15-2-401, 15-2-402

2 Statutes ⇨47

Two sections of Code under which homestead and exempt property allowances were made were not invalid for vagueness and uncertainty because of dual use of "homestead" in Uniform Probate Code homestead allowance and homestead exemption from execution found in statutory scheme Const art 1, § 16 art 3, § 17 IC §§ 15-2-401, 55-1001 et seq

3 Statutes ⇨47

Homestead allowance provision in Uniform Probate Code is not invalid for vagueness on ground that Code does not specify property from which allowance is to be taken first Const art 1, § 16 art 3, § 17 IC §§ 15-2-401, 55-1001 et seq

4 Executors and Administrators ⇨181

Under will which bequeathed all of decedent's community property to surviving spouse, and only separate property remained, separate property was sole source for funds for homestead allowance to surviving spouse Const art 1, § 16 art 3, § 17, IC §§ 15-2-401, 55-1001 et seq

5 Wills ⇨58(2)

A contract to make a will requires a showing of such by clear and convincing evidence

6 Constitutional Law ⇨154(1)

In the absence of clear and convincing evidence of contract to make a will, argument that Uniform Probate Code impaired obligation of contract failed Const art 1, § 16 art 3, § 17 IC §§ 15-2-401, 55-1001 et seq

7 Wills ⇨1

The right to dispose of property by will is in no sense a property right or a so called natural right

8 Appeal and Error ⇨756

Appellant's failure to offer authority for position taken precluded Supreme Court from considering assignment of error Supreme Court Rules, rule 41

9 Appeal and Error ⇨878(1)

Issue not before Supreme Court by proper cross appeal would not be considered

10 Executors and Administrators ⇨181

Exempt property and homestead allowances were properly awarded to surviving spouse with funds for allowances being taken from deceased's separate property IC §§ 15-2-206(b), 15-2-401, 15-2-402, 55-1001 et seq Const art 1 § 16 art 3, § 17

Joseph C Adams, Jr, Lewiston, for plaintiff appellant

Leslie T McCarthy, Lewiston, for defendant respondent

DONALDSON, Justice

This appeal places in issue the propriety of exempt property and homestead allowances being awarded by the district court to the surviving spouse, with funds for the allowances being taken from deceased's separate property For the reasons stated in this opinion, the orders of the district court are affirmed

Irene H Ewing, the decedent, died February 23, 1973, at which time she was domiciled in Nez Perce County, Idaho She had executed a will dated January 24, 1973, in which she bequeathed her community property to her husband, Thomas G Ew-

ing, the respondent, and her separate property to her two daughters from a previous marriage, Donna Alexander and Betty Simmons. Ms. Simmons, whom the decedent also nominated as Executrix, is the appellant in this action as personal representative. In that capacity she filed her application for informal probate on March 7, 1973.

As a result of proceedings in the probate of the estate, the respondent was granted from decedent's separate property a \$4,000 homestead allowance (less \$1,463 he had previously collected from a joint checking account) pursuant to IC § 15-2-401, and a \$3,500 exempt property allowance pursuant to IC § 15-2-402.

This appeal is taken from those two orders.

Appellant assigns the granting of the allowances as error because such actions defeat the intentions of the testatrix. Mrs. Ewing, the appellant continues, intended that Mr. Ewing receive only community property and that the daughters receive all of the deceased's separate property. Thus, awarding Mr. Ewing a portion of the separate property defeats the intentions of the testatrix.

[1] The Court does not agree with the appellant as to Mrs. Ewing's testamentary intentions. While the language of the will may initially lead to such an interpretation, the entire testamentary scheme indicates otherwise. Mrs. Ewing executed the will, which was drafted with the aid of an attorney, after the Uniform Probate Code (hereinafter referred to as UPC) became effective in Idaho. Under the provisions of the UPC the surviving spouse is entitled to both homestead and exempt property allowances. The UPC also has an election procedure wherein the testator may draft the will in such a manner as to require the surviving spouse to elect between the benefits of the statutory allowances and whatever rights may accrue under the provisions of the will. IC § 15-2-206(b). The combination of the language of the docu-

ment and Mrs. Ewing's failure to include an election clause in the will resulted in Mr. Ewing receiving at least some of Mrs. Ewing's separate property. As will be discussed below, the separate property was the only available source for funds for the allowances.

[2] A second assignment of error argues that the two sections of the Idaho Code under which the allowances were made are so vague and uncertain as to violate the mandate of Article 3, Section 17 of the Idaho Constitution. That section provides that "[e]very act or joint resolution shall be plainly worded, avoiding as far as practicable the use of technical terms." Appellant's argument focuses primarily upon the dual use of "homestead" in the UPC homestead allowance and the homestead exemption from execution found in IC § 55-1001 et seq. The Court finds no confusion in the duality. The UPC provisions are effective only in the event the exemption homestead is not selected. The two statutory schemes are directed toward the same end through different means, and the brief intersection of terminology can hardly be said to result in fatal ambiguity.

[3,4] Appellant further argues that vagueness is the result of the failure of the UPC to specify the property from which the allowance is to be taken first. In this situation the statute is quite clear. The "homestead allowance is in addition to any share passing to the surviving spouse * * * by the will of the decedent * * *." IC § 15-2-401. The will bequeathed all decedent's community property to the surviving spouse. With only separate property remaining, it is clear that that is the sole source for funds for the allowance. Thus, the Court rejects appellant's claims of unconstitutional vagueness. See *Nelson v. Marshall*, 94 Idaho 726, 4 P2d 47 (1972).

[5-7] Appellant next argues that the Uniform Probate Code impairs the obligation of a contract and therefore violat-

96 Idaho 383

Armil M. GARNER and Violet Garner, his wife, Plaintiffs-Appellants,
v.

CRATER FARMS, INC., an Idaho Corporation and Milestone, Inc., an Idaho Corporation, Defendants-Respondents
No. 11331.

Supreme Court of Idaho

Dec. 20, 1974

Article 1, Section 16 of the Idaho Constitution. However, appellant fails to instruct the Court on whether she is claiming that the will itself is a contractual obligation or whether there was a contract to make a will involved. A contract to make a will requires a showing of such by clear and convincing evidence. The appellant advances no evidence of such, and thus that argument fails. *Thomas v. Thomas*, 83 Idaho 86, 357 P2d 935 (1960). Second, the appellant offers no authority to the point that the will itself constitutes a contract and we know of none. Also, this Court has held that "the right to dispose of property by will is in 'no sense a property right or a so-called natural right'." We do not agree with appellant's position.

[8] Finally, appellant argues that the granting of the allowances to the surviving spouse denied the other beneficiaries property without due process of law. This violates, appellant continues, Article 1, Section 13 of the Idaho Constitution. Due to appellant's failure to offer authority for this position, this Court will not consider the assignment. *Church v. Roemer*, 94 Idaho 782, 498 P2d 1255 (1972). Supreme Court Rules, rule 41.

[9] Respondent attempts to assign as error the district court's disposition of a joint checking account held by the deceased and the surviving spouse. Since this issue is not before the Court by proper cross-appeal, the Court will not consider the issue. *Hemminger v. Tri State Lumber Company*, 57 Idaho 697, 68 P2d 54 (1937). See also *Leno v. Northwest Credit Corporation*, 84 Idaho 364, 372 P2d 765 (1962).

[10] For the reasons stated herein, the orders of the district court are affirmed. Costs to respondent.

SHEPARD, C. J., and McQUADE, BAKES and McFADDEN, JJ., concur.

Hull v. Cartin, 61 Idaho 578, 597 105 P2d 196, 205 (1940) (further citations omitted).

Husband and wife brought action for personal injuries sustained by wife while employed as operator of potato seed cutting machine manufactured by defendant. The District Court, Seventh Judicial District, Bingham County, Arnold T. Beebe, J., granted manufacturer's motion for partial summary judgment and plaintiff appealed. The Supreme Court, Donaldson, J., held that questions of fact existed as to faulty design of the machine and contributory negligence.

Reversed and remanded.

1 Products Liability ⇨47

Doctrine of strict liability was applicable in suit for personal injuries sustained by employee while working as operator of high speed potato seed cutting machine manufactured by defendant.

2 Judgment ⇨181(2)

Summary judgment is properly granted only when the pleadings, depositions, admissions, and affidavits on file show that there is no genuine issue as to any material fact. Rules of Civil Procedure rule 56(c).

3 Judgment ⇨185(2)

In determining whether an issue of material fact is in dispute, facts should be liberally construed in favor of the party against whom summary judgment is sought. Rules of Civil Procedure, rule 56(c).

APPENDIX 9

PART 4

EXEMPT PROPERTY AND ALLOWANCES

Cross references: For clarification of the term "surviving spouse", see § 15-11-802.

15-11-401. Applicable law. This part 4 applies to the estate of a decedent who dies domiciled in this state. Rights to exempt property and a family allowance for a decedent who dies not domiciled in this state are governed by the law of the decedent's domicile at death.

Source: L. 94: Entire part R&RE, p. 995, § 3, effective July 1, 1995. L. 96: Entire section amended, p. 657, § 5, effective July 1.

15-11-402. Homestead. The provisions of sections 38-41-201 and 38-41-204, C.R.S., provide for a homestead exemption but shall not create an allowance for the surviving spouse or minor children. A personal representative's obligation to distribute property as an exempt property allowance under section 15-11-403, to pay money as a family allowance under section 15-11-404, or to distribute property to devisees, heirs, or beneficiaries shall not be considered a debt, contract, or civil obligation, as referred to under sections 38-41-201 and 38-41-202, C.R.S.

Source: L. 94: Entire part R&RE, p. 995, § 3, effective July 1, 1995.

15-11-403. Exempt property. The decedent's surviving spouse is entitled to exempt property from the estate in the form of cash in the amount of or other property of the estate in the value of fifteen thousand dollars in excess of any security interests therein. If there is no surviving spouse, the decedent's dependent children are entitled jointly to the same exempt property. Rights to exempt property have priority over all claims against the estate, except claims for the costs and expenses of administration, and reasonable funeral and burial, interment, or cremation expenses, which shall be paid in the priority and manner set forth in section 15-12-805. The right to exempt property shall abate as necessary to permit payment of the family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or dependent children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective-share.

Source: L. 94: Entire part R&RE, p. 995, § 3, effective July 1, 1995. L. 96: Entire section amended, p. 657, § 6, effective July 1.

Law reviews. For article, "Child Support Obligations After Death of the Supporting Parent", see 16 Colo. Law. 790 (1987). For article, "Ownership of Personal Property Accumulated During a Marriage", see 17 Colo. Law. 623 (1988). For article, "Avoiding Litigation in Probate Estates", see 18 Colo. Law. 875 (1989).

Annotator's note: Since § 15-11-403 is similar to §§ 15-11-402 and 15-11-405 as they existed prior to the 1994 repeal and reenactment of this entire part, relevant cases construing those provisions have been included in this section. For additional cases, see the annotations under former §§ 15-11-402 and 15-11-405 in the 1987 replacement volume.

This section and § 15-11-404 to be read with § 15-11-202 (1). This section and § 15-11-404, providing for family and exempt property allowances, must be read in conjunction with the definition of "augmented estate" in § 15-11-202 (1) to determine whether distributing such allowances from the "augmented estate" is con-

sistent and harmonious with the creation of an "augmented estate" under the statute. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

Allowances to be claimed from probate estate. The language of § 15-11-202 (1) clearly reflects a legislative intent to establish the family allowance and exempt property allowance as items to be claimed from the probate estate, if any, to which are then added certain items to create the augmented estate. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

Medical services reimbursement funds not recoverable by treating physicians. Medical services reimbursement funds received by the personal representative are a part of the surviving spouse's exempt property allowance when there exists no basis to impress a constructive trust on such funds. The legislature in enacting this section clearly intended that a surviving spouse's exempt property allowance have priority over all claims against the estate. Timothy C. Wirt,

M.D., P.C. v. Prout, 754 P.2d 429 (Colo. App. 1988).

Applied in Lopata v. Metzel, 641 P.2d 95 (Colo. 1982); Snyder v. Macy, 674 P.2d 972 (Colo. App. 1983).

15-11-404. Family allowance. (1) In addition to the right to exempt property, the decedent's surviving spouse and minor children who the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody. If a minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his or her guardian or other person having the child's care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims except claim for the costs and expenses of administration, and reasonable funeral and burial, interment or cremation expenses, which shall be paid in the priority and manner set forth in section 15-12-805.

(2) The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective-share. The death of any person entitled to a family allowance terminates the right to receive an allowance for any period arising after his or her death, but does not affect the right of his or her estate to recover the unpaid allowance for periods prior to his or her death.

Source: L. 94: Entire part R&RE, p. 996, § 3, effective July 1, 1995.

Am. Jur.2d. See 31 Am. Jur.2d, Executors and Administrators, § § 324-339.

C.J.S. See 34 C.J.S., Executors and Administrators, § § 344-347.

Law reviews. For article, "The Widow's Allowance", see 6 Dicta 11 (April 1929). For article, "Widow's Allowance", see 25 Dicta 240 (1948). For article, "A Decade of Colorado Law: Conflict of Laws, Security, Contracts and Equity", see 23 Rocky Mt. L. Rev. 247 (1951). For article, "Child Support Obligations after Death of the Supporting Parent", see 16 Colo. Law. 790 (1987). For article, "Ownership of Personal Property Accumulated During a Marriage", see 17 Colo. Law. 623 (1988). For article, "Avoiding Litigation in Probate Estates", see 18 Colo. Law. 875 (1989).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Section 15-11-403 and this section to be read with § 15-11-202 (1). Section 15-11-403 and this section, providing for family and exempt property allowances, must be read in conjunction with the definition of "augmented estate" in § 15-11-202 (1) to determine whether distributing such allowances from the "augmented estate" is consistent and harmonious with the creation of an "augmented estate" under the statute. In re Estate of Novitt, 37 Colo. App. 524, 549 P.2d 805 (1976).

This section is based upon sound public policy which the courts are zealous to effectuate. In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940); Lyons v. Egan, 107 Colo. 32, 108 P.2d 873 (1940).

The purpose of this section is to secure support to the widow and children during the period of administration, and the prolonged litigation which sometimes ensues. Wilson v. Wilson, 5 Colo. 70, 132 P. 67 (1913); In re Bradley's Estate, 106 Colo. 500, 106 P.2d 1063 (1940); Lyons v. Egan, 107 Colo. 32, 108 P.2d 873 (1940).

The policy of providing a widow's allowance is to protect the surviving spouse during the period until a final distribution of the estate can be made. In re Estate of Plaza, 34 Colo. App. 296, 526 P.2d 155 (1974).

Rights in general. A widow may claim her allowance or waive it. She may take specific items or cash. Until her position is made known or her right is terminated by limitation, proper of the estate cannot be disposed of and claim against it can often not be settled. Wigginton Wigginton, 112 Colo. 78, 145 P.2d 980 (1944).

A claim for a widow's allowance is a claim against the estate of her deceased husband. Brimble v. Sickler, 83 Colo. 494, 266 P. 4 (1928); Hale v. Burford, 73 Colo. 197, 214 P. 5 (1923); In re Williams' Estate, 101 Colo. 262, P.2d 476 (1937); In re Elam's Estate, 104 Colo. 126, 89 P.2d 243 (1939).

The allowance is a part of the expense of administration of an estate. Hale v. Burford, Colo. 197, 214 P. 543 (1923); Ahlf v. King, Colo. 425, 298 P. 647 (1931); Deeble v. Alerte, 58 Colo. 166, 143 P. 1096 (1914).

Allowances to be claimed from probate estate. The language of § 15-11-202 (1) clearly reflects a legislative intent to establish the family allowance and exempt property allowance items to be claimed from the probate estate

APPENDIX 10

ot named in will was not intentional, where contrary fact did not appear In re Atwood's estate, 14 Utah 1, 45 P 1036, 60 Am St R 78 (1896), overruled on other grounds, In re Miller's Estate, 31 Utah 415, 88 P 338 (1906) An instruction was not to be so worded as to

convey to the jury the thought that the presumption of unintentional omission was itself evidence, such a charge was prejudicial and erroneous In re Newell's Estate, 78 Utah 463, 5 P 2d 230 (1931)

COLLATERAL REFERENCES

Am. Jur. 2d. — 79 Am Jur 2d Wills § 644
C.J.S. — 96 CJS Wills § 718
A.L.R. — Pretermitted heir statutes what constitutes sufficient testamentary reference

to, or evidence of contemplation of, heir to render statute inapplicable, 83 A L R 4th 779.
Key Numbers. — Wills ⇐ 82

PART 4

EXEMPT PROPERTY AND ALLOWANCES

75-2-401. Homestead allowance — Amount.

A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of \$10,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to \$10,000 divided by the number of minor and dependent children of the decedent The homestead allowance is exempt from, and has priority over, all claims against the estate, except claims for reasonable funeral expenses and expenses of administration The homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by intestate succession, but is chargeable against any share passing by the will of the decedent, unless the will provides otherwise

History: C. 1953, 75-2-401, enacted by L. 1983, ch. 226, § 2; 1988, ch. 110, § 3.

Repeals and Reenactments. — Laws 1977, ch 194, § 10 repealed former § 75-2-401 (L 1975, ch 150, § 3), relating to homestead allowance, and enacted a new § 75-2-401

Laws 1983, ch 226, § 2 repealed former § 75-2-401 (L 1977, ch 194, § 10), relating to the homestead, and enacted the above section

Editorial Board Comment. — See § 75-2-803 for the definition of "spouse" which controls in this part Also, see § 75-2-104 Waiver of homestead is covered by § 75-2-204 "Election" between the provision of a will and homestead is covered by § 75-2-206

A set dollar amount for homestead allowance [see § 78-23-3] was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under § 75-2-402 The "small estate"

line is controlled largely, though not entirely, by the size of the homestead allowance This is because Part 12 of Chapter 3 dealing with small estates rests on the assumption that the only justification for keeping a decedent's assets from his creditors is to benefit the decedent's spouse and children

Another reason for a set amount is related to the fact that homestead allowance may prefer a decedent's minor or dependent children over his other children It was felt desirable to minimize the consequence of application of an arbitrary age line among children of the testator

Cross-References. — Homestead exemption, Utah Const., Art XXII, Sec 1, §§ 78-23-3, 78-23-4, exemption from execution, § 78-23-5 et seq

Partition proceedings, § 78-39-1 et seq
 Spouse, effect of divorce, annulment or separation, § 75-2-803

NOTES TO DECISIONS

ANALYSIS

Constitutionality
 Administration
 Children
 Construction and application
 Exemption from payment of debts.
 Right to dispose of homestead
 Right to homestead

Constitutionality.

Constitutional provision setting up equality of rights of ownership of separate property by married woman, and eliminating the common-law incapacity, did not confer rights upon wives different from those of husbands, and did not invalidate statute giving husband homestead in property of deceased wife In re Petersen's Estate, 97 Utah 324, 93 P 2d 445 (1939)

Administration.

Contention of widow that legal right of administrator could not be enforced because there were no debts and value of the property would not exceed the exemptions to which she was entitled under former provisions was without merit Columbia Trust Co v Anglum, 63 Utah 353, 225 P 1089 (1924)

It was not a valid objection to a claim of homestead that the parties had not resided on the property, or that the property was held in cotenancy with a stranger In re Petersen's Estate, 97 Utah 324, 93 P 2d 445 (1939)

The amount of property owned by the person claiming homestead was not material to a determination of whether homestead should be allowed In re Petersen's Estate, 97 Utah 324, 93 P 2d 445 (1939)

Children.

"Children" was used in homestead provisions of former succession statutes in its common sense In re Walton's Estate, 115 Utah 160, 203 P 2d 393 (1949)

Construction and application.

Homestead being constitutional creation, all laws relating thereto were to be liberally construed to protect it and make it effective for dependent and helpless, to ensure them shelter and support In re Mower's Estate, 93 Utah 390, 73 P 2d 967 (1937), In re Petersen's Estate, 97 Utah 324, 93 P 2d 445 (1939)

Exemption from payment of debts.

Reasonable expenses of decedent's last illness and funeral expenses as well as administration expenses were preferred claims against estate, and when necessary, homestead property was subject to their payment In re Thorn's Estate, 24 Utah 209, 67 P 22 (1901), In re Petersen's Estate, 69 Utah 484, 256 P 409 (1927), In re Mower's Estate, 93 Utah 390, 73 P 2d 967 (1937)

Right to dispose of homestead.

Under former statute, right to dispose of homestead property by will was limited to such estates as exceeded homestead limit in value In re Little, 22 Utah 204, 61 P 899 (1900)

Under former provisions husband could dispose of all his estate by will subject to homestead rights of widow and minor children, if wife's one-third elective interest was not in excess of homestead allowance, but if one-third exceeded the homestead, he could only devise from his widow two-thirds of his realty In re Mower's Estate, 93 Utah 390, 73 P 2d 967 (1937), holding statutory amendment rendered inoperable rule in In re Schenk's Estate, 53 Utah 381, 178 P 344 (1919) (widow renouncing will could claim distributive one third share, but not homestead)

Right to homestead.

Homestead belonged to heirs to whom it was set apart, and heirs who were of age at time of death of intestate or at time homestead was set apart had no interest therein Christiansen v Robinson, 35 Utah 67, 99 P 458 (1909)

Where real estate was set apart as homestead to surviving wife of husband and minor children, it became theirs absolutely, subject only to valid liens or mortgages, fact that value of property thereafter exceeded limit of statutory homestead exemption would not authorize reopening of estate In re Bedford's Estate, 34 Utah 24, 95 P 518, 16 L R A (n s) 728, 16 Ann Cas 118 (1908)

Upon death of husband or wife, surviving spouse, by operation of law, was vested with right of occupancy and use of homestead, and this right continued until otherwise directed by court, even though survivor remarried In re Hansen's Estate, 55 Utah 23, 184 P 197 (1919)

COLLATERAL REFERENCES

Utah Law Review. — Exemptions from Utah's Estate Tax, 1970 Utah L Rev 42

Brigham Young Law Review. — Articles II and III of the Uniform Probate Code as Enacted in Utah, 1976 B Y U L Rev 425

Am. Jur. 2d. — 40 Am Jur 2d Homestead § 3

C.J.S. — 40 CJS Homesteads § 166

A.L.R. — Previous judgment or agreement for their support, statutory family allowance to

minor children as affected by, 6 A L R 3d 1387
 Waiver of right to widow's allowance by post-nuptial agreement, 9 A L R 3d 1319
 Illegitimate child, eligibility to receive fam-

ily allowance out of estate of his deceased father, 12 A L R 3d 1140
Key Numbers. — Homestead ⇌ 134

75-2-402. Exempt property — Amount.

In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding \$5,000 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than \$5,000, or if there is not \$5,000 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$5,000 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except reasonable funeral expenses, and the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of the reasonable funeral expenses, homestead allowance, and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by intestate succession, but is chargeable against any share passing by the will of the decedent unless the will provides otherwise.

History: C. 1953, 75-2-402, enacted by L. 1975, ch. 150, § 3; 1988, ch. 110, § 4.

Editorial Board Comment. — Unlike the exempt values described in §§ 75-2-401 and 75-2-403, the exempt values described in this section are available in a case where the decedent left no spouse but left only adult children. The possible difference between beneficiaries of the exemptions described by §§ 75-2-401 and 75-2-403, and this section, explain the provision in this section which establishes priorities.

Section 75-2-204 covers waiver of exempt property rights, and § 75-2-206 covers the question of whether a decedent's will may put a spouse to an election with reference to exemptions.

Cross-References. — Effect of divorce, annulment and decree of separation, § 75-2-803
 Waiver of rights by surviving spouse, § 75-2-204

NOTES TO DECISIONS

ANALYSIS

Insufficiency of estate
 — Multiple-party accounts

Insufficiency of estate.

— **Multiple-party accounts.**

It was error for the probate court to deny the

widow her exempt property claim from multiple-party accounts in the name of the decedent's daughter where the estate was insufficient to satisfy the claim. In re Estate of Wagley, 760 P 2d 316 (Utah 1988)

COLLATERAL REFERENCES

Am. Jur. 2d. — 31 Am Jur 2d Executors and Administrators §§ 496, 762
C.J.S. — 34 C J S Executors and Administrators §§ 323 to 366

Key Numbers. — Executors and Administrators ⇌ 173 to 201

75-2-403. Family allowance.

(1) In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration. The allowance may date from the death of the decedent but may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims but not over reasonable funeral expenses and the homestead allowance.

(2) The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowances not yet paid.

History: C. 1953, 75-2-403, enacted by L. 1975, ch. 150, § 3.

Editorial Board Comment. — The allowance provided by this section does not qualify for the marital deduction under the Federal Estate Tax Act [26 U S C § 2001 et seq] because the interest is terminable. A broad code must provide the best possible protection for the family in all cases, even though this may not provide desired tax advantages for certain larger estates. In estates falling in the federal estate tax bracket where careful planning may be expected, it is important to the operation of formula clauses that the family allowance be clearly terminable or clearly nonterminable. With the proposed section clearly creating a terminable interest, estate planners can create a plan which will operate with certainty. Finally, in order to facilitate administration of this allowance without court supervision it is necessary to provide a fairly simple and definite framework.

In determining the amount of the family allowance, account should be taken of both the previous standard of living and the nature of

other resources available to the family to meet current living expenses until the estate can be administered and assets distributed. While the death of the principal income producer may necessitate some change in the standard of living, there must also be a period of adjustment. If the surviving spouse has a substantial income, this may be taken into account. Whether life insurance proceeds payable in a lump sum or periodic installments were intended by the decedent to be used for the period of adjustment or to be conserved as capital may be considered. A living trust may provide the needed income without resorting to the probate estate. If a husband has been the principal source of family support, a wife should not be expected to use her capital to support the family.

Obviously, need is relative to the circumstances, and what is reasonable must be decided on the basis of the facts of each individual case. Note, however, that under the next section the personal representative may not determine an allowance of more than [a total of \$6,000], a court order would be necessary if a greater allowance is reasonably necessary.

NOTES TO DECISIONS

ANALYSIS

Amount of allowance
 Disclosing personal wealth
 Discontinuance of allowance
 Forfeiture of allowance
 Inheritance tax
 Right to allowance

Amount of allowance.

In fixing the amount of the allowance for support during administration, the age of the survivor or survivors, their health, social position, and standing, the education of the children, the value of the estate, its solvency or insolvency, and value and nature of the widow's own separate property were to be considered. *In re Pugsley's Estate*, 27 Utah 489, 76 P 560 (1904), *In re Bundy's Estate*, 121 Utah 299, 241 P 2d 462 (1952)

Disclosing personal wealth.

In filing petition for family allowance, widow and administratrix was to fully disclose her personal wealth. *In re Bundy's Estate*, 121 Utah 299, 241 P 2d 462 (1952)

Discontinuance of allowance.

Where there was a prolonged administration which appeared to have diluted the estate through a family allowance and where there was no evident necessity for such prolongation, the allowance should not have been continued. *In re Bundy's Estate*, 121 Utah 299, 241 P 2d 462 (1952)

75-2-404. Source, determination, and documentation.

If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He may determine the family allowance and may disburse funds of the estate in payment of the family allowance in a lump sum or periodic installments, or a combination, but not exceeding the total sum of \$6,000. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

Forfeiture of allowance.

Wife who had for many years before death of husband lived, pursuant to agreement, separate and apart from him, and was not dependent on him for support, was not entitled to family allowance on his death under former statute. *In re Park's Estate*, 25 Utah 161, 69 P 671 (1902)

Under former statute, widow did not forfeit her allowance where evidence showed she was not voluntarily living separate and apart from husband. *In re Beason's Estate*, 49 Utah 24, 161 P 678 (1916)

Inheritance tax.

On appeal from order excluding family allowance in fixing amount of inheritance tax, Supreme Court could not consider propriety of amount allowed. *In re Green's Estate*, 78 Utah 139, 1 P 2d 968 (1931)

Right to allowance

Provisions in former Probate Code that court could exclude persons with separate property or income from the family allowance altered rule of *In re Pugsley's estate*, 27 Utah 489, 76 p 560 (1904), the family allowance was no longer an absolute right and court could consider the extent and nature of the claimant's property in determining the amount of, or in denying, the allowance. *In re Bundy's Estate*, 121 Utah 299, 241 P 2d 462 (1952)

History: C. 1953, 75-2-404, enacted by L. 1975, ch. 150, § 3; 1979, ch. 245, § 1.

Editorial Board Comment. — See §§ 75-3-902, 75-3-906 and 75-3-907

Cross-References. — Distribution in kind, §§ 75-3-906, 75-3-907

Distribution, order in which assets distributed, abatement, § 75-3-902

PART 5**WILLS**

Editorial Board Comment. — Part 5 of Chapter 2 deals with capacity and formalities for execution and revocation of wills. If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible. To this end, the age for making wills is lowered to eighteen, formalities for a written and attested will are kept to a minimum, holographic wills written and signed by the testator are authorized, choice of law as to validity of execution is broadened, and revocation by operation of law is limited to divorce or annulment. However, the statute also provides for a more formal method of execution with acknowledgement before a public officer (the self-proved will).

These family protection provisions supply the basis for the important small estate provisions of Chapter 3, Part 12.

States adopting the Code may see fit to alter the dollar amounts suggested in these sections or vary the terms and conditions in other ways so as to accommodate existing traditions. Although creditors of estates would be aided somewhat if all family exemption provisions relating to probate estates were the same throughout the country, there is relatively less need for uniformity of law regarding these provisions than is true of any of the other parts of this article. Still, it is quite important for all states to limit their homestead, allowance and exempt property provisions, if any, so that they apply only to estates of decedents who were domiciliaries of the state.

Notice that § 75-2-104 imposes a requirement of survival of the decedent for 120 hours on any spouse or child claiming under this part.

75-2-501. Who may make a will.

Any person 18 or more years of age who is of sound mind may make a will.

History: C. 1953, 75-2-501, enacted by L. 1975, ch. 150, § 3.

Editorial Board Comment. — This section states a uniform minimum age of eighteen for capacity to execute a will. "Minor" is defined in § 75-1-201, and may involve a different age than that prescribed here.

Cross-References. — Custody and deposit of wills, § 75-2-901

Dower and curtesy abolished, § 75-2-113

Right of married woman to take by will and make a will, Utah Const., Art. XXII, Sec. 2, § 30-2-1

NOTES TO DECISIONS

ANALYSIS

Burden of proof
 County as devisee
 Disinheritance
 Expert and opinion evidence
 Legislative control
 Limitations on testamentary capacity of married men
 Mental competency
 Old age
 Testamentary capacity

Burden of proof.

Burden of proof was on contestant to show mental incapacity and undue influence, the

proponent of will could meet that by proof of a negative, that is, that he did not procure the execution of the will by undue influence, and testator was not mentally incapable. *In re Bryan's Estate*, 82 Utah 390, 25 P 2d 602 (1933)

County as devisee.

Testamentary disposition to county hospital could be taken by the county as a corporation. *Manatakis' Estate v. Walker Bank & Trust Co.*, 5 Utah 2d 412, 303 P 2d 701 (1956)

Disinheritance.

Testator was acting wholly within his rights in bequeathing the bulk of his property and

(4) In satisfying a share provided by Subsection (1)(a), devise made by the will abate under Section 75-3-902.

History: C. 1953, 75-2-302, enacted by L. 1998, ch. 39, § 38. last amended by Laws 1988, ch. 110, § 2, relating to pretermitted children in a will, and enacts the present section, effective July 1, 1998.
Repeals and Reenactments. — Laws 1998, ch. 39, § 38 repeals former § 75-2-302, as 1998

NOTES TO DECISIONS

Cited in In re Estate of Jones, 858 P2d 983 (Utah 1993)

PART 4 EXEMPT PROPERTY AND ALLOWANCES

75-2-401. Exempt property and allowances — Applicable law.

This part applies to the estate of a decedent who dies domiciled in Utah. Rights to homestead allowance, exempt property, and family allowance for a decedent who dies not domiciled in Utah are governed by the law of the decedent's domicile at death.

History: C. 1953, 75-2-401, enacted by L. 1998, ch. 39, § 39. last amended by Laws 1988, ch. 110, § 3, relating to homestead allowance and amount, and enacts the present section, effective July 1, 1998.
Repeals and Reenactments. — Laws 1998, ch. 39, § 39 repeals former § 75-2-401, as 1998

75-2-402. Homestead allowance.

A decedent's surviving spouse is entitled to a homestead allowance of \$15,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to \$15,000 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims of the estate. Unless otherwise provided by the will or governing instrument, the homestead allowance is chargeable against any benefit or share passing to the surviving spouse, minor, or dependent child, by the will of the decedent, by intestate succession, by way of elective share, and by way of nonprobate transfers as defined in Sections 75-2-205 and 75-2-206.

History: C. 1953, 75-2-402, enacted by L. 1998, ch. 39, § 40. last amended by Laws 1988, ch. 110, § 4, relating to exempt property amount, and enacts the present section, effective July 1, 1998.
Repeals and Reenactments. — Laws 1998, ch. 39, § 40 repeals former § 75-2-402, as

75-2-403. Exempt property.

In addition to the homestead allowance, the decedent's surviving spouse is entitled from the estate to a value, not exceeding \$10,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same value. If encumbered chattels are selected and the value in excess of security interests, plus that of other exempt

property, is less than \$10,000, or if there is not \$10,000 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$10,000 value. Right to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, but the right to any assets needed to make up a deficiency of exempt property abates as necessary to permit the payment of homestead allowance and family allowance. Unless otherwise provided by the will or governing instrument, the exempt property allowance is chargeable against any benefit or share passing to the surviving spouse, or if there is no surviving spouse, to the decedent's children, by the will of the decedent, by intestate succession, by way of elective share, and by way of nonprobate transfers as defined in Sections 75-2-205 and 75-2-206.

History: C. 1953, 75-2-403, enacted by L. 1998, ch. 39, § 41. enacted by Laws 1975, ch. 150, § 3, relating to family allowance, and enacts the present section, effective July 1, 1998.
Repeals and Reenactments. — Laws 1998, ch. 39, § 41 repeals former § 75-2-403, as

75-2-404. Family allowance.

(1) In addition to the right to homestead allowance and exempt property, the decedent's surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance shall not continue for longer than one year if the estate is inadequate to discharge all allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the child or children having their care and custody. If a minor child or dependent child is not living with the surviving spouse, the allowance may be made payable to the child or his guardian or other person having the child's care and custody and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims except the homestead allowance.

(2) Unless otherwise provided by the will or governing instrument, the family allowance is chargeable against any benefit or share passing to the surviving spouse or minor children, by the will of the decedent, by intestate succession, by way of elective share, and by way of nonprobate transfers as defined in Sections 75-2-205 and 75-2-206. The death of any person entitled to the family allowance terminates the right to allowances not yet paid.

History: C. 1953, 75-2-404, enacted by L. 1998, ch. 39, § 42. last amended by Laws 1979, ch. 245, relating to source, determination, and amount of estate, and enacts the present section, effective July 1, 1998.
Repeals and Reenactments. — Laws 1998, ch. 39, § 42 repeals former § 75-2-404, as

NOTES TO DECISIONS

Amount of allowance.

The factors to be used in determining the amount of the family allowance during administration include the age of the surviving spouse, the surviving spouse's health, the sur-

viving spouse's previous standard of living, the value of the estate, and the value and nature of the surviving spouse's own separate property. *Hamilton v. Hamilton*, 869 P2d 971 (Utah App.), cert. denied, 879 P2d 266 (Utah 1994).

75-2-405. Source, determination, and documentation.

(1) If the estate is otherwise sufficient, property specifically devised may not be used to satisfy rights to homestead allowance or exempt property. Subject to this restriction, the surviving spouse, guardians of minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make those selections if the surviving spouse, the children, or the guardians of the minor children are unable or fail to do so within a reasonable time or there is no guardian of a minor child. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. The personal representative may determine the family allowance in a lump sum not exceeding \$18,000 or periodic installments not exceeding \$1,500 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or an interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which may include a family allowance other than that which the personal representative determined or could have determined.

(2) If the right to an elective share is exercised on behalf of a surviving spouse who is an incapacitated person, the personal representative may add any unexpended portions payable under the homestead allowance, exempt property, and family allowance to the trust established under Subsection 75-2-212(2).

History: C. 1953, 75-2-405, enacted by L. 1998, ch. 39, § 43. **Effective Dates.** — Laws 1998, ch. 39, § 105 makes the act effective on July 1, 1998.

PART 5**WILLS****75-2-501. Who may make will.**

An individual 18 or more years of age who is of sound mind may make a will.

History: C. 1953, 75-2-501, enacted by L. 1998, ch. 39, § 44. **Repeals and Reenactments.** — Laws 1998, ch. 39, § 44 repeals former § 75-2-501, as enacted by Laws 1975, ch. 150, § 3, relating to who may make a will, and enacts the present section, effective July 1, 1998.

NOTES TO DECISIONS**Testamentary capacity.**

A Veteran's Administration incompetency rating, and resulting conservatorships and guardianship, did not create a presumption of decedent's incapacity to make a will; however, such indicia of diminished mental capacity did, at least, neutralize the presumption of testa-

mentary capacity and left the proponent of the will with the burden to show, by a simple preponderance of the evidence, that decedent had the requisite mental capacity to make a valid will *Montes Family v. Carter*, 878 P.2d 1168 (Utah Ct. App. 1994)

COLLATERAL REFERENCES

A.L.R. — Alzheimer's disease as affecting testamentary capacity, 47 A L R 5th 523

75-2-502. Execution — Witnessed wills — Holographic wills.

(1) Except as provided in Subsection (2) and in Sections 75-2-503, 75-2-506 and 75-2-513, a will shall be:

(a) in writing;

(b) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and

(c) signed by at least two individuals, each of whom signed within a reasonable time after he witnessed either the signing of the will as described in Subsection (1)(b) or the testator's acknowledgment of the signature or acknowledgment of the will.

(2) A will that does not comply with Subsection (1) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

(3) Intent that the document constitutes the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting.

History: C. 1953, 75-2-502, enacted by L. 1998, ch. 39, § 45.

Repeals and Reenactments. — Laws 1998, ch. 39, § 45 repeals former § 75-2-502, as

enacted by Laws 1975, ch. 150, § 3, relating to execution of a will, and enacts the present section, effective July 1, 1998.

NOTES TO DECISIONS**Holographic wills.****— Holographic codicil.**

Trial court erred in ruling that a handwritten document signed by the testator which directed the disposition of personal property, including money, was a memorandum under former § 75-

2-513, as the document met the requirements of a holographic will under former section § 75-503 and therefore could have been a codicil to the testator's will if it was shown to have been written after the will. *In re Estate of Kleinm*, 970 P.2d 1286 (Utah 1998).

75-2-503. Writings intended as wills.

Although a document or writing added upon a document was not executed in compliance with Section 75-2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

(1) the decedent's will;

(2) a partial or complete revocation of the will;

(3) an addition to or an alteration of the will; or

(4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.

History: C. 1953, 75-2-503, enacted by L. 1998, ch. 39, § 46.

Repeals and Reenactments. — Laws 1998, ch. 39, § 46 repeals former § 75-2-503, as

last amended by Laws 1977, ch. 194, § 3, relating to holographic wills, and enacts the present section, effective July 1, 1998.