

1966

# In the Matter of the Estate of William Paxman, Deceased : Brief of Appellant State Tax Commission

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE MATTER OF THE ES-  
TATE OF WILLIAM PAXMAN,  
Deceased.

}  
No. 11

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## BRIEF OF APPELLANT STATE TAX COMMISSION

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APPEAL FROM THE JUDGMENT OF THE  
JUDICIAL DISTRICT COURT FOR JUDGE

HONORABLE C. NELSON DAY

---

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE MATTER OF THE ES-  
TATE OF WILLIAM PAXMAN, }  
Deceased.

Case  
No. 10565

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## BRIEF OF APPELLANT STATE TAX COMMISSION

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### STATEMENT OF THE KIND OF CASE

This is an appeal from a decision of the Fifth Judicial District Court, Honorable C. Nelson Day, Judge. The question which appellant State Tax Commission presents to the Court for review is whether or not the decedent, William Paxman, in his will dated May 23, 1944, designated the testamentary provisions therein in favor of his wife, Vivian T. Paxman, to be in addition to the distributive share of his interests in legal and equitable estates created in her by Section 74-4-3, Utah Code Annotated, 1953, or whether she must take either under the will or the statute, as Section 74-4-4, Utah Code Annotated, 1953, specifically provides where it does not appear clearly in the will that its provisions are meant to be in addition to the statutory share.

In addition to the above issue, this appeal presents a question, raised by the executrix on cross-appeal, as to

the rate of inheritance tax to be imposed upon the taxable estate pursuant to Section 59-12-2, Utah Code Annotated, 1953.

## DISPOSITION IN THE LOWER COURT

The lower court, on October 4, 1965, pursuant to a petition (R. 13-15) filed by the executrix for the estate, heard oral argument in support of and in opposition to the widow's claim to be entitled to both her distributive share created by Section 74-4-3, Utah Code Annotated, 1953, and the bequest in her husband's will, which is set forth completely in the statement of facts. A Memorandum Decision (R. 19a) and Order (R. 16-17) ruling for the executrix were issued. Subsequently, the court considered argument on the second question involved in this appeal — the proper rates imposed upon the taxable estate. A second Memorandum Decision (R. 24) followed in connection therewith and finally, on January 20, 1966, a Final Order (R. 29-30), with accompanying Findings of Fact and Conclusions of Law (R. 25-28), and an Order amending the previous Order approving the inheritance tax return and fixing inheritance tax (R. 31-32), were promulgated by the lower court.

## RELIEF SOUGHT ON APPEAL

This appeal is from the final Order (R. 29-30), and specifically from the first three numbered paragraphs of the Order, and those parts of the other documents bearing the same date issued simultaneously therewith, which reflect the same conclusions set forth in these three numbered paragraphs:

1. That the testator, William Paxman, intended to and did provide by his will that his wife, if she survived him, have all of his estate, and without requiring her to relinquish her statutory right to one-third of the real estate, and that such intention appears from the will of the deceased.
2. That the surviving wife of said testator had the right to claim, and receive under the provisions of Sec. 74-4-3 Utah Code 1953 one-third of real estate described in the Inheritance Tax Return on file herein, without renouncing the will of said deceased, and also had the right to receive all other property left by said deceased without relinquishing her right under said statute to claim one-third of the real estate referred to.
3. That the Inheritance Tax Return filed herein by the executrix of said estate is correct and should be approved and the exclusion from the taxable estate in the amount of \$12,306.66 claimed in said return on account of the widow's statutory one-third interest in real estate should be allowed.

## **STATEMENT OF FACTS**

On May 23, 1944, William Paxman, a resident of Juab County, State of Utah, published his last will and testament. Since this document is very concise, and its exact wording extremely significant, that document is here set forth in full:

## **LAST WILL AND TESTAMENT**

**KNOW ALL MEN BY THESE PRESENTS:**

That I, William Paxman, a resident of Nephi, Juab County, State of Utah, over the age of twenty-one years and of sound and disposing mind and memory, and not acting under duress, menace,

fraud or undue influence of any person whomsoever, and hereby expressly revoking all other and former wills made by me, do make, publish and declare this my last will and testament, as follows, to-wit:

1. I hereby give, devise and bequeath unto my beloved wife, Vivian T. Paxman, all my property and estate, both real and personal, of whatsoever nature or wheresoever situated, to have and to hold the same absolutely.

2. I hereby nominate and appoint my beloved wife, Vivian T. Paxman, the executrix of this my last will and testament, and direct that she serve as such executrix without bond.

3. I hereby declare that my omission to provide herein for my children is intentional and not occasioned by any accident or mistake, and it is my desire and will that my children now living and also any of my children which may be born hereafter shall not share in my estate.

IN TESTIMONY WHEREOF, I have hereunto set my hand this 23rd day of May, A.D., 1944.

/s/ William Paxman

The foregoing instrument, consisting of this one page only, was, at the date thereof, by said William Paxman, signed, sealed and published as and declared to be his last will and testament, in the presence of us, who, at his request and in his presence and in the presence of each other, have signed our names as subscribing witnesses thereto.

/s/ Bertha McPherson  
Resident: Nephi, Utah

/s/ Joel Taylor  
Resident: Nephi, Utah



(On November 20, 1964, William Paxman died. No subsequent will or codicil modified the instrument above set forth.

After the death of the testator, executrix for the estate, Vivian T. Paxman, filed a document entitled Acceptance of Testamentary Provisions (R. 4) by which she purported to claim under the statutory provisions herein involved in the following language:

The undersigned surviving wife of William Paxman, deceased, hereby accepts the provisions of the will of said deceased, but without relinquishment of her right as surviving wife to one-third of all real estate left by said deceased, under the provisions of Section 74-4-3, Utah Code Annotated, 1953.

The undersigned hereby claims under both the statute and the will, and contends that it was the intention of said William Paxman, by his will, to bequeath and devise to her all of his estate, and without depriving her of her statutory right to one-third of his real estate in case she survived him.

On September 22, 1965, another unusual document was filed by the executrix for the estate, entitled Petition for Order Approving Inheritance Tax Return and Fixing Inheritance Tax (R. 13-15). The provision of this document out of the ordinary was that part thereof petitioning the District Court to pass on the accuracy and propriety of the inheritance tax return which had been filed by the executrix with the State Tax Commission, without giving the Commission the preliminary right to

make an initial determination of the appropriateness of such a return on the basis of its experience and expertise in this area. Counsel for the Tax Commission in his appearance on October 4, 1965, submitted to the court that petitioner-executrix had failed to exhaust her administrative remedies and that a Commission review prior to the court's assuming jurisdiction would be in the best interests of all.

The court, however, determined to take primary jurisdiction of the case and decided the case upon its merits, which would appear to be within its authority under the provisions of Section 59-12-35, Utah Code Annotated, 1953, even though it is at variance with the administrative pattern of judicial review subsequent to Commission determination usually adhered to in state tax cases.

## ARGUMENT

### POINT I

UNDER APPROPRIATE UTAH LAW, A WIFE MUST CHOOSE TO TAKE EITHER HER STATUTORY DISTRIBUTIVE SHARE UNDER SECTION 74-4-3, UTAH CODE ANNOTATED, 1953, OR TO TAKE UNDER THE TERMS OF HER HUSBAND'S WILL, UNLESS THE HUSBAND EXPRESSLY PROVIDES IN HIS WILL THAT SHE MAY CLAIM BOTH. IN THE ABSENCE OF SUCH A CLEAR PROVISION IN THE WILL, THE ELECTION BY THE WIFE OF ONE IS A REPUDIATION OF THE OTHER.

Section 74-4-3, Utah Code Annotated, 1953, creates an interest in a wife in her own right in real property

owned by her husband during the marriage in following terms:

One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple, if she survives him; provided, that the wife shall not be entitled to any interest under the provisions of this section in any such estate of which the husband has made a conveyance when the wife, at the time of the conveyance, was not and never had been a resident of the territory or state of Utah. Property distributed under the provisions secured by liens for work or labor done or material furnished exclusively for the improvement of the same, and except those created for the purchase thereof, and for taxes levied thereon. The value of such part of the homestead as may be set aside to the widow shall be deducted from the distributive share provided for her in this section. In cases wherein only the heirs, devisees and legatees of the decedent are interested, the property secured to the widow by this section may be set off by the court in due process of administration.

This statute is a substitution for common law dower, which has been expressly abolished in this jurisdiction (Section 74-4-9, Utah Code Annotated, 1953).

This problem of whether or not inheritance taxes apply to dower or comparable statutory property interests received by a wife upon the death of her husband has been of concern in many jurisdictions in this country, although litigation in the area has been much less extensive than might be imagined. The explanation for this

phenomena lies in the history of inheritance taxation in the United States.

The first American inheritance tax law was enacted by the Pennsylvania Legislature in 1826, but the tax was exacted from collateral heirs only, and not the decedent's direct family. It was not until 1891, in the State of New York, that an inheritance tax was imposed upon an estate or part thereof transmitted to a spouse or child of the decedent. By 1920, however, this practice was common in virtually every American jurisdiction. Until 1948, the federal inheritance tax law contained provisions which indirectly benefited an estate when dower or a comparable statutory interest was not claimed. The marital deduction, added to the federal tax law in 1948, terminated this particular benefit, and questions concerning taxation of property passing under statutes such as ours began to be presented to courts for decision.

In the majority of jurisdictions, including Utah, it is deemed that a dower type interest, whether common law or statutory, should not be subjected to an inheritance tax because it doesn't pass from the husband to the wife at his death but is created in the wife, albeit inchoate, at the time the property is obtained or at the time of the marriage, whichever occurs last. *In Re Bullen's Estate*, 47 Utah 96, 151 Pac. 533 (1915). Thus neither an inheritance tax, which is a tax upon the right of receipt by an heir, devisee, or legatee of property, nor an estate tax, which is a tax upon the right of transfer of property from the decedent, will lie in these jurisdictions.

The Utah tax is, despite its nomenclature, an estate tax with some inheritance tax aspects. *State Tax Commission v. Backman*, 88 Utah 424, 55 P. 2d 171 (1936); *Walker Bank & Trust Co. v. State Tax Commission*, 100 Utah 307, 114 P. 2d 1030 (1941).

A minority of jurisdictions, however, have taken a contrary position and imposed a tax upon a dower interest under varying legal and equitable theories. To impose such a tax is not unconstitutional as a violation of due process of law. *State v. Boney*, 156 Ark. 169, 245 S.W. 315 (1922).\*

Most authorities seem to feel that equity and the public interest are served by giving tax benefits in case of transmission to wife and children, but some suggest that inequities can arise where a wife may choose between her statutory interest and a legacy in her husband's will. Particularly is this true where, as in our jurisdiction, the husband may designate in his will that the wife may take both her statutory distributive share and the legacy he provides for her. This may create a situation where two wives, equally loved and cared for by their husbands, might receive through his will the same amount of property, with one getting a substantial tax break over the other simply because one husband had better legal advice than the other, and inserted in his will a statement to the

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\*For a comprehensive and particularly helpful survey of the history of state inheritance taxation of dower and similar interests, and of the practices of the various states in relation thereto, see Note, "Inheritance Taxation of Dower and Other Marital Interests," 99 U. of Pa. L. Rev. 979 (1951).

effect that its provisions were in addition to the statutory share under Section 74-4-3.

Even though our statutes make this possible it would appear to be in the best interests of equity and fairness in tax administration to limit this to instances where this designation is clearly and unambiguously set forth in the will. The provision making possible election by the widow of either her statutory share or her bequest under her husband's will is Section 74-4-4, Utah Code Annotated, 1953, which reads as follows:

If the husband shall make any provision by will for the widow, such provision shall be deemed to be in lieu of the distributive share secured by the next preceding section, unless it shall appear from the will that the decedent designed the testamentary provisions to be additional to such distributive share, in which case the widow shall be presumed to have accepted both such testamentary provisions and such distributive share. If, however, it does not appear from the will that its provision for the widow is additional, then the widow shall be conclusively presumed to have renounced such provision and to have accepted her distributive share, unless within four months after the admission of the will to probate, or within such additional time before distribution as the court may allow, she shall, by written instrument filed with the clerk of the court, accept the testamentary provision, which acceptance shall be construed to be a renunciation of her distributive share. In the event that the wife shall be insane or incompetent, or absent from the state, an election shall be made for her by a general guardian, if she has one, or by a special guardian for the purpose appointed by the court.

It should be pointed out that the executrix for the estate in the instant case is seeking not simply the benefit of an exclusion of her distributive share from the gross estate, but rather claiming *both* under the statute and under the terms of her husband's will. It is respectfully submitted that in the instant frame of reference such a benefit is not available to her.

Under the statutory provisions above set forth, the husband may designate in his will that the widow take both her legacy and her distributive share. If, however, the husband does not clearly manifest this intent and state "that its provision for the widow is *additional* (to the distributive share), then the widow shall be conclusively presumed to have renounced such provision and to have accepted her distributive share," unless within four months after the will is admitted to probate, she, by written instrument filed with the clerk of the court, accepts the testamentary provision "which acceptance shall be construed to be a renunciation of her distributive share."

Thus, unless the husband makes the specific and unambiguous designation in his will, made mandatory by the statute, *the acceptance under the will is a rejection of the distributive share, and an acceptance of the distributive share is a renunciation of the will*. The choice is either/or; a widow cannot "choose" both.

We respectfully submit that this is not a question of first impression, but that this court has consistently in

the past held that the widow is entitled to take either under the terms of the will or under the statute, but not both, unless the appropriate language is found in her husband's will. *In Re Osgood's Estate*, 52 Utah 185, 173 Pac. 152 (1918), involved a fact situation similar to the problem before the court, differing only in that the provisions of the will were much more complicated, and in the testator's express wish that an election be made. The following language from this case is instructive:

In case, however, the husband makes provision in his will for his wife, she may then waive or surrender her rights under section 2826 [74-4-3], and take under her husband's will. That she may do that is just as clear from section 2827 [74-4-4], which we have quoted in full, as it is clear from section 2826 [74-4-3], that she is entitled to one-third of the value of her husband's real property regardless of any provision he may make for her in his will. If, however, the husband makes provision in his will for his widow, and she elects to waive or to relinquish her right under section 2826 [74-4-3], *supra*, and elects to take under the will, she then assumes precisely the same relation to the husband's estate as any other legatee or devisee under the will. In that event she relinquishes the right given to her by section 2826 [74-4-3] just as effectually as though she had conveyed such right by deed either before or after the death of her husband. Such is clearly the purport and effect of sections 2826 [74-4-3] and 2827 [74-4-4] when read and construed together, as they must be. In case, therefore, the widow elects to take under her husband's will, as provided by section 2827 [74-4-4], she, of necessity, relinquishes her right to take under section 2826 [74-4-3], and thus whatever share she receives from her husband's



estate under the will passes to her by such will and not otherwise. In such event *the amount that she receives from her husband's estate, whatever it may be, may not be deducted from her husband's estate in computing the inheritance tax...* 52 Utah 193-194. (Emphasis added.)

The court also noted the following:

... That court [New York] has held that when the widow takes under the husband's will the whole estate is subject to inheritance tax without any deductions except those specifically provided for by statute. To the mind of the writer no other conclusion is permissible under the present wording of our statute. 52 Utah 200.

An earlier case, *In Re Little's Estate*, 22 Utah 204, 61 P. 899 (1900), came to the same conclusions.

A more recent case, *In Re Kohn's Estate*, 56 Utah 17, 187 Pac. 409 (1920), appears to this writer to be controlling, inasmuch as it cannot be distinguished factually. The testator left five dollars to each of his five children and the residue and remainder of his estate to his wife. The court said this, in effect, was a giving of his entire estate to his wife and that the provisions relating to his children were made only to prevent any possible controversy which might arise from omitting his offspring. The court said, "We must assume that the father was familiar with our statute relating to wills," and denied to the estate an exclusion similar to the one Mrs. Paxman is here seeking, holding:

The statute is clear and explicit. If the husband makes any provision in his will for his widow, the presumption arises that the provision so made is in lieu of and not in addition to her

statutory share, and this presumption prevails unless it appears from the will itself that the provision was intended to be in addition to her statutory share.

In both his memorandum and his argument in the lower court, counsel for the estate relied heavily upon *In Re Bullen's Estate*, supra. This case simply stands for the proposition that Section 74-4-3 creates an independent property interest in the wife of which she cannot be deprived without her consent. This proposition is not disputed; however, her decision to take under her husband's will is *her consent, is in fact a voluntary relinquishment of her statutory right*. Unless the husband clearly designates that his legacy to her is in addition to and separate from her statutory share, she must abandon her dower interest to take under the will. This is true whether she is sole heir, whether she inherits with her children, or whether she is merely one of a number of heirs of different classes. Had Mrs. Paxman chose to renounce the will in this case some of the property in the estate would have gone to the disinherited children under intestate succession laws. By claiming under the will she gets all of the property, which is consistent with her husband's manifest intent. By claiming to take both under the will and by the statute she claims exactly the same property — only the inheritance tax ramifications vary.

The Tax Commission has in the past taken the position, consistent with the cases cited above, that unless the husband-decedent's will clearly designates to the contrary, an election by the widow to take either her

statutory interest or the legacy under the will is required. If the widow chooses to take under the will, she waives her statutory real property interest and such property is includable in the taxable estate. This represents a contemporaneous and continuing practical interpretation by the Tax Commission, the agency specifically charged by law with enforcement and administration of our revenue laws. (Section 52-5-46, Utah Code Annotated, 1953). This interpretation should not be overturned unless clearly erroneous.

The practice and interpretive regulations by officers, administrative agencies, departmental heads and others officially charged with the duty of administering and enforcing a statute will carry great weight in determining the operation of a statute. 2 *Sutherland, Statutory Construction*, 516. See also *Western Leather & Finding Co. v. State Tax Commission*, 87 Utah 227, 48 P. 2d 526 (1935).

. . . The use of contemporary and practical interpretation makes for certainty in the law and justifies reliance upon the conduct of public officials. 2 *Sutherland, Statutory Construction*, 513.

Tax practitioners and members of the general public have come to know and rely upon the Commission's policy and practice in this area for many years, have not challenged the same, and "like all precedents, where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time, it will be regarded as of great importance in arriving at the proper construction of a statute." 2 *Sutherland, Statu-*

*tory Construction*, 529-521. See also *Shockley v. Abbott Supply Co.*, 50 Del. 510, 135 A. 2d 607 (1957); *Dixie Coaches v. Ramsden*, 238 Ala. 285, 190 So. 92 (1939); *Murray Hospital v. Angrove*, 92 Mont. 101, 10 P. 2d 577 (1932). Also worthy of note is the fact that the Utah Legislature has acquiesced in this interpretation. Had this body thought the Commission's interpretation inequitable or inconsistent with the intent of Sections 74-4-3 and 74-4-4, it would have been an easy matter for it to have amended the law to require an adjustment of Commission practice. This has not been done, and this legislative acquiescence is implied approval of the Commission's interpretation and administration. *Couch v. Independent Brotherhood of Teamsters*, 302 P. 2d 117 (Okla. 1956); *State v. Yelle*, 52 Wash. 2d 158, 324 P. 2d 247 (1951).

The transmission and inheritance of property is regarded in our Anglo-American legal tradition to be a privilege and not a right. The sovereign has control over such property transfers, and can regulate them in just about any manner deemed in the best interests of the state and its citizens. The same rules of construction and interpretation usually applicable to revenue and taxation laws apply also to inheritance tax laws, including the rule of strict construction of exemptions in favor of the taxing power and against the taxpayer. *English v. Crenshaw*, 120 Tenn. 531, 110 S.W. 211, 17 L.R.A. (N.S.) 753 (1908).

This proposition of law is accepted in virtually every American jurisdiction. The United States Supreme Court has spoken as follows in relation thereto:

When exemption is claimed, it must be shown indubitably to exist. At the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is only when the claims of the concession are too explicit to admit fairly of any other construction that the proposition can be supported. *Farrington v. Tennessee*, 95 U.S. 679, 24 L. Ed. 558, 560 (1878).

Two leading cases standing for this proposition are Utah cases. The first, *Judge v. Spencer*, dealing with property tax, was decided in 1897. The decision contained the following language:

. . . the court will not aid or enlarge exemptions by interpretation. The presumption is that all exemptions intended to be granted were granted in express terms. In such cases the rule of strict construction applies, and, in order to relieve any species of property from its due and just proportion of the burdens of the government, the language relied on, as creating the exemption, should be so clear as not to admit of reasonable controversy about its meaning, for all doubts must be resolved against the exemption. The power to tax rests upon necessity, and is essential to the state. *Judge v. Spencer*, 15 Utah 242, 249; 48 Pac. 1097, 1099-1100 (1897).

In *Stillman v. Lynch*, 56 Utah 540, 547, 192 Pac. 272, 275; 12 A.L.R. 552, 556 (1920), the court held as follows:

If as to exemption there is doubt, that doubt will be resolved in favor of taxation. It has been said taxation is the rule, exemption the exception.

A leading text authority articulates the concept in this fashion:

As a general rule, grants of tax exemptions are given a rigid interpretation against the assertions of the taxpayer and in favor of the taxing power. The basis for the rule here is the same as that supporting a rule of strict construction of positive revenue laws — that the burden of taxation should be distributed equally and fairly among the members of society. 3 *Sutherland, Statutory Construction*, Sec. 6702.

See also 2 *Cooley, Taxation*, Sec. 672 (4th ed. 1924).

Thus, the executrix for the estate has the burden to show that she is entitled to exemption in this case. This seems particularly fair since, as earlier pointed out, there is an inherent inequity in the statute, which permits one party to get a tax benefit another party in a like situation is denied merely because of sounder and more perceptive legal advice. The court should not extend this inequity by permitting the double exemption to be claimed in the type of situation here present.

It might be argued in rebuttal to the foregoing that the Legislature has manifested an intent and a desire to benefit widows and children of decedents, and a liberal rather than a strict interpretation here would best further this legislative policy. The answer to this is that the grant of the double benefit would require not just a liberal interpretation but an unwarranted distortion of the statute. Further, Mrs. Paxman is benefitting sub-

stantially because she is a surviving widow rather than a stranger to the blood, even without the relief she is here seeking. As noted in Point III, she received the full \$40,000 exemption provided for widows and surviving children. Also, she received a joint tenancy exclusion, another legislative boon granted only to surviving family members, in the amount of \$23,450.88. Thus, the fact that she is the widow of the testator instead of someone not related has created in her favor a totally tax-free bequest of over \$63,000, completely independent of this problem. The public policy behind dower — the protection of a widow against a thankless, arbitrary husband — has been well served.

It is thus submitted that it is necessary for a will to clearly and unequivocally state that its provisions in favor of a surviving widow are in addition to the interest created in her by Section 74-4-3 and Section 74-4-4 if she is to get the benefit of both the legacy and the statutory distributive share, and that this requirement is fair and equitable, both generally and in this particular factual context. Any doubt or ambiguity should be resolved in favor of the taxing power and against the taxpayer seeking exemption.

## POINT II

THE LANGUAGE IN THE PARTICULAR WILL HEREIN INVOLVED DOES NOT PROVIDE THAT ITS TESTAMENTARY GRANT TO MRS. PAXMAN IS TO BE CONSIDERED ADDITIONAL TO THE WIFE'S DISTRIBUTIVE SHARE.

TIVE SHARE CREATED IN HER BY SECTION 74-4-3, UTAH CODE ANNOTATED, 1953.

The first point in this brief examined the standard under which a wife might claim both her statutory distributive share and the bequest left her in her husband's will. It was therein concluded, and respectfully suggested to the court, that the only time this is possible is when the will of the decedent husband clearly and without ambiguity designates that the wife is to take her legacy in addition to her statutory interest. Point II is correlative, and the problem with which it deals is whether or not the last will and testament executed by William Paxman on May 23, 1944, meets this statutory test. It is submitted that it does not.

The provision in Mr. Paxman's will which provides for his wife is numbered paragraph 1, and reads as follows:

1. I hereby give, devise and bequeath unto my beloved wife, Vivian T. Paxman, all my property and estate, both real and personal, of whatever nature or wheresoever situated, to have and to hold the same absolutely.

Other provisions of the will appoint his wife to be executrix and set forth his intention to disinherit his children. These have no relevance to the instant question.

On the sole basis of the wording above quoted, it was urged that William Paxman intended that his grant



to his wife be in addition to her distributive share provided for in Section 74-4-3. No evidence other than this will was proffered to support this contention. Indeed, had there been an offer of such evidence, it would have been inadmissible since the statute requires that the intent of the testator be apparent in the will itself.

An examination of the language of the will reveals no reference, explicit or implied, to Section 74-4-3 or any other statute, no reference, explicit or implied, to any concept that her bequest should be in addition to any other interest the wife might have in such property or any other property, no reference, explicit or implied, to dower or a widow's distributive share in her husband's real property, no reference, explicit or implied, to inheritance taxes. Taxation is the only context in which this provision could be meaningful, since under either petitioner's interpretation or respondent's interpretation of the document, she is entitled to inherit the full property after taxes. This was Mr. Paxman's evident and primary concern. The language above quoted is simply a general bequest by the husband to the wife of all of his property, both realty and personalty, and is couched in extremely broad terms. *To hold that this meets the statutory test, that it appears from this language that the husband intended his bequest to be in addition to the widow's statutory distributive share would require the same holding in relation to just about every broadly-phrased bequest or grant in a husband's will in favor of his wife.* We submit that this result would be greatly at odds with the manifest legislative intent, and that a clear provision evidencing

specific intent in the will would be required if the benefit here sought is obtained — not just a general expression suggesting that the testator wanted his wife to have as much of his property as possible under the most favorable terms.

We submit, therefore, that this will does not provide that its legacy should be in addition to the widow's statutory interest — indeed, it makes no reference or inference whatsoever to such interest. Therefore, it must be interpreted under the language of Section 74-4-4 to be in lieu of and not in addition to the statutory grant, and an election of one or the other by the wife is mandatory. Insofar as the lower court held that the will shows the testator's intent that this bequest be in addition to Mrs. Paxman's statutory one-third interest in the husband's realty, or that it was possible in this case for the widow to elect to take both her statutory interest and her legacy, we submit the lower court was in error and should be reversed.

### POINT III

THE LOWER COURT DID NOT ERR IN CONCLUDING THAT THE APPLICABLE TAX RATE TO BE APPLIED AGAINST THE TAXABLE ESTATE OF THE DECEDENT, WILLIAM PAXMAN, WAS 5% RATHER THAN 3%.

Section 59-12-2, Utah Code Annotated, 1953, provides as follows:

A tax equal to the sum of the following percentages of the market value of the net estate shall

be imposed upon the transfer of the net estate of every decedent, whether a resident or nonresident of this state:

Three per cent of the amount by which the net estate exceeds \$10,000 and not to exceed \$25,000, except where property not exceeding in value the sum of \$40,000 goes to the husband, wife and/or children of the deceased or any or all of them by descent, devise, bequest or transfer directly or through a trustee, then in such case the exemptions shall be the amount so going not to exceed \$40,000;

Five per cent of the amount by which the net estate exceeds \$25,000 and does not exceed \$75,000 except where property not exceeding in value the sum of \$40,000 goes to the husband, wife and/or children of the deceased or any of or all of them by descent, devise, bequest or transfer directly or through a trustee, then in such case the exemption shall be the amount so going not to exceed \$40,000, but on the excess of \$40,000 the rate shall be as herein provided;

Eight per cent of the amount by which the net estate exceeds \$75,000 and does not exceed \$125,000;

Ten per cent of the amount by which the net estate exceeds \$125,000; provided, at the discretion of the tax commission, the taxpayer may choose to pay in kind on an estate or any portion thereof which is not liquid.

The inheritance tax provided for in this section is a graduated tax, with rates varying according to the size of the net estate. The net estate is determined by making certain specified deductions (debts, property pre-

viously taxed, tax-free bequests) from the gross estate, as provided by Section 59-12-7, Utah Code Annotated, 1953. The gross estate, in turn, is computed according to certain criteria set forth in Section 59-12-3, Utah Code Annotated, 1953.

The initial tax rate provided for in Section 59-12-2 is 3%, and is imposed on that part of the net estate between \$10,000 and \$25,000 in value. The next bracket, with a 5% rate, is on that part of a net estate between \$25,000 and \$75,000 in value. There is no tax on the first \$10,000 value in any estate; this figure is the basic and universal exemption. Note, however, that there is provision for a \$40,000 exemption in certain circumstances (where the property in question “goes to the husband, wife and/or children of the deceased or any or all of them by descent, devise, bequest or transfer directly or through a trustee”) *and that this \$40,000 exemption is not deducted prior to computing the net or taxable estate*, but that the \$40,000 amount simply eats up the tax bracket as set forth in the statute. Since \$40,000 is greater than \$25,000, this exemption, where appropriate, eliminates from tax the entire 3% bracket and half of the 5% bracket. It follows that whenever the \$40,000 exemption is appropriate, the initial tax rate is 5% rather than 3%.

This conclusion is supported by the expression “but on the excess of \$40,000 the rate shall be as herein provided” at the end of the paragraph providing the 5% rate. This is an express statutory statement that the

5% rate shall apply to that part of the estate between \$40,000 and \$75,000 in value.

That this is to be interpreted in the context of this paragraph alone is certainly evident, since a clause of this type appears in this paragraph alone, and no similar language may be found in the paragraphs providing for the 3%, 8% or 10% tax brackets. This is reasonable, since the 5% bracket is the only bracket requiring adjustment where a \$40,000 exemption is claimed. Indeed, there is no other explanation which would justify the inclusion of this language at this precise point in the statute.

Any doubt that the legislative intent behind this section is as submitted above must be eliminated by a consideration of *In Re Walton's Estate*, 115 Utah 160, 203 P. 2d 393 (1949). The Walton case considered a number of questions in relation to the interpretation of Section 59-12-2. Most of them are not relevant to the instant problem; one of them, however, is. In discussing the exemption appropriate to the Walton estate, and what effect such exemptions would have on the sections herein described, the court said:

The first sentence of the second paragraph of Section 80-12-2, as amended, imposes 3% tax on that part of the net estate that exceeds \$10,000 and does not exceed \$25,000. But, the paragraph continues, if the property goes to certain specified people — "husband, wife and/or children" the "exemptions" are as high as \$40,000 if that amount of property so passes.

It seems clear that as the first tax to be imposed upon any part of an estate is the 3% of that

over \$10,000 and not to exceed \$25,000, there is at least \$10,000 exempt in all cases. Starting with this premise, it is reasonable to say that what the legislature had in mind was: In case of the specified heirs, they have an exemption as high as \$40,000 if the property going to them equals that amount. Assuming a net estate of \$24,000, if the property going to them is only \$100, the general exemption of \$10,000 applies and the 3% tax is on all above that \$10,000. If the property going to them is \$15,000, a 3% tax is payable upon the difference between the \$15,000 and the \$24,000. If in a larger estate the property going to them is \$26,000 there is no 3% tax due, but the 5% tax is payable upon the property in excess of \$26,000 and not exceeding \$75,000. If they receive property of \$41,000 valuation, *\$40,000 is exempt and 5% payable on all in excess of \$40,000 but not exceeding \$75,000.* (Emphasis supplied.)

A concurring opinion in this case by the esteemed former Chief Justice of the Supreme Court, James H. Wolfe, is perhaps even more explicit. He wrote "... if the property passing to the heirs designated by the statute exceeded \$40,000, up to the amount of \$75,000, the tax on the \$35,000 or any part thereof would be as provided on the general scale of \$25,000 to \$75,000 or 5%." He then illustrated the mathematical ramifications of the bracket system in chart form.

The Tax Commission in its interpretation of Section 59-12-2 has for many decades been consistent with the Walton case and the procedure and concepts set forth herein, whenever a \$40,000 exemption is claimed in an estate totaling more than \$40,000 in value; since the Wal-

ton case, this procedure has not been challenged, in so far as this office has been able to determine, and it has certainly never been successfully challenged.

The comments and arguments set forth earlier in this brief about the force and effect of a long standing administrative practice and interpretation apply with equal force here as in Point I. The same is true in relation to the duty of a taxpayer asserting an exemption to prove that he is entitled thereto, and the presumption existing against exemption in favor of the taxing authority, which have also been previously discussed.

In way of illustration, it may be of value to the court to set forth representative computations under Section 59-12-2. We will presume a net estate valued at \$100,000. The first computation illustrates the tax that would be properly imposed if only the \$10,000 exemption were appropriate:

\$	0	—	\$ 10,000	.....	Exempt
\$10,000	—	\$ 25,000	at 3%	.....	\$450
\$25,000	—	\$ 75,000	at 5%	.....	\$2500
\$75,000	—	\$100,000	at 8%	.....	\$2000
Total Tax					\$4950

This second computation shows tax due when the estate is eligible for the \$40,000 exemption:

\$	0	—	\$ 10,000	.....	Exempt
\$10,000	—	\$ 25,000	.....	Exempt	
\$25,000	—	\$ 40,000	.....	Exempt	
\$40,000	—	\$ 75,000	at 5%	.....	\$1750
\$75,000	—	\$100,000	at 8%	.....	\$2000
Total Tax					\$3750

Thus, the Legislature created a real benefit and concession in favor of those who leave their property, consistent with statutory directive, to their spouses and children. On the sample estate above set forth a \$1200 tax saving is effected — should the decedent leave all of his property to others than his immediate family, an inheritance tax of \$4950 would be due instead of a tax of only \$3750, which would be appropriate had family members been his heirs. Counsel for petitioner contended in a memorandum submitted to the lower court that the Tax Commission's and Supreme Court's interpretation of Section 59-12-2 in the Walton case would "put the direct heirs of the decedent in a disadvantageous position compared with collateral heirs" and favor "collateral heirs or strangers" over "surviving spouses or children." The fallacy of this contention is clearly demonstrated by the computations set forth above.

It is clear, of course, that if the position of counsel for the executrix is sustained in face of the Walton decision, the Tax Commission's long standing interpretation, and the decision of the lower court on this point, an even greater benefit would accrue to the spouses and children involved. The appropriate computation in this case would be as follows:

\$ 0 — \$ 10,000 .....	Exempt
\$10,000 — \$ 25,000 .....	Exempt
\$25,000 — \$ 40,000 .....	Exempt
\$40,000 — \$ 55,000 at 3% .....	\$450
\$55,000 — \$100,000 at 5% .....	\$2250
Total Tax .....	\$2700



It is respectfully submitted, however, that the Legislature clearly never intended that the computation should be made in this manner, and that such a computation would be at odds with both the spirit and the express wording of Section 59-12-2, Utah Code Annotated, 1953.

## CONCLUSION

Sections 74-4-3 and 74-4-4, Utah Code Annotated, 1953, require, unless the husband's will clearly designates to the contrary, that an election be made by the widow to take either under the terms of the will or accept her statutory distributive share. The will in the instant case does not so designate, and the State Tax Commission respectfully urges reversal of that part of the lower court's decision which states or implies that the will does so provide, or that the widow is entitled to take both under the statute and the will. It is prayed that that part of the court's decision dealing with inheritance tax rates, from which a cross-appeal has been taken by respondent in this case, be affirmed. It is further submitted that there are compelling and controlling case precedents which support both of these points in this jurisdiction, and that the best interests of the state of Utah and its citizens would be served by re-affirming the conclusions and principles set forth in these cases.

Respectfully submitted,

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