SMU | Dedman School of Law

SMU Law Review

Volume 15 | Issue 1 Article 3

January 1961

Widow's Election - A Study in Three Parts

Cecil A. Ray Jr.

COMMENTS

THE WIDOW'S ELECTION — A STUDY IN THREE PARTS

Cecil A. Ray, Jr.

Under the Texas community property system, each spouse has a vested interest in one half of the community property.[1] The husband, however, is given the exclusive power to manage and control the entire community estate, even to the extent of making inter vivos transfers, provided such transfers are not in fraud of the wife's rights.[2] Nevertheless, the husband's right of testamentary disposition extends only to his one-half interest in the community estate, *i.e.*, he has no absolute right of testamentary disposition over the community estate.[3] Upon the husband's death, the wife is vested with full management and control over her former community interest.[4] Whenever the will of a deceased spouse purports to dispose of more than one half of the community estate, or other property rights of the surviving spouse, but makes some provision for the surviving spouse from the deceased's own property, equity permits such a disposition under an election doctrine. The surviving spouse may (1) assent to the disposition by waiving any statutory rights that may be claimed, or (2) assert rights in the community property, thereby waiving any gift under the will.[5] Apparently, the "widow's

[1] Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935).

[2] Tex. Rev. Civ. Stat. Ann. art. 4619 (1960).

[3] Carroll v. Carroll, 20 Tex. 731, 743 (1858).

[4] See Tex. Rev. Civ. Stat. Ann. art. 4619 (1960); Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), cert. denied, 359 U.S. 913 (1959); Smitheal v. Smith, 31 S.W. 422 (Tex. Civ. App. 1895).

[5] 1 de Funiak, Community Property § 217 (1943). See generally Comment, 6 Baylor L. Rev. 84 (1953). In the early case of Philleo v. Holliday, 24 Tex. 38, 44 (1859), the Texas Supreme Court defined the doctrine as follows:

> The principle of election is, that he who accepts a benefit under a will, must adopt the whole contents of the instrument, so far as it concerns him; conforming to its provisions, and renouncing every right inconsistent with it. . . .

The Supreme Court of Texas in Dakan v. Dakan, 125 Tex. 305, 312, 83 S.W.2d 620, 624 (1935), expressed the election principle in an oft-quoted statement:

> Election is the obligation imposed upon a party to choose between two inconsistent rights . . . where there is a clear intention of the person from whom he derives one that he should not enjoy both, the principle being that one shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if legal and well founded, which would defeat or in any way prevent the full effect and operation of every part of the will . . . . The doctrine of election is generally regarded as being founded on the intention of the testator.

Since the determination of whether the husband's will disposes of the wife's property is a question of law and not a question of fact, Hodge v. Ellis, 154 Tex. 341, 277

election" doctrine is borrowed from the common law, which gives the widow a similar election when her dower rights are inconsistent with the deceased husband's will.[6]

The widow's election will may be a useful device in planning an estate when the entire estate or a substantial portion thereof consists of community property. In the usual widow's election will, the husband, who normally predeceases the wife, devises the residence to his wife in fee and places the residue of the estate, including the wife's community interest, in a testamentary trust which provides a life income to the wife and a distribution of corpus to the children upon the wife's death.[7] Ordinarily, the wife elects to take the life estate in the entire community, in lieu of her share of the community estate in fee.[8] The husband may also make a testamentary disposition of his separate property to a trust for the wife's benefit, conditioned upon the transfer of her separate property to the trust. The two transactions create similar problems and tax consequences.[9]

To insure the wife's election under the will at her husband's death, the "inter vivos election" was designed in several community property jurisdictions. The inter vivos election is a transaction whereby the wife executes an agreement electing to take under the provisions of the will and waiving her community property rights which are inconsistent with the provisions of the will. This agreement is executed during the lives of both spouses, hence the name "inter vivos election."

Numerous advantages may flow from the inclusion of a widow's election will in the estate plan; some of the most compelling are the favorable tax consequences when the wife elects to take under a properly drafted will. Aside from the tax advantages, other factors may make the use of such a will desirable.[10] The nature of

S.W.2d 900 (1955); but cf. Hocker v. Piper, 2 S.W.2d 997 (Tex. Civ. App. 1928) error ref. (instructed verdict that an election was presented), it is a proper question for summary adjudication. Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955).

[6] In a common-law jurisdiction, the wife may elect either (1) to accept the provisions of the husband's will in lieu of her dower rights or statutory rights in his property, or (2) to reject the benefits of his will and assert her rights at law. 1 de Funiak, op. cit. supra note 5, § 217.

[7] See Cohen, Drafting Tax Clauses in a Will—Acquisition of Surviving Spouse's Interest in an Estate, 1957 So. Calif. Tax Inst. 549.

[8] 1 Beveridge, Federal Estate Taxation § 5.08 (1956).

[9] See Annot., 156 A.L.R. 820 (1945).

[10] The most obvious non-tax factors are whether: (1) the wife desires the responsibility of managing and controlling the entire community after the husband's death; (2) the wife needs to be protected against her own inexperience and possible improvidence in business and the management of investments; (3) a life estate in the entire community will provide the wife with greater financial security than would outright ownership of one half; (4) the husband desires to preserve the property for his children or other chosen beneficiaries against possible dissipation by some future husband of the wife; or (5) the

the community property system, with the husband being the sole manager, presents the most important reason because the wife, often inexperienced in business, receives the benefit of the husband's experience through his estate plan.[11]

The purpose of this Comment is to develop the substantive law of the widow's election in Texas, to explore the theories behind the use of the inter vivos election, and to enumerate the tax consequences of a widow's election will. Throughout this Comment it is assumed that the wife survives the husband, unless the contrary is noted.

SUMMARY OF CONTENTS

property is of such a nature as to warrant an election, e.g., a large portion of the property consists of an integrated business or other inseparable assets which the husband wishes to be continued under a single, experienced management with the ultimate view that his son will eventually manage such property.

[11] As a practical matter, the husband may wish to write a letter to the wife to be delivered after his death, in an attempt to keep her from electing against the will and thereby destroying his estate plan. The purpose of such a letter is to explain the reasons which prompted him to incorporate a widow's election will into the estate plan. This approach may be especially helpful to the wife if she is inexperienced in business and not likely to retain all of the facts concerning the husband's estate plan which he explained to her during his lifetime. For a discussion of a letter to a widow see Estate Plans, Institute for Business Planning § 15,801.1. For an example of such a letter, although not discussing a widow's election will, see Casey, Estate Planning Forms, Institute for Business Planning § 25,103.

PART I: TEXAS SUBSTANTIVE LAW

I. THE DOCTRINE OF ELECTION

A. *The Decedent's Will*

1. *Intent to Dispose of the Wife's Property*

The husband's will does not present the wife with an election unless the court is assured that his intention is (1) that his wife shall be presented with the choice of either retaining the property she presently owns or receiving property under the will,[12] and (2) that she shall not enjoy both of these inconsistent rights.[13] The requisite intention is proved by showing that the husband attempted to make a testamentary disposition of his wife's property or property rights,[14] giving her some other property in its place.[15]

If the husband does not attempt to make a testamentary disposition of his wife's property rights, it follows that no election is presented;[16] hence, the wife does not surrender her property rights by accepting some interest under such a will,[17] since the will does not purport to control the title to her property.[18] Further, the wife is not estopped to claim her property rights at law as well as the benefits under such a will;[19] she is entitled to both.[20]

2. *Presumptions*

Historically, Texas courts have been reluctant to divest a widow of her ownership of one half of the community property.[21] Consequently, a presumption has arisen that a testator intends to limit his disposition to his own property,[22] in which the surviving spouse

[12] Evans v. Jacobs, 249 S.W.2d 98 (Tex. Civ. App. 1952) error ref. n.r.e.

[13] White v. Hebberd, 89 S.W.2d 482 (Tex. Civ. App. 1936).

[14] Colden v. Alexander, 141 Tex. 134, 171 S.W.2d 328 (1943); Chace v. Gregg, 88 Tex. 552, 32 S.W. 520 (1895); Wurth v. Scher, 327 S.W.2d 72 (Tex. Civ. App. 1959).

[15] Logan v. Logan, 112 S.W.2d 515 (Tex. Civ. App. 1937) error dism.

[16] Avery v. Johnson, 108 Tex. 294, 192 S.W. 542 (1917); Lee v. Powell, 285 S.W.2d 291 (Tex. Civ. App. 1955); Wolf v. Hartmangruber, 162 S.W.2d 112 (Tex. Civ. App. 1942); Baker v. Johnson, 64 S.W.2d 1037 (Tex. Civ. App. 1933); Swilley v. Phillips, 169 S.W. 1117 (Tex. Civ. App. 1914) error ref.; see Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), cert. denied, 359 U.S. 913 (1959).

[17] Swilley v. Phillips, supra note 16.

[18] Waller v. Dickson, 229 S.W. 893 (Tex. Civ. App. 1921).

[19] Campbell v. Campbell, 215 S.W. 134 (Tex. Civ. App. 1919) error ref.; Autrey v. Stubenrauch, 133 S.W. 531 (Tex. Civ. App. 1910) error ref.

[20] Ottenhouse v. Paysinger, 244 S.W.2d 714 (Tex. Civ. App. 1951).

[21] See Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), cert. denied, 359 U.S. 913 (1959). As a result, the presumption has arisen that property in the husband's possession upon the dissolution of the marriage is community unless proved otherwise by the one seeking to establish it as his own. Wolf v. Hartmangruber, 162 S.W.2d 112 (Tex. Civ. App. 1942).

[22] Avery v. Johnson, 108 Tex. 294, 302, 192 S.W. 542, 544 (1917); Long v. Long, 252 S.W.2d 235 (Tex. Civ. App. 1952) error ref. n.r.e.; Ford v. Bachman, 203 S.W.2d 630 (Tex. Civ. App. 1947) error ref. n.r.e.; Rippy v. Rippy, 49 S.W.2d 494 (Tex. Civ. App. 1932) error ref.

has no interest.[23] The electing spouse has the burden of rebutting this presumption.[24] This presumption (described as a "canon of construction" by one court)[25] may be overcome (1) by unequivocal language manifesting an intention to dispose of the survivor's property,[26] or (2) by "the strongest and most necessary implication" from the four corners of the document that the testator intends to dispose of another's property.[27] Thus, if not rebutted by express terms, the presumption stands unless the language "must be open to no other construction" than that the will disposes of the survivor's property.[28] It is insufficient, however, that the will *may* be construed to reveal an intention to dispose of the wife's property.[29] Finally, when the language itself does not rebut the presumption,[30] parol evidence may not contradict, add to, or explain the contents of the will; nor may parol evidence import an intention to deprive the survivor of her property if that intention is not displayed on the face of the instrument.[31] The reasons usually given for the use of this presumption are that (1) the decedent knows he cannot deprive his wife of her property rights and therefore he must evidence a clear intent to do so,[32] and (2) the law deprives no one of their property by mere conjecture.[33]

3. *Interpretations of the Language Used*

The husband's will is regarded as unambiguous and as presenting

[23] Ellis v. Scott, 58 S.W.2d 194 (Tex. Civ. App. 1933) error dism.

[24] Ibid.

[25] Arrington v. McDaniel, 4 S.W.2d 262 (Tex. Civ. App. 1928), modified, 14 S.W.2d 1009 (Tex. Comm. App. 1929).

[26] Baldwin v. Baldwin, 134 Tex. 428, 135 S.W.2d 92 (1940); Avery v. Johnson, 108 Tex. 294, 192 S.W. 542 (1917); Moss v. Helsley, 60 Tex. 426 (1883); Sailer v. Furche, 22 S.W.2d 1065 (Tex. Comm. App. 1930).

[27] Long v. Long, 252 S.W.2d 235, 242 (Tex. Civ. App. 1952) error ref. n.r.e.; Ford v. Bachman, 203 S.W.2d 630 (Tex. Civ. App. 1947) error ref. n.r.e.; Packard v. De Miranda, 146 S.W. 211, 214 (Tex. Civ. App. 1912) error ref.

[28] Lindsley v. Lindsley, 139 Tex. 512, 163 S.W.2d 633 (1942); Baldwin v. Baldwin, 134 Tex. 428, 135 S.W.2d 92 (1940); Cheatham v. Mann, 133 S.W.2d 264 (Tex. Civ. App. 1939) error ref.; McJunkin v. Republic Nat'l Bank, 131 S.W.2d 1085 (Tex. Civ. App. 1939) error dism. judgm. cor.

[29] Hocker v. Piper, 2 S.W.2d 997 (Tex. Civ. App. 1928) error ref.

[30] Avery v. Johnson, 108 Tex. 294, 192 S.W. 542 (1917); Moss v. Helsley, 60 Tex. 426 (1883); Ford v. Bachman, 203 S.W.2d 630 (Tex. Civ. App. 1947) error ref. n.r.e.; Pope v. Pope, 175 S.W.2d 289 (Tex. Civ. App. 1943); Whaley v. Quillin, 153 S.W.2d 969 (Tex. Civ. App. 1941) error ref.

It seems clear that the wife's subsequent acts are immaterial in interpreting whether the will actually presented an election situation, even if the acts would have effected an election had the language presented an election. Long v. Long, 252 S.W.2d 235 (Tex. Civ. App. 1952) error ref. n.r.e.

[31] Schelb v. Sparenberg, 133 Tex. 17, 124 S.W.2d 322 (1939); Whaley v. Quillin, supra note 30; Hocker v. Piper, 2 S.W.2d 997 (Tex. Civ. App. 1928) error ref.

[32] Lindsley v. Lindsley, 139 Tex. 512, 163 S.W.2d 633 (1942).

[33] Avery v. Johnson, 108 Tex. 294, 302, 192 S.W. 542, 544 (1917); Pope v. Pope, 175 S.W.2d 289 (Tex. Civ. App. 1943); Whaley v. Quillin, 153 S.W.2d 969 (Tex. Civ. App. 1941) error ref.

a clear case of election when it (1) specifically names or describes the wife's property,[34] or (2) devises "all that portion of land I own that lies between . . ." in contravention of the wife's community rights therein,[35] or (3) devises the north one half of a tract of land to the children of his first wife and the south one half of the same tract to the children of the second wife, thereby denying the children of his first wife the right to an *undivided* one half.[36] Conversely, a will is regarded as unambiguous and as presenting no election when the first person singular pronoun is accompanied by other words which are indicative of the testator's intention, *e.g.*, "land purchased by me before my marriage," "my separate estate," and "money that I may die possessed of in my separate right."[37]

When the first person singular pronoun is used alone, however, the testator's intention is not adequately expressed and the court must interpret the will as an ambiguous instrument. For example, the phrases "my estate" and "my property" do not show an unequivocal intent on the part of the testator to dispose of more than his share of the community property and do not rebut the presumption against such a testamentary disposition.[38] The result is not changed if the testator uses the first person singular pronoun standing alone in the dispositive provisions of the residuary clause, *e.g.*, "residue of my property,"[39] or "balance of my real estate,"[40] because the subject of the devise is still "my property."[41] Moreover, a devise of "one half of my property" disposes of only one half of the testator's one half of the community, *i.e.*, one fourth of the total

[34] Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900 (1955); Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955); Rogers v. Trevathan, 67 Tex. 406, 3 S.W. 569 (1887); Bumpass v. Johnson, 285 S.W. 272 (Tex. Comm. App. 1926); Leach v. Leach, 208 S.W.2d 618 (Tex. Civ. App. 1948) error ref. n.r.e.; Cheatham v. Mann, 133 S.W.2d 264 (Tex. Civ. App. 1939) error ref. But see Ford v. Bachman, 203 S.W.2d 630 (Tex. Civ. App. 1947) error ref. n.r.e., where a codicil which made a specific devise of a community property ranch to the wife for life, remainder to the husband's grandchildren, was held to pass only the husband's community interest in the ranch because the presumption against one's intending to devise another's property was not rebutted by clear language. It was reasoned that the specific language devising the ranch referred back to the residuary clause which disposed of "all of my estate," and thus no election was presented.

[35] Chace v. Gregg, 88 Tex. 52, 32 S.W. 520 (1895).

[36] Harkey v. Lackey, 259 S.W.2d 641 (Tex. Civ. App. 1953) error ref. n.r.e.

[37] Baker v. Johnson, 64 S.W.2d 1037 (Tex. Civ. App. 1933). See also Logan v. Logan, 112 S.W.2d 515 (Tex. Civ. App. 1937) error dism.

[38] Long v. Long, 252 S.W.2d 235 (Tex. Civ. App. 1952) error ref. n.r.e.; McDow v. Lund, 250 S.W.2d 247 (Tex. Civ. App. 1952) error ref.; Ottenhouse v. Paysinger, 244 S.W.2d 714 (Tex. Civ. App. 1951); Slavin v. Greever, 209 S.W. 479 (Tex. Civ. App. 1919); Payne v. Farley, 178 S.W. 793 (Tex. Civ. App. 1915).

[39] Ward v. Gohlke, 279 S.W.2d 422 (Tex. Civ. App. 1955) error ref.; Ford v. Bachman, 203 S.W.2d 630 (Tex. Civ. App. 1947) error ref. n.r.e.; Rippy v. Rippy, 49 S.W.2d 494 (Tex. Civ. App. 1932) error ref.

[40] Avery v. Johnson, 108 Tex. 294, 192 S.W. 542 (1917).

[41] Ibid.

community estate.[42] The following provisions dispose of only the testator's property and do not present the survivor with an election: (1) "property of which I die seized and possessed,"[43] (2) "all my estate,"[44] (3) "all my property,"[45] and (4) "all my estate of every kind whatsoever, real, personal, and mixed, separate and community."[46] In addition to the basic presumption that one does not intend to dispose of another's property, the following reasons compel a finding that the first person singular pronoun conveys only the testator's community interest: (1) the use of "seized and possessed" means ownership; thus, there is no intent to dispose of the survivor's share of the community,[47] and (2) "my" is expressive of an intent to dispose of only the testator's interest in the community.[48]

If a will is to present an election even though these possessive terms are used, the testator's intention to dispose of another's property must be clearly expressed by other provisions.[49] Circumstances may manifest an intention to dispose of the entire community estate although "my property" or similar terms are used.[50] Thus, if the husband makes a testamentary disposition of "all my property" but specifically describes the community property, reciting that it is his wife's separate property,[51] or otherwise describes the property in such a way as to evidence an intention to dispose of property which he does not own,[52] the plain intention of the language is to present an election.[53] Similarly, when the husband's will creates a trust for his wife and their son but the husband never owns sufficient property to establish the trust, it has been held that "my estate" includes the entire community because (1) it is used to describe the corpus of the trust, (2) it is used interchangeably with "our estate," and (3)

[42] Church of Christ v. Wildfong, 265 S.W.2d 622 (Tex. Civ. App. 1954).

[43] Sailer v. Furche, 22 S.W.2d 1065 (Tex. Comm. App. 1930); Gulf, C. & S.F. Ry. v. Brandenburg, 167 S.W. 170 (Tex. Civ. App. 1914) error ref.; Gibony v. Hutcheson, 50 S.W. 648 (Tex. Civ. App. 1899).

[44] Carroll v. Carroll, 20 Tex. 731 (1858); Wolf v. Hartmangruber, 162 S.W.2d 112 (Tex. Civ. App. 1942); Autrey v. Stubenrauch, 133 S.W. 531 (Tex. Civ. App. 1910) error ref.

[45] Pope v. Pope, 175 S.W.2d 289 (Tex. Civ. App. 1943); Sauvage v. Wauhop, 143 S.W. 259 (Tex. Civ. App. 1912) error dism.

[46] Waller v. Dickson, 229 S.W. 893 (Tex. Civ. App. 1921).

[47] Sailer v. Furche, 22 S.W.2d 1065 (Tex. Comm. App. 1930).

[48] Sauvage v. Wauhop, 143 S.W. 259 (Tex. Civ. App. 1912) error dism.

[49] Long v. Long, 252 S.W.2d 235 (Tex. Civ. App. 1952) error ref. n.r.e.

[50] Delevan v. Thom, 244 S.W.2d 551 (Tex. Civ. App. 1951).

[51] Cunningham v. Townsend, 291 S.W.2d 438 (Tex. Civ. App. 1956) error ref. n.r.e.

[52] Skaggs v. Deskin, 66 S.W. 793 (Tex. Civ. App. 1902).

[53] Farmer v. Zinn, 276 S.W. 191 (Tex. Comm. App. 1925). See also Baldwin v. Baldwin, 134 Tex. 428, 135 S.W.2d 92 (1940) (where the husband dealt with all of the personalty).

a special clause (in this case) requires the wife to elect.[54] Further, "all my estate" has been construed as referring to the entire community estate[55] when the wife is devised a life estate therein charged with the support of a daughter with a restriction being placed on the wife's power of sale and a clause stating that the husband intends that the wife elect.[56] Also, when an arbitrator, appointed by the husband to construe his will, finds that an election is presented, and it is not an unreasonable construction, the term "my estate" is held to encompass the entire community.[57] Finally, the practical interpretation placed on an ambiguous will by all of the interested parties, *viz.*, those acting under it throughout a period of years, although not controlling, is given considerable weight in arriving at a proper construction.[58] Hence, when the interested parties act for over fifteen years as if the will disposed of the entire community estate, the term "my estate" will be construed to be an attempt to encompass all of the community property that was held in the husband's name.[59]

B. *A Benefit Must Be Received By The Electing Spouse*

To present an election the will must contain an inducement to take thereunder by giving some benefit to the surviving spouse to which she would not be entitled at law.[60] The determinative factor is that the wife receives something under the will to which she is not otherwise entitled, and the relative values of the right surrendered and the right received are immaterial.[61] Of course, a testamentary disposition of the surviving spouse's property is essential, but if the wife does not receive a benefit under the will, she is not presented with an election although the will disposes of her property. Furthermore, such a will is ineffective unless she expressly ratifies it.[62]

---

[54] McJunkin v. Republic Nat'l Bank, 131 S.W.2d 1085 (Tex. Civ. App. 1939) error dism. judgm. cor.

[55] Cf. Munger v. Munger, 298 S.W. 470 (Tex. Civ. App. 1927) error ref.

[56] Dunn v. Vinyard, 251 S.W. 1043 (Tex. Comm. App. 1923).

[57] Couts v. Holland, 107 S.W. 913 (Tex. Civ. App. 1908) error ref.

[58] Baldwin v. Baldwin, 134 Tex. 428, 135 S.W.2d 92 (1940).

[59] Ibid.; cf. Colden v. Alexander, 141 Tex. 134, 171 S.W.2d 328 (1943).

[60] Mayo v. Tudor's Heirs, 74 Tex. 471, 12 S.W. 117 (1889); Dakan v. Dakan, 52 S.W.2d 1070 (Tex. Civ. App. 1932), aff'd, 125 Tex. 305, 83 S.W.2d 620 (1935). The person making the election may be prompted to do so by considerations other than the value of the property received. See Dunn v. Vinyard, 251 S.W. 1043 (Tex. Comm. App. 1923).

[61] Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955). It was held in Smith v. Butler, 85 Tex. 126, 19 S.W. 1083 (1892), that although the benefit received was smaller in value than the one surrendered, an election was presented.

[62] Campbell v. Campbell, 215 S.W. 134 (Tex. Civ. App. 1919) error ref.; McClary v. Duckworth, 57 S.W. 317 (Tex. Civ. App. 1900) error ref.

A discussion of when a benefit is actually received may be divided into two general classifications, *viz.*, benefits of a quantitative nature and benefits of a qualitative nature. Quantitatively speaking, the benefit may be a fee simple, a life estate, a leasehold, or other similar interests. Qualitatively speaking, the benefit may be community property, separate property, homestead rights, exempt property, and other statutory allowances.[63]

1. *Life Estate in the Entire Community*

In reference to the quantitative nature of the benefit, the will must give the donee "some free disposable property" which can become "compensation for what the testator sought to take away,"[64] and the benefit must be a material one.[65] A common benefit given the surviving spouse in lieu of her rights at law is a life estate in the entire community.[66] The courts have held that although (1) the life estate is charged with the support of the children, (2) the wife can not sell her interest therein, and (3) any excess above a comfortable living for the wife must be invested in interest-bearing securities for the remaindermen, the life estate is still regarded as a benefit.[67] Furthermore, if the wife predeceases her husband and devises him a life estate in the entire community estate[68] or in her separate property,[69] he receives a sufficient benefit to require an election. When the entire community estate and the homestead are placed in trust for the wife's benefit during her lifetime (in order to double her income) with the remainder to another, a material benefit is presented in lieu of the strict homestead right and her interest in the community.[70]

Closely akin to the life estate in the entire community and also considered a benefit is a gift of all the rents and revenue from the entire community estate to the wife for her lifetime,[71] or until she

[63] The qualitative nature of the benefit received is discussed in section II infra p. 100.

[64] Smith v. Butler, 85 Tex. 126, 19 S.W. 1083 (1892).

[65] Delevan v. Thom, 244 S.W.2d 551 (Tex. Civ. App. 1951).

[66] See Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955); Farmer v. Zinn, 261 S.W. 1073 (Tex. Civ. App. 1924), aff'd, 276 S.W. 191 (Tex. Comm. App. 1925); Lee v. McFarland, 46 S.W. 281 (Tex. Civ. App. 1898) error ref.

[67] Dunn v. Vinyard, 251 S.W. 1043 (Tex. Comm. App. 1923). In this case, however, there was a clause which stated that the husband intended that the wife elect.

[68] Leach v. Leach, 208 S.W.2d 618 (Tex. Civ. App. 1948) error ref. n.r.e.

[69] Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900 (1955).

[70] Delevan v. Thom, 244 S.W.2d 551 (Tex. Civ. App. 1951) (the wife was an invalid and of unsound mind). In the case of a joint will, a life estate in the entire community given to the survivor is a sufficient benefit to present an election situation. Chadwick v. Bristow, 146 Tex. 481, 208 S.W.2d 888 (1948); Dufner v. Haynen, 263 S.W.2d 662 (Tex. Civ. App. 1953) error ref. n.r.e.

[71] Dunn v. Vinyard, 251 S.W. 1043 (Tex. Comm. App. 1923); cf. Gilroy v. Richards, 63 S.W. 664 (Tex. Civ. App. 1901).

remarries.[72] The result is the same when the husband survives and the wife has made a similar disposition to him.[73] A will that gives the wife the delay rentals on oil and gas leases[74] or a one-half interest in the royalty due to the community free of community debts,[75] requires her to elect because of the benefit. Moreover, when the wife is devised the homestead in fee, *free of taxes*, in lieu of her community property rights, the requisite benefit is received.[76]

2. *Provisions of the Will in Excess of the Statute of Descent and Distribution*

Whether an election is presented when the benefits under the will exceed the rights under the law of descent and distribution is the subject of some conflict in the Texas cases. The same conflict exists if the benefits under the law of descent and distribution exceed those under the will. A vital distinction must be made between the cases involving separate property and those involving community property. When community property is involved, it is not clear whether the survivor's interest passes as an inheritance or is owned outright at law.[77] In theory, the survivor's interest in the community passes to her as an owner[78] and not as an inheritance. The courts have not resolved this question with particularity because in either event the survivor is entitled to one half of the community property upon an election against the will.[79] The Texas Supreme Court, in determining if a benefit is presented, recently held that when community property is involved, it is improper to compare what the beneficiary of the will received with what he would have received if there had been no will.[80] Rather, the test, followed by several cases,[81] is whether the benefit is something of which the survivor cannot be deprived

[72] Bumpass v. Johnson, 285 S.W. 272 (Tex. Comm. App. 1926).
[73] Cunningham v. Townsend, 291 S.W.2d 438 (Tex. Civ. App. 1956) error ref. n.r.e.
[74] Bradshaw v. Parkman, 254 S.W.2d 865 (Tex. Civ. App. 1953) error ref. n.r.e.
[75] Baldwin v. Baldwin, 134 Tex. 428, 135 S.W.2d 92 (1940).
[76] Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935).
[77] See Tex. Prob. Code Ann. § 45.
[78] Slavin v. Greever, 209 S.W. 479 (Tex. Civ. App. 1919).
[79] Logan v. Logan, 112 S.W.2d 515 (Tex. Civ. App. 1937) error dism.; Munger v. Munger, 298 S.W. 470 (Tex. Civ. App. 1927) error ref. See also Harkey v. Lackey, 259 S.W.2d 641 (Tex. Civ. App. 1953) error ref. n.r.e., where it was held that when the wife died intestate before the husband, the children were put to an election either to take under the husband's will, which attempted to dispose of the entire community estate, or to take their intestate share from the wife.
[80] Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955).
[81] Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900 (1955); Cunningham v. Townsend, 291 S.W.2d 438 (Tex. Civ. App. 1956) error ref. n.r.e.; Pope v. Pope, 175 S.W.2d 289 (Tex. Civ. App. 1943).

without her consent. In other cases,[82] however, language may be found indicating that an election is presented between the will and rights under the "laws of descent and distribution" when one exceeds the other. Nevertheless, "laws of descent and distribution" correctly refer only to the survivor's community which is owned outright at the decedent's death; therefore, the survivor's inheritance if there had been no will should be immaterial.

When separate property is involved, the above rationale is not applicable because there is no separate property counterpart of section 45 of the Texas Probate Code. In *Von Koenneritz v. Hardcastle*[83] and *Fairbanks v. McAllen*,[84] the argument that an inconsistency between the "laws of descent and distribution" and the will presented an election situation was rejected. In *White v. Hebberd*,[85] the inconsistency apparently was between the will and the laws of intestacy. However, since the husband accepted a benefit under the will he was estopped to elect against it. No other Texas case has considered the question of whether the surviving spouse has the right to reject the will and take under the laws of intestacy when separate property is involved.

It is believed that no Texas court will allow a surviving spouse to elect against the will and claim anything other than his rights of homestead, exempt property, and allowances. The surviving spouse may not take his intestate share upon electing against the will except to the extent that the decedent dies intestate as to some part of his estate.[86] The reason for this conclusion is that a testator does not intend to die intestate as to any part of his estate which is disposed of by the will; thus, the laws of descent and distribution are inapplicable. Furthermore, section 45 of the Texas Probate Code should be construed as merely stating the rights of the husband and the wife in the community property. Only insofar as this section controls the decedent's one half of the community should it be held to be a statute of descent and distribution as to the surviving spouse.

3. *Life Estate in the Decedent's Separate Property*

A will that provides the wife with a life estate in the husband's separate property subject to the homestead rights and separate per-

[82] Cheatham v. Mann, 133 S.W.2d 264 (Tex. Civ. App. 1939) error ref.; Langston v. Robinson, 253 S.W. 654 (Tex. Civ. App. 1923). See also Caddell v. Lufkin Land & Lumber Co., 234 S.W. 138 (Tex. Civ. App. 1921), aff'd, 255 S.W. 397 (Tex. Comm. App. 1923).

[83] 231 S.W.2d 498 (Tex. Civ. App. 1950) error ref. n.r.e.

[84] 170 S.W.2d 581 (Tex. Civ. App. 1943) error ref. (The inconsistency was between the homestead rights at law and the will.)

[85] 89 S.W.2d 482 (Tex. Civ. App. 1936).

[86] See 4 Page, Wills § 1388 (lifetime ed. 1941).

sonalty,[87] or a fee in separate property which is subject to the homestead rights,[88] contains the requisite benefit. The same is true when the surviving spouse is entitled to one half of the personalty and she is bequeathed all of the personalty,[89] or all of the household furniture.[90]

4. *Other Benefits*

The most extreme examples of wills which have been held to confer the requisite benefit are found in two early Texas Supreme Court cases. In *Rogers v. Trevathan*,[91] a life estate in one half of the entire community (including the homestead) was devised to the wife and the other one half was devised to the children. The court held that although the husband devised the wife's property to another, a benefit was present because otherwise she would not have been entitled to a homestead since the estate was solvent and under the law at that time a solvent estate was subject to partition. In *Wells v. Petree*,[92] the advantage that accrued to the children from maintaining the estate intact was held to be a benefit sufficient to require an election.

C. *Inconsistent Rights Of The Survivor At Law And Under The Will*

The benefit under the decedent's will must be inconsistent with the surviving spouse's rights at law, or no election is presented. The rights under the will and at law are clearly inconsistent when the wife cannot take both without disappointing the will.[93] In other words, the wife's enjoyment of her rights at law must defeat some provision of the will and she must relinquish some legal right or interest in her property if she takes under the will.[94] When these

[87] Evans v. Jacobs, 249 S.W.2d 98 (Tex. Civ. App. 1952) error ref. n.r.e.

[88] Whaley v. Quillin, 153 S.W.2d 969 (Tex. Civ. App. 1941) error ref.; Nelson v. Lyster, 74 S.W. 54 (Tex. Civ. App. 1903).

[89] Smith v. Butler, 85 Tex. 126, 19 S.W. 1083 (1892); Skaggs v. Deskin, 66 S.W. 793 (Tex. Civ. App. 1902).

[90] Pryor v. Pendleton, 92 Tex. 384, 47 S.W. 706, rev'd on rehearing, 92 Tex. 387, 49 S.W. 212 (1899).

[91] 67 Tex. 406, 3 S.W. 569 (1887).

[92] 39 Tex. 419 (1873) (decided by reconstruction court and not binding as authority).

[93] See Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900 (1955); McWhorter v. Gray, 4 S.W.2d 302 (Tex. Civ. App. 1928); Nelson v. Lyster, 74 S.W. 54 (Tex. Civ. App. 1903).

[94] Dakan v. Dakan, 52 S.W.2d 1070 (Tex. Civ. App. 1932), aff'd, 125 Tex. 305, 83 S.W.2d 620 (1935).

factors exist, the wife must make a choice[95] regardless of the relative value of the rights exchanged.[96]

Conversely, if the wife can assert her rights at law and not frustrate any provision of the will, no election is required.[97] For example, no inconsistency exists when part of the estate is not devised by the will and the beneficiary under the will also claims her portion thereof as the surviving spouse.[98] When the will specifically provides, however, that one right, *e.g.*, a life estate in one half of the community, is devised to the wife *in lieu* of her rights in the entire community, an election is presented because of the inconsistency.[99]

Probably the most common case of inconsistent rights occurs when the husband's will disposes of the entire community estate in disregard of the wife's community interest by devising a life estate in the entire community to her, remainder to another.[100] On the other hand, when the husband's will clearly does not dispose of his wife's property, but devises a life estate in his own property to her, she does not surrender her title to one half of the community estate by electing under the will, because taking under the will is not inconsistent with her claim of absolute ownership of one half of the community estate.[101]

D. *Electing Spouse Must Adopt The Entire Contents Of The Will*

At the heart of the doctrine of election is the rule of *law* that one who accepts a benefit under the will must adopt the entire contents of the will. Every right inconsistent with the will must be renounced,[102] including any other interest in property of which the

[95] Bumpass v. Johnson, 285 S.W. 272 (Tex. Comm. App. 1926).

[96] Baldwin v. Baldwin, 134 Tex. 428, 135 S.W.2d 92 (1940); Bumpass v. Johnson, supra note 95.

[97] Logan v. Logan, 112 S.W.2d 515 (Tex. Civ. App. 1937) error dism.; Baker v. Johnson, 64 S.W.2d 1037 (Tex. Civ. App. 1933); Rippy v. Rippy, 49 S.W.2d 494 (Tex. Civ. App. 1932) error ref. In Philleo v. Holliday, 24 Tex. 38 (1859), although a benefit was presented, no election was required because the rights were not inconsistent.

[98] Packard v. De Miranda, 146 S.W. 211 (Tex. Civ. App. 1912) error ref.

[99] Wells v. Petree, 39 Tex. 419 (1873). Although this case was decided by the reconstruction court, the result seems logically correct on this point.

[100] See Chace v. Gregg, 88 Tex. 552, 32 S.W. 520 (1895); Dunn v. Vinyard, 251 S.W. 1043 (Tex. Comm. App. 1923).

[101] Avery v. Johnson, 108 Tex. 294, 192 S.W. 542 (1917); Campbell v. Campbell, 215 S.W. 134 (Tex. Civ. App. 1919) error ref.; Hutchens v. Dresser, 196 S.W. 969 (Tex. Civ. App. 1917) error dism.; Swilley v. Phillips, 169 S.W. 1117 (Tex. Civ. App. 1914) error ref.; Sauvage v. Wauhop, 143 S.W. 259 (Tex. Civ. App. 1912) error dism.; Haby v. Fuos, 25 S.W. 1121 (Tex. Civ. App. 1894).

[102] Miller v. Miller, 149 Tex. 543, 235 S.W.2d 624 (1951); Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935); Smith v. Butler, 85 Tex. 126, 19 S.W. 1083 (1892); Philleo v. Holliday, 24 Tex. 38 (1859); Harkey v. Lackey, 259 S.W.2d 641 (Tex. Civ. App. 1953) error ref. n.r.e.; White v. Hebberd, 89 S.W.2d 482 (Tex. Civ. App. 1936); Gilroy v. Richards, 63 S.W. 664 (Tex. Civ. App. 1901).

will disposes.[103] In other words, the beneficiary under the will must not occupy inconsistent positions with reference to any provision of the will.[104] Thus, it is impossible to accept the favorable provisions of the will and repudiate its unfavorable provisions.[105]

E. *Equitable Estoppel*

On occasion courts have resorted to a doctrine of equitable estoppel which precludes the wife from occupying inconsistent positions with reference to the will.[106] Generally, when a person pursues some course of conduct or asserts a particular right or claim with full knowledge of the facts and of his rights, he is estopped in equity from assuming a subsequent position which is inconsistent with his former conduct if such action would be to the detriment of another. Therefore, when the wife has full knowledge of the condition and extent of her husband's estate and of her duty to choose between inconsistent rights, her election under one provision of the will estops her from contesting the other provisions of the will.[107] Equity implies a condition that acceptance of a single benefit under a will, to which one is not otherwise entitled, is acceptance of the will's entire contents; and the electing spouse is estopped to claim an inconsistent right[108] when another person may be harmed thereby.[109]

---

[103] Wurth v. Scher, 327 S.W.2d 72 (Tex. Civ. App. 1959); Fairbanks v. McAllen, 170 S.W.2d 581 (Tex. Civ. App. 1943) error ref.

[104] Paschal v. Acklin, 27 Tex. 174 (1863); Smith v. Negley, 304 S.W.2d 464 (Tex. Civ. App. 1957); Slavin v. Greever, 209 S.W. 479 (Tex. Civ. App. 1919) (dictum); Nelson v. Lyster, 74 S.W. 54 (Tex. Civ. App. 1903).

[105] Gillman v. Gillman, 313 S.W.2d 931 (Tex. Civ. App. 1958) error ref. n.r.e.; Dufner v. Haynen, 263 S.W.2d 662 (Tex. Civ. App. 1953) error ref. n.r.e.

[106] See, e.g., Dunn v. Vinyard, 234 S.W. 99 (Tex. Civ. App. 1921), rev'd on other grounds, 251 S.W. 1043 (Tex. Comm. App. 1923). (The commission of appeals held that it was a question of fact whether the wife elected and it was not a proper subject for an instructed verdict.) Where the husband does not devise property other than his own, he is not estopped. Lee v. Powell, 285 S.W.2d 291 (Tex. Civ. App. 1955); Gulf, C. & S.F. Ry. v. Brandenburg, 167 S.W. 170 (Tex. Civ. App. 1914) error ref.

[107] Bumpass v. Johnson, 285 S.W. 272 (Tex. Comm. App. 1926); Gillman v. Gillman, 313 S.W.2d 931 (Tex. Civ. App. 1958) error ref. n.r.e.; Von Koenneritz v. Hardcastle, 231 S.W.2d 498 (Tex. Civ. App. 1950) error ref. n.r.e.; Logan v. Logan, 112 S.W.2d 515 (Tex. Civ. App. 1937) error dism.; Langston v. Robinson, 253 S.W. 654 (Tex. Civ. App. 1923). If the wife does not know or understand the effect of her acts, she is not estopped by her election. Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), cert. denied, 359 U.S. 931 (1959); White v. Blackman, 168 S.W.2d 531 (Tex. Civ. App. 1942) error ref. w.o.m.; Payne v. Farley, 178 S.W. 793 (Tex. Civ. App. 1915).

[108] Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935); Cunningham v. Townsend, 291 S.W.2d 438 (Tex. Civ. App. 1956) error ref. n.r.e.; Bradshaw v. Parkman, 254 S.W.2d 865 (Tex. Civ. App. 1953) error ref. n.r.e.; Leach v. Leach, 208 S.W.2d 618 (Tex. Civ. App. 1948) error ref. n.r.e.; Skaggs v. Deskin, 66 S.W. 793 (Tex. Civ. App. 1902). Of course, where no benefit is received which is inconsistent with the wife's rights at law, she is not estopped by accepting under the will. Autrey v. Stubenrauch, 133 S.W. 531 (Tex. Civ. App. 1910) error ref.

[109] Ellis v. Scott, 58 S.W.2d 194 (Tex. Civ. App. 1933) error dism.; contra, when the other beneficiaries are not harmed, Pryor v. Pendleton, 92 Tex. 384, 47 S.W. 706,

Although language in some cases indicates that a distinction may be drawn between equitable estoppel and the rule of law that the electing spouse must adopt the entire contents of the will, close examination reveals no real difference. In Texas, because of the blended system of law and equity, any difference is only superficial.

II. Property Subject to the Election

A. *Rights Of Surviving Spouse At Law And By Will*[110]

A consideration of the surviving spouse's rights at law is necessary in order to determine whether the decedent's will disposes of these rights. The rights of a surviving spouse may be divided into two classes: (1) those of which the decedent spouse may make a testamentary disposition without the survivor's consent, and (2) those of which the decedent spouse may not make a testamentary disposition without the survivor's consent.[111] An example of the first class is the right of the surviving spouse to take as an heir under the laws of descent and distribution in case of intestacy.[112] Examples of the second class are (1) the survivor's one-half interest in the community estate,[113] (2) the homestead right or the allowance in lieu thereof,[114] (3) the exempt property or the allowance in lieu there-

rev'd on rehearing, 92 Tex. 387, 49 S.W. 212 (1899). (On rehearing the wife was held to have received a benefit which required her to elect, apparently to the detriment of the other beneficiaries.) A common example of the application of the doctrine of estoppel when the surviving spouse takes benefits under the will is the case of joint and mutual wills. Murphy v. Slaton, 154 Tex. 35, 273 S.W.2d 588 (1954); Chadwick v. Bristow, 146 Tex. 481, 208 S.W.2d 888 (1948); Dufner v. Haynen, 263 S.W.2d 662 (Tex. Civ. App. 1953) error ref. n.r.e. Although Texas does not allow the electing spouse to repudiate the election, some states do allow a repudiation when unusual circumstances prevail. See Annot., 81 A.L.R. 740 (1932), supplemented, 71 A.L.R.2d 943 (1960).

[110] At common law the surviving widow has a right of dower in one third of the real estate which her husband owned and which passes to her children by him. This is in the form of a life estate. Curtesy is the surviving husband's right to a life estate in all of the wife's property which passes to their children, if such children are born alive and capable of inheriting the property. Where the husband's intention, as shown in his will, is not apparent, a devise is presumed in addition to the wife's dower rights. Where, however, the husband shows a clear intent to make a gift in lieu of dower, then the full effect is given to the intention and an election is presented. In many states, the common-law rule has been changed by statute so that a provision in a will is presumed to be in lieu of dower, unless the intention is that it be in addition to dower. In such a case, an election is not necessary. See generally 4 Page, op. cit. supra note 86, at §§ 1350, 1351, 1352, 1353.

[111] 4 Page, op. cit. supra note 86, § 1394, at 12. Of course, it is possible to draft the husband's will in such a way as to prevent the wife from claiming the benefits under the will and also those of the statute, and to provide that she will be presented with an election as to which she will take.

[112] Tex. Prob. Code Ann. § 37.

[113] Tex. Const. art. 16, § 15; Tex. Rev. Civ. Stat. Ann. art. 4619 (1960); Tex. Prob. Code Ann. § 45.

[114] Tex. Const. art. 16, §§ 50, 51, 52; Tex. Rev. Civ. Stat. Ann. art. 4618 (1960); Tex. Prob. Code Ann. §§ 271-85.

of,[115] and (4) the family allowance.[116] The doctrine of election is concerned primarily with only the second class, as an election is not presented unless two inconsistent and valid rights are in existence at the same time.[117]

B. *Community Property*

As stated earlier, an attempted testamentary disposition of more than the testator's one half of the community presents the surviving spouse with an election.[118] The survivor may take either his or her community interest at law or the benefits under the decedent's will.[119] The husband's will need not dispose of every item of the community estate because particular provisions of the will may present the wife with an election. Consequently, each provision must be examined to determine if an election is required.[120] If one provision disposes of the wife's community interest in exchange for some benefit, an election situation is presented regardless of the effect of the other provisions of the will.[121] If the husband's will does not attempt to devise his wife's community interest to a third party but instead gives it to her outright, she is not put to an election and may take her community interest in addition to the benefits under the will.[122]

C. *Homestead Or Allowance In Lieu Thereof*

In Texas, the surviving spouse has a right to the use and occupancy of the homestead for as long as he or she may elect.[123] Upon the death of the first spouse, this peculiar right of homestead passes to the survivor. Under the Texas Constitution the homestead property passes according to the laws of descent and distribution, the same as other real property, but it may not be partitioned among the heirs so long as the survivor elects to use it.[124] It is immaterial that the title to the property which is subject to the homestead, *i.e.*, "the

[115] Tex. Const. art. 16, § 49; Tex. Prob. Code Ann. §§ 271-81.

[116] Tex. Prob. Code Ann. §§ 286-93.

[117] 4 Page, op. cit. supra note 86, § 1394.

[118] There is a presumption that the husband intends to dispose of only his interest by his will. See cases cited in note 22 supra.

[119] Delevan v. Thom, 244 S.W.2d 551 (Tex. Civ. App. 1951).

[120] Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955).

[121] See ibid.

[122] Miller v. Miller, 149 Tex. 543, 235 S.W.2d 624 (1951).

[123] The homestead is an exemption created early in the history of the Texas Republic. Its purpose at the time of creation was to encourage colonization of the frontier. In general, the homestead is protected from forced sale, mortgages, deeds of trust, and liens. Tex. Const. art. 16, § 50. The homestead property consists of not more than 200 acres in the rural area and of city lots of not more than $5,000 in value at the time of acquisition, provided that it is used as a home or place of business. Tex. Const. art. 16, § 51.

[124] Tex. Const. art. 16, § 52.

underlying property," has vested in the heirs or is the separate property of the decedent, to which the survivor has no claim.[125] The husband may not deprive his wife and children of the homestead right by withdrawing the estate from administration in the county court because equity will intervene and set the estate aside to the wife as her homestead.[126] If there is no homestead, the Texas Probate Code provides for an allowance to the survivor in lieu of homestead.[127] Election under the will does not preclude the wife's claim for an allowance in lieu of homestead unless the will expressly so provides.[128]

As previously indicated, the statute apparently does not contemplate that the survivor's rights in the homestead will be defeated merely by title descending and vesting in another person. An examination of the cases, however, reveals that an attempt by the decedent to make a testamentary disposition of the underlying property may terminate the homestead right. Thus, when the underlying property is devised to one who is not entitled to assert the right of homestead, without mentioning that the surviving spouse has a homestead right therein or that the provisions of the will are to be accepted in lieu of the homestead right, that right may be lost. Although the cases apparently recognize the principle that the surviving spouse is faced with an election between the provisions of the will and her homestead rights only when the testator clearly intends that the survivor is not to enjoy both, it is impossible to predict with certainty when it will be held that the testator intends to dispose of the survivor's homestead rights as well as the underlying property.

1. *Cases Which Present No Election*

The cases holding that no election is required between the homestead rights at law and the provisions of the will are few in number, with relatively simple facts. In *Whaley v. Quillin*,[129] the wife was not presented with an election when her husband's will devised her the fee simple title to the underlying property because her acceptance of the fee encompassd the homestead rights which were attached to the property. However, by accepting the fee she may have elected to take under the will and renounce all inconsistent rights.[130]

[125] Wicker v. Rowntree, 185 S.W.2d 150 (Tex. Civ. App. 1945) error ref. w.o.m.
[126] Runnels v. Runnels, 27 Tex. 515 (1864).
[127] Tex. Prob. Code Ann. § 273 (not to exceed $5,000).
[128] Lieber v. Mercantile Nat'l Bank, 331 S.W.2d 463 (Tex. Civ. App. 1960) error ref. n.r.e.
[129] 153 S.W.2d 969 (Tex. Civ. App. 1941) error ref.
[130] Nelson v. Lyster, 74 S.W. 54 (Tex. Civ. App. 1903).

a. *When the Underlying Property is Community.*—Often it is difficult to determine if the election is caused by the community nature of the underlying property or by the conflict between the homestead rights and the will. In *Mitchell v. Thompson,*[131] the will did not clearly show whether the husband intended to devise the entire community estate or only his one-half interest therein to his daughter. The court held that the presumption that he intends to dispose of only his interest was applicable, and even if he intended to devise the entire community estate, such a devise would be ineffective unless the wife made an express election to take under the will. The wife, however, continued to occupy the homestead secured to her by the Texas Constitution and did not elect to take under the will. Hence, the daughter was only entitled to one half of the community. In *Smith v. Butler,*[132] the husband's will disposed of the entire community, consisting of two tracts. It was held that the wife's homestead right was not defeated by this disposition because she was not presented with an election between the homestead and the will. The homestead tract and the personalty were devised to the wife for life, remainder to the daughter and her children, and the non-homestead tract was devised to the son. Although the wife elected to abide by her husband's testamentary disposition of the community property, she was held to be entitled to her homestead rights as well as to the exempt personalty. It is believed that this case correctly states the rule pertaining to election whether the homestead is attached to community property or separate property.

b. *When the Underlying Property is Separate.*—In light of the constitutional provisions, it seems clear that the surviving spouse's homestead rights are not defeated by the decedent's testamentary disposition of the underlying separate property, nor is the survivor presented with an election between the provisions of the will and the homestead rights. Accordingly, in *Haby v. Fuos,*[133] the husband made a testamentary disposition of an undivided one half of his separate property, which was subject to the homestead, to his wife in fee; the other undivided one half was devised to her for life, remainder to the heirs of X. In a suit brought by the heirs of X for their undivided one half, it was held that the wife did not have to elect because the husband did not dispose of anything belonging to her; hence, the heirs of X did not recover their undivided one

[131] 286 S.W. 642 (Tex. Civ. App. 1926), rev'd on other grounds, 292 S.W. 862 (Tex. Comm. App. 1927).
[132] 85 Tex. 126, 19 S.W. 1083 (1892).
[133] 25 S.W. 1121 (Tex. Civ. App. 1894).

half. Furthermore, her acts in taking inventory of the estate did not impair her rights to the homestead.[134]

2. *Cases Presenting an Election*

An analysis of the cases holding that the surviving spouse must elect between the homestead rights at law and the benefits under the will demonstrate that the principal question is whether the sole cause of the election is the inconsistency between the disposition of the underlying property and the homestead rights. If the will expressly states that the wife is to take its benefits in lieu of her homestead rights, rather than the homestead itself, an election is clearly presented.[135] Normally the husband may not encumber the homestead; but when the wife is the only one who can complain, she must either accept the benefits of the will or retain the homestead privilege.[136]

a. *When the Underlying Property is Community.*—Often the courts do not distinguish between an inconsistency in the survivor's community rights vis-á-vis the will and the homestead rights vis-á-vis the will. In *Wichita Valley Ry. v. Somerville*,[137] the husband made a testamentary disposition of hotel property, which was owned as community property and used as a homestead, by giving a life estate in the rents to his wife, with the remainder to his son in fee. His wife also received a bequest of the hotel furniture. Her subsequent joinder in a deed of the fee and of the personal property was held not to be an election to accept the benefits under the will in lieu of her community and homestead rights. The reason was that it was equally possible that the son rather than the wife claimed the furniture (to which the wife had only an undivided interest at law). Apparently, this court first looked to see if the wife had in fact elected before deciding if the will presents an election situation; this approach appears to be incorrect.

In *Martin v. Moran*,[138] an election was found between: (1) the wife's right to an allowance in lieu of homestead, and (2) the terms of the husband's will, directing that the entire community estate of $3,000 be used to erect five houses. The wife was to receive a life

[134] The court held that the only question was whether the estate was insolvent, thus entitling the wife to an absolute fee under section 279 of the Texas Probate Code, or solvent, thus entitling the wife to a life estate, remainder to the heirs of X. In either event her right could not be defeated by the husband's testamentary disposition. Section 279 was declared unconstitutional by Lacy v. Lockett, 82 Tex. 190, 17 S.W. 916 (1891), insofar as it attempts to pass the homestead to the wife in fee.

[135] McCormick v. McNeel, 53 Tex. 15 (1880).

[136] Ibid.

[137] 179 S.W. 671 (Tex. Civ. App. 1915).

[138] 32 S.W. 904 (Tex. Civ. App. 1895).

estate in one of the houses and a portion of the rentals from the others, but she collected all of the rentals, apparently repudiating the will. It seems that the wife received the equivalent of a homestead by collecting the entire rental from the properties. Nevertheless, if she had claimed the entire $3,000 she might have been entitled to it as an allowance in lieu of the homestead and exempt property. The only inconsistency compelling the wife to elect seems to be between the wife's community rights and the provisions of the will, rather than between the will and the homestead. Apparently the court also determined, although incorrectly, that the survivor had elected in fact before ascertaining whether she was presented with an election.

In *Fairbanks v. McAllen*,[139] the wife devised the community property homestead to X, as long as X remained single, remainder over to the four children, and bequeathed all of her personal property to her husband.[140] The husband's right to the homestead and one half of the personalty "under the laws of descent and distribution" was held inconsistent with the provisions of the will bequeathing all personalty to him but depriving him of the homestead.[141] Therefore, his election to take all of the personalty under the will would preclude him from claiming the homestead "under the laws of descent and distribution." Any implication that an election must be made between the will and rights "under the laws of decent and distribution" appears to be incorrect unless the latter phrase encompasses only the husband's community interest. Nevertheless, the court correctly required an election because of the inconsistency between the statutory homestead right and the terms of the will.

In *Delevan v. Thom*,[142] the husband placed the entire community estate in trust for his wife's support and maintenance because she was unable to care either for herself or her property, and he gave the trustee specific powers over the homestead, *e.g.*, to sell in certain instances. The court correctly ruled that the trustee's powers were inconsistent with the wife's use and occupancy of the homestead; therefore, the wife was presented with an election.

In *Evans v. Jacobs*,[143] the husband made a testamentary disposition of the 213 acre homestead tract to his wife for life, remainder to the four children. Although one half of this land was community and the other half was his separate property, the will recited that the

[139] 170 S.W.2d 581 (Tex. Civ. App. 1943) error ref.
[140] Cash, stock, and bonds in the amount of $74,377.
[141] Tex. Prob. Code Ann. § 45. Apparently the personal property was community.
[142] 244 S.W.2d 551 (Tex. Civ. App. 1951).
[143] 249 S.W.2d 98 (Tex. Civ. App. 1952) error ref. n.r.e.

entire tract was his separate property. The court held that since the husband's will disposed of the entire community, the wife was presented with an election to take either her half of the community or a life estate in the 213 acres. The wife accepted the life estate under the will. Under these facts, the only inconsistency requiring an election seems to be between the life estate in the husband's separate property and his community interest vis-á-vis the wife's community interest which he disposed of under the will. Notwithstanding this inconsistency, the wife still should be able to enjoy her homestead rights in the underlying property since the right of homestead is not inconsistent with either of these rights.[144]

b. *When the Underlying Property is Separate.*—When separate property is involved, it is usually easier to determine if an inconsistency between the will and the homestead rights exists, requiring the survivor to elect. Generally, when the will places the underlying property in trust, it is so encumbered that the surviving spouse must elect between the will and the homestead rights. For example, in *Lindsley v. Lindsley*,[145] the trustee's power over the husband's separate property was held inconsistent with the wife's homestead right therein, resulting in an election situation. The court stated:

> The deceased spouse may not by testamentary provisions deprive the survivor of the use and occupancy of the homestead. . . . [T]he will does not by "express words" exclude the right sought to be enjoyed by the surviving widow with respect to the homestead. . . . By this we mean that the will does not in terms say that the bequests are to be accepted in lieu of the homestead or exempt personal property rights. . . .

Nevertheless, since the trustee was empowered to *operate and rent* the property until delivered to the residuary legatee, the court found this power inconsistent with the wife's right of use and occupancy as a homestead.[146] Furthermore, since the wife actually elected under the will, she was precluded from asserting her homestead rights in addition to the benefits received under the will. The result of this

[144] Subsequently the wife ceased to reside on the homestead property and deeded 45 acres to X in fee, and all of her right, title, and interest in the remainder to him in fee also. It was held that she could not convey a fee simple interest because all she acquired under the will was a life estate. Since the homestead does not pass by the will but arises under the constitution, merely because the wife does not receive the homestead (or if she does receive it, later abandons it) should not prevent her from conveying the life estate which she acquired by virtue of her election under the will. See Tex. Rev. Civ. Stat. Ann. art. 1290 (1945).

[145] 139 Tex. 512, 163 S.W.2d 633 (1942).

[146] In this case the husband devised his entire separate estate to the executor and trustee with directions that the wife was to receive the residence and 20 acres of the 500 acre farm in fee, that other specific devisees were to receive 60 acres, and that the remainder was to be given to Southern Methodist University.

case may be questioned, however, on the theory that the trustee took the trust property *subject to* the homestead rights of the wife; thus, no election was presented.

In *Wicker v. Rowntree*,[147] the wife made a testamentary disposition of her separate property, which was burdened with her husband's homestead rights, to the husband and the two daughters,[148] share and share alike. The husband claimed one third of the property in fee under the will and also the homestead rights at law as the surviving spouse. The court held that he was presented with an election to renounce his rights under the will and enjoy the homestead or to renounce his homestead rights and share equally with his daughters under the will.[149] It is believed that this result is incorrect. No election should be found under these facts because the exclusive right of the surviving spouse to use and occupy the underlying property as homestead is no more inconsistent with the fee ownership of the property than any other possessory interest. Carried to its logical end, this result would apparently prohibit one spouse from possessing a homestead right in the other's separate property. Moreover, the testamentary disposition of a decedent should not destroy the survivor's homestead right any more than the husband's inter vivos conveyance of the underlying property destroys the homestead right when it is not made in accordance with the applicable statutes.[150] The Texas Constitution, providing that the property burdened with the homestead passes by the laws of descent and distribution, does not contemplate the result reached by this case. Thus, to avoid an election situation under this decision, the testator should expressly provide that the property is devised subject to the homestead rights of the surviving spouse.

[147] 185 S.W.2d 150 (Tex. Civ. App. 1945) error ref. w.o.m.

[148] One daughter was married and the other was a feme sole; thus neither was entitled to the homestead.

[149] The court recognized that: (1) the husband may enjoy a homestead in the wife's separate property; (2) the wife may not deprive him of the homestead by her will; (3) the homestead is not inherited but is a creation of the Texas Constitution; (4) since the will does not expressly present the husband with an election, it must be determined by manifest implication that it was the wife's intent to exclude him from the enjoyment of the homestead right; (5) the enjoyment of a one-third fee simple interest by each of the two daughters is inconsistent "with the exclusive right to use and occupy the entire estate throughout his life should he choose"; (6) the fact that the husband may enjoy his homestead right in the entire tract and at the same time enjoy a fee simple title to an undivided one third is not the test, i.e., "his claim must not defeat or in any way prevent the full effect and operation of every part of the will." Lindsley v. Lindsley, 139 Tex. 512, 163 S.W.2d 633 (1942), is relied on as having a controlling fact situation, apparently without noticing the important distinction resulting from the powers of the trustee in that case.

[150] Tex. Rev. Civ. Stat. Ann. arts. 1300 (1945), 4618 (1960).

In *Miller v. Miller*,[151] the husband devised his separate property homestead of 233 acres to his wife and their seven children, share and share alike, without mentioning his wife's homestead rights or statutory exemptions. The wife contended that she was entitled to (1) her one half of the community; (2) one eighth of the husband's separate property in fee; (3) the exempt property; and (4) all of her statutory allowances, including (a) a year's allowance,[152] since she had no separate property adequate for her maintenance, (b) the allowance in lieu of exempt property,[153] and (c) the allowance in lieu of the homestead.[154] The trial court held that the will did not require an election and that she was entitled to all the property that she claimed. Furthermore, all the allowances were held properly chargeable to her husband's separate property and his one half of the community.

The court of civil appeals[155] reversed and rendered the trial court only with regard to (1) the setting apart of exempt property to the wife absolutely,[156] (2) the $1,000 allowance for support payable out of the husband's separate estate,[157] and (3) an allowance in lieu of the homestead right.[158] Although the wife did not complain of this holding, the executor of the estate appealed to the Texas Supreme Court, contending that the wife was required to elect either to take under the will or to claim her rights at law.[159]

The supreme court, relying on *Lindsley v. Lindsley*,[160] sustained the executor's contention and reversed the court of civil appeals because a "manifest implication" from the will as a whole indicated that the husband intended to deny the wife her statutory rights if she accepted the benefits of the will.[161] It was presumed that the husband knew he could not deprive his wife of those rights and that a testamentary disposition of part of them would present an election situation. The following inconsistencies between the statutory rights

[151] 149 Tex. 543, 235 S.W.2d 624 (1951).

[152] Tex. Prob. Code Ann. §§ 287, 288.

[153] Tex. Prob. Code Ann. § 273 ($690 was claimed as the value of a truck that was sold by the executors).

[154] Ibid.

[155] 230 S.W.2d 237 (Tex. Civ. App. 1950).

[156] The wife is entitled only to the use of the exempt property.

[157] The year's allowance for support is to be paid out of the community estate when there is both separate and community property.

[158] The allowance in lieu of homestead is granted only when there is no existing homestead at the death of the first spouse.

[159] The executor conceded that the wife was not presented with an election between the will and her community interest, and the court agreed.

[160] 139 Tex. 512, 163 S.W.2d 633 (1942).

[161] The holding of the court of civil appeals that there can be no allowance in lieu of homestead in this case is apparently upheld as it is not mentioned.

and the will were held to require an election: (1) the homestead right of exclusive use and occupancy of 200 of 233 acres as provided at law, vis-á-vis the fee in an undivided one eighth of the entire 233 acres in common with the seven children as provided by the will;[162] and (2) the use and power of disposition of the exempt personal property for her maintenance, vis-á-vis the undivided one eighth in all property after payment of the debts, under the will.[163]

In a concurring opinion Justice Garwood expressed the following rationale. Whenever a husband makes a testamentary disposition of his separate property to his wife and others, common experience teaches that he believes this is the only property to which she is entitled and the testamentary provisions usually are of equal value with her statutory rights. In this situation the natural presumption is that the husband intends to dispose of his wife's statutory rights by negativing their application, unless rebutted by facts rendering a contrary intent more probable. Such a presumption is not analogous to the presumption that the testator intends to dispose of only his own property. It is not common experience that a person intends to dispose of another's property without explicit language making such intention known. Admittedly, the wife's statutory rights are property in a vague sense, but they are lost by abandonment and are not considered property in the ordinary sense. Thus, they are not within the ambit of the presumption that the testator intends only to dispose of his own property.

Under these facts Justice Garwood reached the same result as the majority opinion by what may be a more logical approach. His presumption, however, appears to be limited to situations involving statutory rights attached to separate property. If the property is community, a conflicting presumption that the decedent intended only to dispose of his own property arises. Thus, if the underlying property is community, an exception to the general rule of construction would be necessary, *viz.*, language showing an intent to negative the survivor's statutory rights must be open to no other construction. This exception would require proof only that it is more probable that the testator intended to negative the exemption rights than not. The holding of the majority also appears to be limited to a situation

[162] This finding is in direct conflict with Wicker v. Rowntree, 185 S.W.2d 150 (Tex. Civ. App. 1945) error ref. w.o.m., which found that the fact that the husband can enjoy his homestead right in the entire tract and at the same time enjoy a fee simple estate in an undivided one third is not the test, and therefore not determinative of the fact that there was no election. Merely because the fee simple title is not owned by the person who is entitled to the homestead, should not destroy the homestead right since it is a mere right to use the property and does not affect the fee ownership.

[163] The latter inconsistency will be discussed in the next section.

where the homestead is attached to separate property. Even so limited, an election is unnecessary since the wife can enjoy her homestead right and at the same time own one eighth of the underlying fee.

In *Oelkers v. Clemens*,[164] the wife made a testamentary disposition of $5,000 in cash to her husband. She devised her separate property, which had been occupied as a homestead, to X. Subsequently, the husband conveyed all of his right, title, and interest in the homestead to the executor of the estate in exchange for a fee interest in other separate property. It was held that the husband must elect either to assert his homestead rights or renounce them and take the cash bequest under the will. The court reasoned that the provisions of the will were inconsistent with the husband's statutory homestead rights. Furthermore, the husband's conveyance of his right, title, and interest in the homestead to the executor and acceptance of other property in exchange was an election against the will. In other words, the husband renounced his cash bequest under the will when he asserted the homestead right by his act of conveyance. *Miller v. Miller* was relied on as authority for the proposition that the rights involved were inconsistent. This case is subject to the same criticism as *Miller v. Miller, viz.*, the rights are not inconsistent since the husband could occupy the homestead even though the fee title has been devised to another.

c. *Rationale.*—In theory, the wife's assertion of her homestead right does not require an election because it is not inconsistent with the fee ownership of the property. It is evident that at times an election may be required whenever the husband attempts to make a testamentary disposition of the underlying community property in contravention of his wife's homestead rights therein. This result may be explained in two ways: (1) in some cases the question of whether an election is presented seems to be decided, although incorrectly, by first looking to see if the surviving spouse has in fact elected, and (2) in other cases it may be impossible to ascertain whether the wife is asserting her homestead right or her rights in the community property. Whenever it is possible to determine that it is the homestead right which the wife asserts, as opposed to her community interest, the assertion of that right should not defeat the husband's testamentary disposition of the entire community or require an election any more than her assertion of the homestead right prevents the underlying community property from descending according to the laws of descent and distribution under the Texas Constitution. When the underlying property is the separate property of the decedent, a

[164] 260 S.W.2d 74 (Tex. Civ. App. 1953) error ref. n.r.e.

fortiori, the survivor's assertion of homestead rights should not defeat a testamentary disposition of the property or require an election unless the will expressly stipulates that an election is intended.

D. *Exempt Property Or Allowance In Lieu Thereof*

The Texas Constitution[165] and statutes[166] provide that certain enumerated items of personal property shall be reserved to the family, exempt from forced sale,[167] and delivered to the widow or other specified persons.[168] If the estate is solvent upon final settlement,[169] the exempt property, except for the homestead, passes to the heirs and distributees of the estate in the same manner as the other property of the estate.[170] If any part of the enumerated exempt property is not among the effects of the deceased, the court is authorized to make a reasonable allowance in lieu thereof, not to exceed $1,000. This amount is in addition to the allowance for the widow's support.[171] If necessary, the court may order a sale of so much of the estate as is needed to provide the widow with the allowance.[172]

Generally, the exempt property and the allowance in lieu thereof receive the same treatment as the homestead right insofar as the widow's election is concerned, *i.e.*, they are statutory rights unaffected by testamentary disposition[173] or withdrawal of the estate from the court's administration.[174] In *Ellis v. Scott*,[175] the wife, unsuccessful in her contest of the probate of the husband's will, had both the exempt property and the statutory allowance in lieu of exempt property, unavailable in kind, set apart for her benefit. The will directed the executors to prepare a suitable home for the wife. The court, assuming that the will disposed of only the husband's separate property, held that although she retained the statutory homestead,

[165] Tex. Const. art. 16, § 49.

[166] Tex. Rev. Civ. Stat. Ann. art. 3832 (1945).

[167] This statute also provides for the setting apart of the homestead, but since that is considered separately above, this discussion omits any reference to it.

[168] Tex. Prob. Code Ann. § 272.

[169] Tex. Prob. Code Ann. § 280. Exempt property and family allowances are excluded in determining the solvency of the estate.

[170] Tex. Prob. Code Ann. § 278. Section 279 of the Probate Code provides that if the estate is insolvent the absolute title to the exempt property shall pass to the widow and children. However, this section has been held unconstitutional. See note 134 supra.

[171] Tex. Prob. Code Ann. § 273.

[172] Tex. Prob. Code Ann. § 276.

[173] Lindsley v. Lindsley, 139 Tex. 512, 163 S.W.2d 633 (1942).

[174] Runnels v. Runnels, 27 Tex. 516 (1864). The first Texas case to recognize the possibility that the husband might present the wife with an election between the provisions of the will and the exempt property was Little v. Birdwell, 27 Tex. 689 (1864). In this case, however, the Texas Supreme Court expressly declined to decide whether the wife must elect between the will and her exempt property rights at law.

[175] 58 S.W.2d 194 (Tex. Civ. App. 1933) error dism.

the wife must return the other allowances, *viz.*, personal property exempt from forced sale, before enjoying the benefits under the will. Therefore, the wife's election to take her statutory allowances prevents her from accepting the benefits under her husband's will since the statute does not contemplate that she should take both. This case correctly held that the assertion of the homestead is not such an inconsistency as requires the survivor to elect. Apparently, when only the separate property of the decedent is involved, an election is correctly presented between the statutory exemptions and the will because the allowances and exempt property must be charged against that estate alone.

In *Lindsley v. Lindsley*,[176] the husband bequeathed fifty books from the family library to his wife, the balance to a charity to be selected by a trustee. The wife alleged that since the will did not expressly exclude her right to enjoy the exempt property (including the remainder of the library to which she was entitled at law) she was entitled to the other bequests under the will *in addition* to her rights in the exempt property. Recognizing that the wife's right to the statutory exemptions usually cannot be defeated by her husband's testamentary disposition, the supreme court held, however, that the wife's claim to the entire library defeated that part of the will specifically providing for the disposition of the remainder of the library; therefore, the wife was presented with an election.

In *Miller v. Miller*,[177] the wife claimed the benefits under her husband's will in addition to the homestead, the allowance for a year's maintenance, and the exempt personalty, all allowed by statute but not mentioned in the will. The supreme court held that although the husband confined his testamentary disposition to his property, there was an inconsistency between her rights at law, *i.e.*, to receive all the exempt property, and her rights under the will, *i.e.*, to receive an undivided one eighth of the exempt personalty. In other words, the wife's election to take her full share of exempt personalty would defeat other legacies. Thus, the election was actually based on the inconsistency between the terms of the will and the survivor's rights at law with regard to exempt property and not the alleged inconsistency between the wife's homestead rights and the provisions of the will.[178] The problem of election in reference to exempt personalty may be circumvented if the husband's will bequeathes all of

[176] 139 Tex. 512, 163 S.W.2d 633 (1942). This case also involved a fact situation whereby the wife was put to an election between the homestead and provisions of the will.

[177] 149 Tex. 543, 235 S.W.2d 624 (1951). See text at note 151 supra for discussion of election between the homestead rights and the will.

[178] See text at note 163 supra.

the exempt personalty to his wife,[179] as there would be no inconsistency between the wife's rights at law and under the will. Unlike the homestead right, which may be enjoyed regardless of the ownership of the underlying property, the failure to secure the exempt property to the wife presents an election.

E. *Right To A Family Allowance*

The Texas Probate Code also provides that the court shall fix a family allowance for the support of the widow and minor children[180] in an amount sufficient for their maintenance for a period of one year after the testator's death.[181] No allowance is made for the wife or minor children when they have property in their own right adequate for their maintenance.[182] The question arises whether the wife and the minor children are entitled to this allowance when adequate provisions have been made for them by the husband's will, *i.e.*, whether the wife or the minor children may elect to take under the husband's will and also claim the statutory family allowance.

In *Trousdale v. Trousdale's Ex'rs*,[183] the supreme court held that when the husband's will makes adequate provisions for the immediate wants of his wife, although it fails to mention the family allowance, the provision is intended to be in lieu of the year's allowance. When the wife accepts the provisions made for her by her husband's will, she may not receive the year's allowance which is bequeathed to another unless she disclaims all rights under the will to which she is not otherwise entitled.[184] Accordingly, if a wife claims the family allowance, she may not later claim the benefits under the will.[185]

In *Miller v. Miller*,[186] the wife claimed the benefits under the will

[179] Pope v. Pope, 175 S.W.2d 289 (Tex. Civ. App. 1943); Whaley v. Quillin, 153 S.W.2d 969 (Tex. Civ. App. 1941) error ref.

[180] Tex. Prob. Code Ann. §§ 286, 291.

[181] Tex. Prob. Code Ann. § 287.

[182] Tex. Prob. Code Ann. § 290.

[183] 35 Tex. 756 (1872) (The wife's application for an allowance was denied). Although this case was decided by the reconstruction court (1867-74), it appears to be in accord with the majority rule on this particular point. At an early date, the Texas Supreme Court was faced with this problem and decided that under the facts presented it was not forced to decide if the wife can be compelled to elect between the will and the family allowance. See Runnels v. Runnels, 27 Tex. 516 (1864); Little v. Birdwell, 27 Tex. 689 (1864). In Little v. Birdwell, although the court expressly denied that it was deciding the question, it did in fact decide it by holding that as the estate was solvent and had been ready for partition for over a year, the time had passed for making application for the allowance. The court reasoned that since the wife had held the title to the property during that time, she received the benefit of a year's allowance, which was all she claimed. Merely because she failed to apply for the allowance within the statutory time, however, did not cause her to lose these rights.

[184] Nelson v. Lyster, 74 S.W. 54 (Tex. Civ. App. 1903).

[185] Cf. Ellis v. Scott, 58 S.W.2d 194 (Tex. Civ. App. 1933) error dism.

[186] 149 Tex. 543, 235 S.W.2d 624 (1951). This case is previously discussed in relation to the homestead rights and the rights to exempt property.

in addition to the family allowance, the homestead, and the exempt property. In discussing the inconsistencies between the wife's rights at law and under the will, the court did not distinguish the family allowance from the allowance in lieu of exempt property.[187] After holding that the wife must elect to take either under the will or that which she receives by law,[188] the court concluded that if she takes under the will, "she will have elected not to enjoy the benefits of the exemption laws." Furthermore, if she repudiates the will, she is entitled to her one half of the community property and "the benefits of the exemption laws," although the family allowance is charged against the entire community estate rather than the husband's community interest and separate property. Apparently the court considered "the benefits of the exemption laws" to include the family allowance, and if the wife elects under the will, she is precluded from claiming the family allowance also. As mentioned earlier, the concurring opinion of Justice Garwood would have decided the question on the basis of the presumption that when the will makes some provision for the wife, the intent of the testator is to deprive her of statutory exemption rights. This is probably true in the case of the family allowance, but in the case of exempt personalty and homestead rights it cannot be said that such a presumption is founded on common experience. This decision and its over-all effect is obscured because three separate legal rights, *viz.*, the homestead right, the right to exempt personalty, and the family allowance, are treated as a single, inseparable right.

F. *Summary*

In conclusion, it seems settled that when the will makes adequate provisions for the wife and the minor children, they may not claim both the benefits under the will and the family allowance. The terms of the will presumably indicate that the testator intends to deprive them of the statutory rights.[189] Although the statutes creating these rights are to be considered as being in *pari materia*,[190] it seems im-

[187] 149 Tex. at 550, 235 S.W.2d at 628 (1951), citing what is now §§ 278, 279 of the Texas Probate Code:

> Under the law the widow is entitled to all of the exempt personal property to be used and disposed of by her as may be necessary for her support and maintenance. She will not have to account for any part of this allowance unless the estate, upon final settlement, should be solvent.

[188] The court apparently based its holding on the inconsistency between the will and the right to exempt personalty at law, and possibly on the inconsistency between the will and the right to the homestead. See discussion of these rights at notes 151, 177 supra.

[189] Such a presumption is similar to that made by Justice Garwood in the concurring opinion in Miller v. Miller, 149 Tex. 543, 235 S.W.2d 624 (1951).

[190] Eoff v. Pace, 25 S.W.2d 264 (Tex. Civ. App. 1930), rev'd on other grounds, 48 S.W.2d 956 (Tex. Comm. App. 1932).

proper to give them identical treatment since they are distinct and different rights. The wife should be entitled to the exempt personalty in addition to bequests under the will unless it is absolutely clear that the husband intends the benefits under the will to be accepted in lieu of the exempt personalty or the allowance in lieu thereof. In the case of homestead rights it appears that the survivor is presented with an election only when the testamentary disposition of the underlying property is such that both the surviving spouse and the devisee cannot enjoy the benefits therefrom. This test should be strictly construed. The fact that one person owns the underlying fee title and another person is entitled to enjoy the homestead rights is immaterial in determining if the surviving spouse is put to an election.

III. Who May Exercise the Right of Election

The right of election is personal and usually may be exercised only by the party entitled to it,[191] provided he or she is competent to make the election.[192] This rule prevents the right from inuring to the benefit of someone for whom it is not intended; yet, when the beneficiary is mentally incompetent, as in *Delevan v. Thom*,[193] it is impossible for her to make an election. In that case, the question was who possessed the right to elect for the wife's benefit, *i.e.*, the guardian, the probate court, or the district court. It was held that: (1) The right of election is not such a property right as would constitute part of the estate committed to the guardian's care, and the guardian, therefore, could not exercise the right in the absence of statutory authority.[194] (2) The probate court could not grant full relief if it exercised the right of election because the action would be ex parte since the trustees of the estate were not subject to its jurisdiction. The trustees, however, were vitally affected if that court exercised the right because the trust would lapse and the property would pass into the control of the probate court if it renounced the will on the wife's behalf. (3) The district court, with the broader constitutional grant of jurisdiction, is the proper court to exercise the wife's right of election.

When a child is presented with an election, the district court may elect for him.[195] Also, in *Colden v. Alexander*,[196] it was held that the

[191] Broughton v. Millis, 67 S.W.2d 650 (Tex. Civ. App. 1933) (will did not require an election).

[192] 4 Page, Wills § 1361 (lifetime ed. 1941).

[193] 244 S.W.2d 551 (Tex. Civ. App. 1951).

[194] See 4 Page, op. cit. supra note 192, § 1363; Annot., 74 A.L.R. 452 (1931), supplemented, 147 A.L.R. 336 (1943).

[195] Kerens Nat'l Bank v. Stockton, 281 S.W. 580 (Tex. Civ. App. 1926), rev'd on other grounds, 120 Tex. 546, 40 S.W.2d 7 (1931).

[196] 141 Tex. 134, 171 S.W.2d 328 (1943).

district court could partition and close the estate as if the wife had elected under the will because she could not refrain from electing and prevent the termination of the administration of the estate.

If the election had not been made during the lifetime of the person entitled to elect, her heirs or personal representatives may not elect for her upon her death,[197] even if the decedent were incompetent at death,[198] unless the will shows that the testator intended the right of election to pass to them.[199] Apparently, however, the personal nature of the right does not prevent it from being delegated to an agent under a general power of attorney,[200] at least when the agent acts under the direction of the one entitled to elect.[201] Finally, when the right of election is exercisable at the option of several beneficiaries, all must concur in the election before it may be effected.[202]

IV. How the Surviving Spouse Effects an Election

A. *Time Of Making The Election*

Because no statute prescribes the time within which an election must be made, equity implies a reasonable time.[203] The surviving spouse need not elect until after the probate proceeding,[204] although an election may be made before the will is probated.[205] In *Smith v. Butler*,[206] the wife was not too late in asserting her rights at law six months after her husband died and five months after the probate of the will. On the other hand, it is too late to assert statutory rights for support or allowances when the estate is ready for partition and distribution to the beneficiaries[207] or is ready for closing.[208] Finally, in *Farmer v. Zinn*,[209] it was held that when the wife accepted benefits under the will for ten years, it was then too late to assert inconsistent rights at law.

---

[197] There are no Texas cases on this point. See Annot., 85 A.L.R. 856 (1933).

[198] See Annot., 74 A.L.R. 452, 456 (1931), supplemented, 147 A.L.R. 336, 351 (1943).

[199] 4 Page, op. cit. supra note 192, § 1362.

[200] See Annot., 85 A.L.R. 856, 859 (1933).

[201] 4 Page, op. cit. supra note 192, § 1361.

[202] Id. at § 1364.

[203] See Runnels v. Runnels, 27 Tex. 516 (1864); Harkey v. Lackey, 259 S.W.2d 641 (Tex. Civ. App. 1953) error ref. n.r.e.; 4 Page, op. cit. supra note 192, § 1365.

[204] Mitchell v. Thompson, 286 S.W. 642 (Tex. Civ. App. 1926), rev'd on other grounds, 292 S.W. 862 (Tex. Comm. App. 1927).

[205] Dunn v. Vinyard, 251 S.W. 1043 (Tex. Comm. App. 1923).

[206] 85 Tex. 126, 19 S.W. 1083 (1892).

[207] Little v. Birdwell, 27 Tex. 689 (1864).

[208] Colden v. Alexander, 141 Tex. 134, 171 S.W.2d 328 (1943); Oelkers v. Clemens, 260 S.W.2d 74 (Tex. Civ. App. 1953) error ref. n.r.e.

[209] 261 S.W. 1073 (Tex. Civ. App. 1924), aff'd, 276 S.W. 191 (Tex. Comm. App. 1925).

B. *Intent To Exercise An Election*

For the surviving spouse to effect an election under the will, she must intend to elect[210] or accept benefits under the will which are inconsistent with her rights at law.[211] The question of intent becomes especially important when the election is implied[212] rather than expressed.[213] Moreover, when the person with the power to elect does not intend to elect to take under the will, no election is made.[214] When the surviving spouse's conduct is inconsistent with the assertion of one of two inconsistent rights, he or she is held to have elected that right which is consistent with prior conduct.[215] Acts which do not clearly indicate whether the survivor elects to take under a will do not show an election and apparently the survivor takes his estate at law.[216]

C. *Knowledge As A Prerequisite For Election*

Closely akin to the question of whether the wife intends to elect under the will or assert her rights at law is the question of whether she has adequate knowledge of (1) her rights at law, (2) the condition and extent of the estate, and (3) a duty to choose between inconsistent rights.[217] The problem is primarily a fact question.[218] Thus, when the wife is not appraised of her community rights and it cannot be ascertained whether her actions are in recognition of the will or in opposition to it, she has not elected under the will, but rather she takes against it.[219]

When the wife fails to plead and prove a state of facts relieving her of the effect of her election, *i.e.*, that she did not have sufficient

---

[210] Dunn v. Vinyard, 251 S.W. 1043 (Tex. Comm. App. 1923); Mitchell v. Thompson, 286 S.W. 642 (Tex. Civ. App. 1926), rev'd on other grounds, 292 S.W. 862 (Tex. Comm. App. 1927).

[211] Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935).

[212] Express and implied elections are discussed in the text at note 229 infra.

[213] Wurth v. Scher, 327 S.W.2d 72 (Tex. Civ. App. 1959).

[214] White v. Blackman, 168 S.W.2d 531 (Tex. Civ. App. 1942) error ref. w.o.m.; Payne v. Farley, 178 S.W. 793 (Tex. Civ. App. 1915).

[215] 4 Page, op. cit. supra note 192, § 1366.

[216] See Wichita Valley Ry. v. Somerville, 179 S.W. 671 (Tex. Civ. App. 1915); Martin v. Moran, 32 S.W. 904 (Tex. Civ. App. 1895). Since the wife acted in ignorance of her rights, she is not estopped in a subsequent repudiation of the will.

[217] As stated in Dunn v. Vinyard, 251 S.W. 1043, 1046 (Tex. Comm. App. 1923):

> In the absence of statutory regulation, it may be generally said that two things are necessary in order that acts relied upon will amount to an election: First, the party must have had knowledge of his rights; that is, he must have had knowledge of the condition and extent of the estate, and of his duty to choose between the inconsistent rights; second, that he intended to elect, as shown by his words and acts, viewed in the light of all the circumstances.

[218] Wurth v. Scher, 327 S.W.2d 72 (Tex. Civ. App. 1959). This case reversed and remanded a summary judgment that the wife had elected.

[219] Martin v. Moran, 32 S.W. 904 (Tex. Civ. App. 1895).

knowledge, she is bound thereby. Thus, in *Bumpass v. Johnson*,[220] when the wife's attorney read the will to her as executrix of the estate and she collected rents from the land in accordance with the terms thereof, she was held to have sufficient knowledge of the condition and extent of the estate to know that the community property was disposed of by the will. The court pointed out that a party need not know the exact extent of legal rights or the exact legal effect of a choice in order to effect an election. When the wife receives benefits[221] or elects under a will after she is fully informed of the facts and circumstances, she has waived any right to complain about the failure of anyone previously to appraise her of specific devises of her property.[222]

Therefore, when the wife accepts a benefit in ignorance of a material fact, knowledge of which is necessary to enable her to make an intelligent choice, she is not estopped to assert contrary rights at a later date,[223] especially if no one is harmed thereby.[224] For example, in *Logan v. Logan*,[225] the wife's ignorance of the existence of a partnership trust between her husband and a son (by virtue of which the husband and son owned one half of the property which she claimed as community survivor) was held to prevent her from being bound by any prior election under the will. Finally, even if a wife is in doubt as to her rights, she cannot be bound by accepting a class bequest under a will because she does not know that she has a choice between inconsistent rights.[226]

Since a wife must have the requisite knowledge before she is bound by her election, she is not required to elect until the status of the legal title is determined in the probate proceeding.[227] Furthermore, no election is required until it is determined whether the estate is free from the claims of creditors.[228]

---

[220] 285 S.W. 272 (Tex. Comm. App. 1926).

[221] Langston v. Robinson, 253 S.W. 654 (Tex. Civ. App. 1923).

[222] Gillman v. Gillman, 313 S.W.2d 931 (Tex. Civ. App. 1958) error ref. n.r.e.

[223] White v. Blackman, 168 S.W.2d 531 (Tex. Civ. App. 1942) error ref. w.o.m.; Logan v. Logan, 112 S.W.2d 515 (Tex. Civ. App. 1937) error dism.; Payne v. Farley, 178 S.W. 793 (Tex. Civ. App. 1915); see Annot. 81 A.L.R. 740 (1932), supplemented, 71 A.L.R.2d 943 (1960).

[224] Packard v. De Miranda, 146 S.W. 211 (Tex. Civ. App. 1912) error ref.

[225] 112 S.W.2d 515 (Tex. Civ. App. 1937) error dism. In this case, however, it was decided that since the wife would own the same interest in the community estate after the will was probated as she would if she asserted her rights under the statute, she was not put to an election.

[226] See Rippy v. Rippy, 49 S.W.2d 494 (Tex. Civ. App. 1932) error ref. (dictum).

[227] Colden v. Alexander, 141 Tex. 134, 171 S.W.2d 328 (1943).

[228] Leach v. Leach, 208 S.W.2d 618 (Tex. Civ. App. 1948) error ref. n.r.e. See generally text at note 203 supra.

D. *Express Or Implied Election*

Generally, an election is made expressly. However, an election may be implied if the party's acts are clearly and unequivocally made with the requisite knowledge and intention.[229] When the election is implied, the question of intention must be decided from all of the facts and circumstances in the particular case.[230] Intention to elect[231] and knowledge of one's rights[232] are ordinarily fact questions, and as in all fact questions, they should be submitted to the jury for determination.[233] If reasonable minds could not differ as to the effect of the acts and declarations of the surviving spouse, then the election may be effected as a matter of law.[234]

1. *Effect of an Express Declaration*

When the survivor acts under an express agreement that such acts shall not operate to her prejudice, no election under the will is effected because of the lack of intent to elect.[235] A declaration that a beneficiary intends to elect to take under or to take against a will, or a mere expression of satisfaction with a will, may not be an election.[236] An election is effected, however, when such a declaration is made in writing, expressing a clear intent to elect,[237] *e.g.*, executing a receipt for benefits received under the will and releasing the executor from any and all liability,[238] or filing an agreement in court to take under the will.[239] In *Evans v. Jacobs*,[240] the wife was

[229] Wurth v. Scher, 327 S.W.2d 72 (Tex. Civ. App. 1959); 4 Page, op. cit. supra note 192, § 1366.

[230] Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906 (1940); Gorman v. Gause, 56 S.W.2d 855 (Tex. Comm. App. 1933); Dunn v. Vinyard, 251 S.W. 1043 (Tex. Comm. App. 1923). Where a joint will, a joint and mutual will, or a mutual will is involved, the survivor's acts in probating the will and accepting benefits, Murphy v. Slaton, 154 Tex. 35, 273 S.W.2d 588 (1954), or doing the above in addition to taking possession of property and qualifying as an independent executor, Chadwick v. Bristow, 146 Tex. 481, 208 S.W.2d 888 (1948), show an election.

[231] Farmer v. Zinn, 276 S.W. 191 (Tex. Comm. App. 1925); Wurth v. Scher, 327 S.W.2d 72 (Tex. Civ. App. 1959); Leach v. Leach, 208 S.W.2d 618 (Tex. Civ. App. 1948) error ref. n.r.e.

[232] Williams v. Emberson, 55 S.W. 595 (Tex. Civ. App. 1900).

[233] Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906 (1940); Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935); Mayo v. Tudor's Heirs, 74 Tex. 471, 12 S.W. 117 (1889); Dunn v. Vinyard, 251 S.W. 1043 (Tex. Comm. App. 1923); Wichita Valley Ry. v. Somerville, 179 S.W. 671 (Tex. Civ. App. 1915).

[234] White v. Hebberd, 89 S.W.2d 482 (Tex. Civ. App. 1936).

[235] Gorman v. Gause, 56 S.W.2d 855 (Tex. Comm. App. 1933).

[236] 4 Page, op. cit. supra note 192, § 1366; see Rippy v. Rippy, 49 S.W.2d 494 (Tex. Civ. App. 1932) error ref.

[237] Caddell v. Lufkin Land & Lumber Co., 234 S.W. 138 (Tex. Civ. App. 1921), aff'd, 255 S.W. 397 (Tex. Comm. App. 1923).

[238] Von Koenneritz v. Hardcastle, 231 S.W.2d 498 (Tex. Civ. App. 1950) error ref. n.r.e.

[239] Huston v. Colonial Trust Co., 266 S.W.2d 231 (Tex. Civ. App. 1954) error ref. n.r.e.; McJunkin v. Republic Nat'l Bank, 131 S.W.2d 1085 (Tex. Civ. App. 1939) error dism. judgm. cor.

[240] 249 S.W.2d 98 (Tex. Civ. App. 1952) error ref. n.r.e.

held to have elected to take under the will because she expressed satisfaction with it, received property under it, and collected rents from her husband's land. Also, when a wife insisted that her husband's will be carried out after she was informed of her right of election and she joined the beneficiaries in turning the property over to the court, it was held that she elected to take under the will.[241]

2. *Effect of Acceptance of Benefits*

As previously pointed out, acceptance of benefits under a will[242] with full knowledge of the facts[243] prevents the survivor from subsequently asserting inconsistent rights. Moreover, one who accepts a benefit under a will in a binding manner surrenders the right to contest its validity; the theory is that a legatee whose only interest is in sustaining the will cannot play the role of an heir who may have an interest in contesting it.[244] Accordingly, it is held that if the manner in which a wife deals with property after her husband's death indicates an election,[245] *e.g.*, by selling the property,[246] she is bound by the election and may not subsequently allege inconsistent rights at law. A wife's recognition of her husband's will and the acceptance of benefits thereunder, followed by a subsequent partition of the estate and conveyance to the remaindermen in accordance with the will, has been held to indicate her election to take under the will.[247]

In many jurisdictions, a conflict of authority exists as to whether the acceptance of property under a decree of distribution not in conformity with the terms of a will constitutes an election against the will.[248] In *Floyd v. Seay*,[249] the wife took both her community and separate property in addition to her rights under the will. The children acquiesced in the executor's partition and distribution of

[241] Smith v. Butler, 85 Tex. 126, 19 S.W. 1083 (1892).

[242] Cunningham v. Townsend, 291 S.W.2d 438 (Tex. Civ. App. 1956) error ref. n.r.e.; House v. Rogers, 23 S.W.2d 414 (Tex. Civ. App. 1929), aff'd, 39 S.W.2d 1111 (Tex. Comm. App. 1931); see Lieber v. Mercantile Nat'l Bank, 331 S.W.2d 463 (Tex. Civ. App. 1960) error ref. n.r.e.

[243] Bumpass v. Johnson, 285 S.W. 272 (Tex. Comm. App. 1926).

[244] Smith v. Negley, 304 S.W.2d 464 (Tex. Civ. App. 1957). See Buckner Orphan's Home v. Berry, 332 S.W.2d 771 (Tex. Civ. App. 1960), where the wife probated and accepted benefits under one will, but was dissatisfied and subsequently produced a later will. She was held estopped to claim under the second will because she had elected under the first one and could not later contest it. In this case, however, the wife released all of her interest in the estate which transferred any property she would have received under the second will to the executor.

[245] Lee v. McFarland, 46 S.W. 281 (Tex. Civ. App. 1898) error ref.

[246] Oelkers v. Clemens, 260 S.W.2d 74 (Tex. Civ. App. 1953) error ref. n.r.e.; Chace v. Gregg, 31 S.W. 76 (Tex. Civ. App.), aff'd, 88 Tex. 552, 32 S.W. 520 (1895).

[247] Rogers v. Trevathan, 67 Tex. 406, 3 S.W. 569 (1887).

[248] 4 Page, Wills § 1366 (lifetime ed. 1941).

[249] 196 S.W. 237 (Tex. Civ. App. 1917) error ref.

the estate with full knowledge that the will did not dispose of the wife's rights at law. The court held that the children were estopped to claim that the wife elected under the will.[250]

3. *Effect of Offering the Will for Probate*

In several jurisdictions, a division of authority exists as to whether the offering of the will for probate constitutes an election under it.[251] In Texas, usually, this factor is considered along with other circumstances by the fact-finder. For example, when the wife offers the will for probate, inventories the property, is the sole beneficiary, and is named independent executrix, such factors do not constitute an election under the will if she does not receive a benefit to which she is not otherwise entitled.[252] On the other hand, an election to take under the will is effected when the wife receives a benefit to which she is not otherwise entitled, in addition to filing the will for probate and disposing of the property in exact accordance with its terms.[253] Whether the wife has elected under the will by failing to object to the executor's listing of all the property in the inventory as separate property, when she knows it is community, is a jury question.[254] However, the court, in *St. Mary's Orphan Asylum v. Masterson*,[255] held that the wife did not elect to take against the will by making an agreement with the child of her husband (1) not to probate the will, and (2) to take only a half interest, leaving the remainder to be divided equally among the other children. Finally, when a husband's will is not offered for probate until after the wife's subsequent death and the wife never mentions the will or indicates her election to take under it but merely occupies the property to which she is entitled at law, she does not elect to take under the will.[256]

4. *Effect of Qualifying as an Executor*

In several jurisdictions, one who qualifies as an executor has thereby elected under the will and may not claim any interest adverse

[250] In this case the will did not show an intent to present an election. Furthermore, the wife mortgaged the property and the mortgagee's rights would be prejudiced unless the children were estopped to claim that the wife elected under the will.

[251] 4 Page, op. cit. supra note 248, § 1367.

[252] Campbell v. Campbell, 215 S.W. 134 (Tex. Civ. App. 1919) error ref.; McClary v. Duckworth, 57 S.W. 317 (Tex. Civ. App. 1900) error ref.

[253] Farmer v. Zinn, 276 S.W. 191 (Tex. Comm. App. 1925) (the wife filed an inventory in addition to other acts); Bradshaw v. Parkman, 254 S.W.2d 865 (Tex. Civ. App. 1953) error ref. n.r.e.

[254] Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935).

[255] 122 S.W. 587 (Tex. Civ. App. 1909) error ref.

[256] Mitchell v. Thompson, 286 S.W. 642 (Tex. Civ. App. 1926), rev'd on other grounds, 292 S.W. 862 (Tex. Comm. App. 1927) (The court of civil appeals affirmed an instructed verdict on this point).

thereto.[257] The theory is that the oath of the executor to carry out the will estops him from later rejecting its terms. In *Dunn v. Vinyard*,[258] however, the wife filed the will for probate and produced an inventory in conjunction with the other executors. The wife expressed satisfaction with the will and all of her acts were consistent with its terms. The court held that her acts, such as joining in the application for probate, taking the oath as executrix, and filing an inventory and appraisement of her husband's property are cogent evidence of the intent to elect under the will and should be submitted to the jury. Similarly, in *Wurth v. Scher*,[259] the court ruled that the question of the wife's election under the will by qualifying as independent executrix, filing an inventory, and selling the property with the son's joinder was for the jury. In some cases, however, the evidence conclusively establishes an election under the will in the absence of a contrary expression of intention. For example, in *Langston v. Robinson*,[260] the wife elected under the husband's will by probating it, qualifying as independent executrix, and being the sole devisee. The same result was reached as a matter of law in *White v. Hebberd*,[261] when the husband received letters testamentary, acted as independent executor, secured a three-year extension of a loan with the help of other executors, occupied the homestead for two years while he acted as executor, refused to waive his life estate in the property devised by the will, and sought to have a legal determination made of his rights in the property as fixed by the will.

5. *Effect of Recognizing the Executor*

The survivor's recognition of the executor as such does not constitute an election to take under, or an estoppel to deny, the will's provisions if the act causes no injury to other legatees.[262] Likewise, prosecution of a suit to determine one's rights under a will does not result in an election.[263] Finally, the survivor's act of giving a power of attorney and later revoking it before anyone has changed his position in reliance thereon does not constitute sufficient proof of an intent to elect.[264]

---

[257] See 4 Page, op. cit. supra note 248, § 1367.
[258] 251 S.W. 1043 (Tex. Comm. App. 1923).
[259] 327 S.W.2d 72 (Tex. Civ. App. 1959).
[260] 253 S.W. 654 (Tex. Civ. App. 1923).
[261] 89 S.W.2d 482 (Tex. Civ. App. 1936).
[262] Pryor v. Pendleton, 92 Tex. 384, 47 S.W. 706, rev'd on other grounds on rehearing, 92 Tex. 387, 49 S.W. 212 (1899).
[263] Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900 (1955); White v. Hebberd, 89 S.W.2d 482 (Tex. Civ. App. 1936).
[264] Miller v. Miller, 149 Tex. 543, 235 S.W.2d 624 (1951).

V. Effect of Election

A. *Effect On Other Portions Of The Estate*

Although a surviving spouse's election against the will necessarily disrupts the testator's plan of distribution, when the testamentary scheme is not entirely destroyed, it is the court's duty to carry out the testator's purposes as if the electing spouse were dead.[265] Generally, an election to take against the will does not affect the will; only the rights of the electing spouse are affected.[266] Obviously, in some situations an election to take against the will destroys the testamentary scheme to such an extent that the remaining provisions of the will cannot be carried out in accordance with the testator's intention. As a result, the will must be disregarded and the remainder of the estate distributed according to the laws of descent and distribution.

A testator may specify what portion of his estate should bear any loss occasioned by the wife's election against the will.[267] The court should construe the will to give effect to the testator's intention when it is clear that he intends to create a trust out of his separate property and one half of the community property, irrespective of whether the wife elects under the will (which would pass her one half of the community to the trust).[268] In the absence of an expression of intent by the testator, the loss should fall either upon the beneficiaries generally or upon those portions of the estate from which provision for the wife is to be made.[269] In *Pope v. Pope*,[270] however, it was stated by way of dictum that the wife may not exercise a right of election which would defeat the minor child's right of election to take exempt property and support payments. Normally, beneficiaries must contribute in order to make up the losses occasioned by the election, the residuary estate usually being held liable for the first contribution.[271] On the other hand, the testator's devise to the electing spouse may be the recoupment to the other beneficiaries for the loss sustained as a result of the election against the will.[272]

---

[265] Munger v. Munger, 298 S.W. 470 (Tex. Civ. App. 1927) error ref.
[266] Ellis v. Scott, 58 S.W.2d 194 (Tex. Civ. App. 1933) error dism.
[267] See cases collected in Annot., 36 A.L.R.2d 291, 295 (1954).
[268] McDow v. Lund, 250 S.W.2d 247 (Tex. Civ. App. 1952) error ref.; see generally Munger v. Munger, 298 S.W. 470 (Tex. Civ. App. 1927) error ref.
[269] See Annot., 36 A.L.R.2d 291 (1954).
[270] 175 S.W.2d 289 (Tex. Civ. App. 1943).
[271] See Annot., 36 A.L.R.2d 291, 296 (1954).
[272] Id. at 306.

B. *Acceleration Of Remainders*

A wife's election to take against the will and the concomitant renunciation of her benefits under the will does not defeat a vested remainder which is dependent upon her renounced portion unless the testator clearly intends to accomplish such a result.[273] Similarly, as in *Munger v. Munger*,[274] when a wife has been devised a life estate with remainder to the children, the wife's election to take against the will does not affect the rights of the other beneficiaries. The dominant intention of the testator was that the corpus go to his daughters. Since the wife's election to take against the will should have been anticipated by the husband, it was tantamount to her death as respects the payment of income to, or taking possession of, property by the remaindermen.[275] Thus, the election caused the acceleration of income from the remaining half of the community estate to the daughter's benefit.

A conflict of authority exists in other states as to whether a contingent remainder may be accelerated when the contigency has not yet occurred.[276] No Texas case has decided this point, and the majority of other jurisdictions hold that such a remainder may not be accelerated.[277] When the election against the will and the attendant acceleration of remainders occasions a loss to other beneficiaries, as well as the remaindermen, the principle of acceleration of remainders comes into conflict with the rules for compensating the disappointed beneficiaries.[278] In other words, when the remainderman is allowed to enjoy his gift immediately while the estates of other beneficiaries are diminished to make up the share of the electing spouse, the problem is which claim, *viz.*, that of the beneficiaries or that of the remainderman, has precedence over the renounced estate.[279] The answer, of course, is governed by the intent of the testator when ascertainable.[280] If the testator's intent is not clear, a doctrine has been developed which provides that the remainder following the renounced life estate is not accelerated, but instead the life estate is sequestered to compensate the beneficiaries whose shares are reduced by the

[273] 4 Page, op. cit supra note 248, § 1390.
[274] 298 S.W. 470 (Tex. Civ. App. 1927) error ref.
[275] Forsythe v. Dallas Joint Stock Land Bank, 81 S.W.2d 1103 (Tex. Civ. App. 1935), rev'd on other grounds, 130 Tex. 563, 109 S.W.2d 1046 (1937); Simes and Smith, Future Interests § 797 (2d ed. 1956).
[276] 4 Page, op. cit. supra note 248, § 1390; Simes and Smith, op. cit. supra note 275, § 796.
[277] 4 Page, op. cit. supra note 248, § 1390.
[278] Ibid. See Annot., 36 A.L.R.2d 291, 313 (1954).
[279] American Law of Property § 21.44 (1952).
[280] 4 Page, op. cit. supra note 248, § 1390.

spouse's election.[281] Of course, if the wife's election does not substantially distort the testator's dispositive plan, sequestration is not needed. In practical effect, therefore, the doctrine of sequestration largely forestalls the effect of the doctrine of acceleration of remainders, particularly insofar as the renounced estate is needed to compensate disappointed beneficiaries.

C. *Failure To Elect*

In the absence of a statute, the effect of the surviving spouse's failure to elect generally arises only after the survivor's death. The reason is that in the ordinary situation the only limitation upon an election is estoppel, and then only when the rights of third parties are involved.[282] Although no relevant statute exists in Texas, a judicial limitation has been imposed upon the electing spouse in the form of a time limit.[283] When the time for election has passed or the electing spouse dies without electing, the question is whether the spouse is entitled to the property under the will or to the rights at law. A mere intention to elect unaccompanied by an act with full knowledge of the circumstances is not an election to take under a will, no matter how often the intent is expressed.[284] After a sufficient time for electing has lapsed, the electing spouse retains her interest in the property and is not held to have elected to take under the will.[285] In the absence of an express election, a surviving wife must do some act with the intent that it be an election[286] or she has in fact not elected.[287] Such an act is the acceptance of benefits under the will to which she is not otherwise entitled. If she does not receive benefits of some value, she has not elected.[288]

In other states, in the absence of a statute, the electing spouse who dies before electing is presumed to have elected the more valuable right, and unless the rights at law are clearly more beneficial, the presumption is in favor of an election to take under the will.[289] Statutes enacted with reference to the election problem usually re-

[281] American Law of Property § 21.44 (1952); but see Restatement, Property § 234 (1940) (adopts the view that the renounced interest of the wife is sequestered).

[282] 4 Page, op. cit. supra note 248, § 1372.

[283] See text at note 203 supra.

[284] Mitchell v. Thompson, 286 S.W. 642 (Tex. Civ. App. 1926), rev'd on other grounds, 292 S.W. 862 (Tex. Comm. App. 1927).

[285] Harkey v. Lackey, 259 S.W.2d 641 (Tex. Civ. App. 1953) error ref. n.r.e.

[286] Wurth v. Scher, 327 S.W.2d 72 (Tex. Civ. App. 1959).

[287] Pryor v. Pendleton, 49 S.W. 403 (Tex. Civ. App. 1898), aff'd, 92 Tex. 384, 47 S.W. 706, rev'd on rehearing, 92 Tex. 387, 49 S.W. 212 (1899). On rehearing the supreme court found that the daughter had in fact accepted a benefit to which she was not otherwise entitled and therefore was estopped to claim adversely to the will to the detriment of the other beneficiaries.

[288] McClary v. Duckworth, 57 S.W. 317 (Tex. Civ. App. 1900) error ref.

[289] 4 Page, op. cit. supra note 248, § 1372.

quire an election only in accordance with the general rules of equity.[290] Many statutes provide that failure to make a written election results in a waiver of rights at law and constitutes an election to take under the will. Some statutes, however, provide for the opposite result.[291]

PART II: THE INTER VIVOS ELECTION AGREEMENT

I. Modification of the Legal Community by Contract

In Texas,[292] as opposed to the old Spanish system of community property from which the Texas law was derived,[293] the spouses may not execute any contract (either ante-nuptial or post-nuptial)[294] which alters or modifies the legal community. In the old Spanish system,[295] and in all other community property states,[296] the parties may execute marital contracts before marriage. Some state statutes prohibit contracts that "alter the legal orders of descent,"[297] but in several states the parties may contract between themselves as to the nature of their property and may freely convey the property to one another.[298] The growth of the Texas doctrine of election may well represent an effort to evade the prohibition against contracts which "alter the legal orders of descent."[299] In other words, that which is prohibited during marriage is accomplished after the death of one spouse by a testamentary disposition of the entire community, followed by the survivor's election to accept the will in lieu of the community rights. The development of the election doctrine is more obvious in California where the principles of community property have been distorted frequently by common-law concepts. This distortion is evidenced by decisions holding that the "community property" is actually owned by the husband, with the wife having a mere expectancy in one half, which vests at the husband's death.[300]

[290] Id. at § 1374.

[291] 4 Page, op. cit. supra note 248, § 1378.

[292] Tex. Rev. Civ. Stat. Ann. art. 4610 (1960).

[293] See Las Siete Partidas, Part 4, Title 11, Law 24 (2 de Funiak, Community Property 36 (1943)).

[294] Weidner v. Crowther, 157 Tex. 240, 301 S.W.2d 621 (1957).

[295] See note 293 supra.

[296] Ariz. Rev. Stat. Ann. § 25-201 (1956); Cal. Civ. Code § 158; Idaho Code Ann. §§ 32-905, 32-906 (1947); La. Civ. Code Ann. art. 2325 (West 1952); Nev. Rev. Stat. §§ 123.070, 123.080 (1959); Tex. Rev. Civ. Stat. Ann. art. 4610 (1960); Wash. Rev. Code § 26.16.120 (1952); Comment, 25 Wash. L. Rev. 165 (1950).

[297] Ariz. Rev. Stat. Ann. § 25-201 (1956); Roden v. Roden, 29 Ariz. 398, 242 Pac. 337 (1926) (does not apply to post-separation agreements); La. Civ. Code Ann. art. 2326 (West 1952); Tex. Rev. Civ. Stat. Ann. art. 4610 (1960); Las Siete Partidas, Part 4, Title 11, Law 24 (2 de Funiak, Community Property 36 (1943)).

[298] Cal. Civ. Code § 158; Idaho Code Ann. §§ 32-905, 32-906 (1947); Nev. Rev. Stat. §§ 123.070, 123.080 (1959); Wash. Rev. Code § 26.16.120 (1952).

[299] See 1 de Funiak, Community Property § 217 (1943).

[300] Ibid.

II. California

In California, where the inter vivos election has been used most extensively, the parties may contract between themselves as to the nature of the community property.[301] Thus, the California courts recognize the contractual nature of a transaction whereby the husband executes a will and the wife appends thereto a written waiver of her community rights and an election to take under the will.[302] In effect, the wife is electing to take under her husband's will during his lifetime. By this technique, the husband restricts the wife's freedom of choice to some extent, by determining during his lifetime if she will abide by the provisions of his will.

The theory and effect of the decisions and the tax results of restricting the wife's freedom of choice are not clear under California law. First, the unilateral or bilateral nature of the contract and the obligations of the parties prior to the husband's death are indefinite.[303] Of course, the nature of the contract is determined by examining the instrument itself. If it is unilateral, with the consideration for the wife's election being the existence of the will unaltered at the husband's death, no liability results to the husband if he subsequently revokes or changes the will. Moreover, the wife may change her mind before the husband dies without incurring liability. Only upon the husband's death does a unilateral contract arise by which both parties are bound.[304] In *Gains v. California Trust Co.*,[305] the California court spoke of a legally implied promise by the husband, arising when the wife executes the election agreement, that he will not make a testamentary disposition other than the one to which the wife's waiver is attached. Under this theory the contract is governed by section 158 of the California Civil Code, which subjects the parties to the rules controlling contracts between persons occupying a confidential relationship toward each other. Thus, if one spouse obtains an advantage over the other, it is presumed that the transaction was entered into under undue influence. Otherwise, the parties are bound by the agreement, and if the husband revokes the will or materially changes it, the wife has an action at law for damages or in equity for specific performance if damages are inadequate. In the *Gains*

[301] See Cal. Civ. Code § 158.

[302] Flanagan v. Capital Nat'l Bank, 213 Cal. 664, 3 P.2d 307 (1931); In re Whitney's Estate, 171 Cal. 750, 154 Pac. 855 (1916); Gains v. California Trust Co., 48 Cal. App. 2d 709, 121 P.2d 28 (1942); In re Wyss' Estate, 112 Cal. App. 487, 297 Pac. 100 (1931); O'Neil v. Ross, 98 Cal. App. 306, 277 Pac. 123 (1929).

[303] See generally Brown and Sherman, Election to Take by Will — Some Practical Considerations, 23 Calif. S.B.J. 11 (1948); Note, 20 Calif. L. Rev. 219 (1932).

[304] O'Neil v. Ross, 98 Cal. App. 306, 277 Pac. 123 (1929) (dictum).

[305] 48 Cal. App. 2d 709, 121 P.2d 28 (1942).

case, the wife was allowed to repudiate the waiver and election to take under the will because the value of her benefit under the will was less than her share of the community property. It was held that the waiver and election were to her disadvantage under section 158 of the California Civil Code. Such a monetary disadvantage may be present whenever the wife receives a life estate in the entire community, with remainder to the children, in exchange for relinquishing her community interest, especially when the wife is past middle age. Thus, even in California it is not certain that the wife is bound by the inter vivos election although the transaction should be an enforceable contract. In *In re Wyss' Estate*,[306] the California court indicated that estoppel is the basis upon which the wife's inter vivos election binds her when she does not revoke the election before her husband's death. Having permitted her husband to die with a will executed in reliance upon her election to take under it, the wife is estopped to revoke her election after his death. No inter vivos transfer of the wife's interest in the community property is made by virtue of the inter vivos election; instead, it is a conditional promise by the wife to permit the entire community to be controlled by the husband's will. The condition is that he make no changes in his will subsequent to the execution of the election agreement. The consideration for the wife's promise is the execution of the husband's will.

III. TEXAS

Two major obstacles may prevent a Texas court from holding that an inter vivos election agreement is valid and enforceable. One is the prohibition of article 4610[307] against contracts between husband and wife which "alter the legal orders of descent," and thus change the nature of the property; and the second is the hesitancy of Texas courts to enforce estoppel against a married woman.

A. *The Prohibition Of Article 4610*

The courts' interpretation of article 4610 apparently prohibits the parties from contracting as to the nature of property to be

[306] 112 Cal. App. 487, 297 Pac. 100 (1931).

[307] Tex. Rev. Civ. Stat. Ann. (1960). Article 4610 reads as follows:

> Parties intending to marry may enter into such stipulations as they may desire, provided they be not contrary to good morals or to some rule of law; and in no case shall they enter into an agreement, or make any renunciation, the object of which would be to alter the legal orders of descent, either with respect to themselves, in what concerns the inheritance of their children or posterity, which either may have by any other person, or in respect to their common children; nor shall they make any agreement to impair the legal rights of the husband over the persons of their common children. No matrimonial agreement shall be altered after the celebration of the marriage.

acquired.[308] Although the statute expressly refers only to ante-nuptial contracts, the courts have extended its application to post-nuptial contracts.[309] When article 4610 was enacted,[310] the Texas laws were quite different than they are today; and the article should be read with this in mind.[311] The "forced heirship" statute, to which article 4610 originally referred, has been repealed; thus, the article should not invalidate contracts on the ground that they "alter the legal orders of descent." Obviously, "the legal orders of descent" refers to the old "forced heirship" statute and not to the statute of descent and distribution. While it is beyond the scope of this Com-

[308] Gorman v. Gause, 56 S.W.2d 855 (Tex. Comm. App. 1933). Here it was held that the constitution and statutes defined the nature of property and the "rules of law" for purposes of article 4610. Thus, since the legislature does not have the power to enlarge the wife's separate property beyond constitutional limits, Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925), the parties themselves cannot do so by agreement.

[309] Weidner v. Crowther, 157 Tex. 240, 301 S.W.2d 621 (1957). The basis for this extension is said to be public policy.

[310] January 20, 1840, 4 Laws of the Republic of Texas 3 (2 Gammel's Laws of Texas 179 (1898)).

[311] At that time Texas had a "forced heirship" statute which was enacted on January 28, 1840, 4 Laws of the Republic of Texas 167 (2 Gammel's Laws of Texas 344 (1898)). It appears that article 4610 was originally intended to refer to the "forced heirship" statute, which was subsequently repealed on July 24, 1856. In 1879, George W. Paschal specifically refers to the annotations under the statute which repealed the "forced heirship" statute (article 3868, Paschal's Annotated Digest 644 (2d ed. 1870)) in his discussion of article 4632 (now article 4610). See Paschal's Annotated Digest 773 (2d ed. 1870). Thus, it appears that a well-informed person writing in the early history of the state considers article 4610 to refer to the "forced heirship" statute. This conclusion is further strengthened by the fact that article 4610 was adopted from the Louisiana Civil Code arts. 2035-10 (1825), La. Civ. Code arts. 2325-2330 (1870), and that code provides for "forced heirship" at article 1495.

If Gorman v. Gause, 56 S.W.2d 855 (Tex. Comm. App. 1933), is followed in Texas, the marriage contract will be practically nullified. In Gorman v. Gause, the court reasoned that article 4610 allows contracts which are not contrary to some "rule of law." Since the constitution and statutes which define community property are "rules of law," any contract which is contrary to them is invalid. It seems significant that the agreement in Gorman v. Gause purported to change all of the property which was acquired during the marriage from community to the separate property of the one who acquired it. Moreover, the enforcement of the agreement would have resulted in the wife's exclusion from participation in what would have been a community estate of $70,000. This opinion does not indicate, however, that such a contract would be invalid even if it were fair and equitable to the wife. There is dictum at page 858 which indicates that such a contract would be valid if phrased in terms of promises to convey property after it is acquired rather than changing the nature of it as it is acquired. It is believed that article 4610 does not require the result reached in this case, but that this case was decided as it was in order to achieve justice for the wife.

It was the purpose of the 1840 legislature to allow the husband and wife some freedom in contracting before marriage, but Gorman v. Gause is in direct opposition to that purpose and should not be followed. The validity of marriage contracts in Louisiana under the statutes from which article 4610 was derived strengthens this conclusion. See Daggett, The Community Property System of Louisiana 114-18 (2d ed 1945); Huie, The Texas Constitutional Definition of the Wife's Separate Property, 35 Texas L. Rev. 1054-67 (1957). Gorman v. Gause was decided nearly 100 years after the passage of the 1840 statute. It has been suggested that by this time the court was too far out of contact with the civil law system to carry out the full meaning of the statute permitting ante-nuptial contracts. See Huie, *Some Basic Principles of Texas Community Property Law,* Comparative Studies in Community Property Law 114, 130 (Charmatz & Daggett ed. 1955).

ment to consider the various constructions of article 4610, it is sufficient to note that the clause "to alter the legal orders of descent . . . in what concerns the inheritance of their children. . ." has been construed as referring to the laws of descent and distribution.[312] Therefore, the statute has been given a far broader meaning than apparently was intended.

In at least three instances a contract which operates "to alter the legal orders of descent" (referring to the statute of descent and distribution) may be held valid. These three exceptions to the prohibition of article 4610 are: (1) the partition of community property by husband and wife; (2) a division of community property in conjunction with a permanent separation; and (3) a contract to make a will, when actually followed by a will. These exceptions will be considered in the order enumerated.

The Texas Constitution[313] authorizes the husband and wife to partition community property or exchange the community interest of one spouse in any property for the community interest of the other spouse in other community property. Article 4624a[314] provides that the partition shall be effectuated by a written instrument subscribed and acknowledged by both spouses in the manner required by law for the conveyance of realty. Such an instrument obviously alters "the legal orders of descent" because thereafter such partitioned property is the separate property of the respective spouses.

When the parties have separated with the intention that the separation shall be permanent, a subsequent agreement dividing their property apparently is valid, if fair and equitable.[315] Moreover, an agreement to divide property in contemplation of permanent separation may be valid although executed before separation.[316] Both examples alter "the legal orders of descent." Since the cases that support the above examples were decided before the constitutional amendment authorizing partition of community property was enacted, the formalities required by the amendment when executing the agreement apparently are not essential.

A contract to make a will, followed by the actual making of the will, is enforceable although it alters "the legal orders of descent."

[312] Weidner v. Crowther, 157 Tex. 240, 301 S.W.2d 621 (1957); Groesbeck v. Groesbeck, 78 Tex. 664, 14 S.W. 792 (1890).

[313] Tex. Const. art. 16, § 15.

[314] Tex. Rev. Civ. Stat. Ann. (1960).

[315] Cox v. Mailander, 178 S.W. 1012 (Tex. Civ. App. 1915) error ref. (dictum). In this case, however, the division was not fair and equitable.

[316] Gorman v. Gause, 36 S.W.2d 279 (Tex. Civ. App. 1931) (dictum), aff'd, 56 S.W.2d 855 (Tex. Comm. App. 1933). No mention was made of the dictum in the opinion by the commission of appeals.

In *Johnson v. Durst*,[317] for example, the husband contracted to devise all the property he owned at his death to his wife's nieces in consideration of his wife's promise not to revoke her will devising all of her property to him. The court held that such a contract does not deprive the husband of his right of inheritance; instead, it gives him a greater share of the wife's estate than he would have received under the laws of descent and distribution. Therefore, the "legal orders of descent" are not altered. Since there were no children of the marriage, no one was harmed, and consequently no one was in a position to urge the contract's invalidity. In *Graser v. Graser*,[318] the husband and wife executed a contract, written entirely in the husband's handwriting, disposing of the entire community estate. When the husband died, the wife probated the document as his will. Upon the wife's subsequent death the instrument was refused probate as the wife's will because it lacked proper execution, *i.e.*, it had an insufficient number of witnesses. It was held to be the husband's holographic will; thus, the wife died intestate. Furthermore, article 4610 was said to invalidate an instrument executed as a contract to make a will when the instrument is *not* followed by the execution of a will, because only a will can "alter the legal orders of descent." It was admitted that the statute's purpose is to protect the children of the marriage and they may not be estopped by any conduct of the wife which tends to ratify the contract. *Weidner v. Crowther*[319] involved a contract to make a will which would "alter the legal orders of descent." It was held that article 4610 does not invalidate the contract if it is followed by a joint and mutual will incorporating its terms, since the statutes authorize all persons to make a testamentary disposition of their own property. These examples indicate that article 4610 does not absolutely prohibit contracts which change the "legal orders of descent." Unless the contract purports to change the nature of property to be acquired or takes advantage of the wife, it should be upheld by the Texas courts.

The inter vivos election does not change the nature of the property owned by the spouses, or that which is to be acquired, although it does permit all of the property to pass in accordance with the husband's will. In this sense it is analogous to the joint and mutual will. In neither case does the instrument change the "legal orders of descent," which the courts have interpreted to mean statutes of descent and distribution. If this reasoning is sound, problems arise

[317] 115 S.W.2d 1000 (Tex. Civ. App. 1938) error dism.
[318] 147 Tex. 404, 215 S.W.2d 867 (1948).
[319] 157 Tex. 240, 301 S.W.2d 621 (1957).

as to the time when the parties become bound and as to the nature of their respective obligations. Unsatisfactory as it is, the California law gives the only indication of what the answers may be. In no event, however, should the inter vivos election agreement be susceptible to the construction that it passes a property interest to the deceased spouse. If such a construction is possible, the agreement will be void as an agreement to change the nature of property held by husband and wife in contravention of article 16, section 15 of the Texas Constitution. Furthermore, such a construction would yield undesirable tax consequences.

B. *Estoppel Of A Married Woman*

Aside from the several theories with reference to an enforceable contract, the inter vivos election agreement may be valid because the wife is estopped to revoke it. The theory behind an estoppel is that the husband dies with his estate plan constructed in reliance upon her agreement to elect to take under the will, and her failure to do so will upset the estate plan. Logically, the inter vivos election is not an ordinary contract (which the wife is prevented from making because of her contractual incapacity) and the wife should be susceptible to the doctrine of estoppel. The Texas courts, however, do not estop a married woman when, as in *Gorman v. Gause*,[320] another person will receive an advantage at her expense. When property greatly changes in value, a situation may arise at the husband's death whereby the wife will be immune to the doctrine of estoppel under the rule of *Gorman v. Gause*. If, however, an arm's length transaction is effected and the benefits to the wife are explained to her by her own counsel and are sufficiently great to induce her to execute an inter vivos election agreement for her own "economic self-interest,"[321] she may be estopped. In such a case, every element of estoppel would be present, *viz.*, an act by the wife coupled with reasonable reliance by the husband to his detriment. The question most likely to arise is whether the husband may reasonably rely upon the wife's inter vivos election. Of course, a finding of overreaching on the husband's part greatly diminishes his prospects of obtaining a finding of reasonable reliance. If, however, no advantage is taken of the wife, the husband should be entitled to rely reasonably upon the inter vivos election. Especially is this true if the wife has had her disabilities removed by proper court action.[322] In

[320] 56 S.W.2d. 855 (Tex. Comm. App. 1933).

[321] Westfall, Estate Planning and the Widow's Election, 71 Harv. L. Rev. 1269, 1278 (1958). This phrase is coined to indicate that the wife is prompted to elect to take under the will solely because of the economic benefits she may receive.

[322] Tex. Rev. Civ. Stat. Ann. art. 4626 (1960). Although the wording limits the

such a case, the wife has the capacity to deal for herself. Therefore, she should be amenable to the doctrine of estoppel, at least when she is guilty of positive acts of fraud.[323] The theory upon which the wife is estopped in such a case is the same as that upon which promissory estoppel is based. If substantial injustice would be caused by the wife's revocation of her inter vivos election agreement, *e.g.*, by diminishing the share of a child who is a remainderman, the case for estoppel of the wife seems even stronger.

IV. Conclusion

Although there is no assurance that an inter vivos election agreement is valid in Texas, no harm results in executing one simultaneously with the husband's will, provided the husband is informed that his whole estate plan may fail if the agreement is not upheld. If an agreement is executed, the wife may feel a moral obligation to her husband which would deter her from attempting to repudiate her election after his death. The foregoing suggestions and theories are some of the alternatives a Texas court may adopt in support of a holding that an inter vivos election is binding upon the wife after the husband's death. If a fair and just election agreement is drafted, that does not take advantage of the wife, it should control. The inter vivos election is subject to the same rules that govern election at death and these elements must be kept in mind when the agreement is executed. If such an election agreement is valid in Texas, it will be a great aid to estate planning.[324]

---

wife's contractual powers to business and trading purposes, there is authority for the proposition that the courts will indulge in a broad interpretation of the statute and place little limitation on the type of agreement executed. See George v. Dupignac, 273 S.W. 934 (Tex. Civ. App. 1925) error ref.; Comment, 13 Sw. L.J. 84, 101 (1959).

[323] See Brown v. Federal Land Bank, 180 S.W.2d 647 (Tex. Civ. App. 1944) error ref. w.m.; Vickery v. Republic Nat'l Bank & Trust Co., 170 S.W.2d 840 (Tex. Civ. App. 1943) error ref. w.o.m.; Comment, 25 Texas L. Rev. 657, 663 (1947).

[324] An inter vivos election agreement should anticipate such questions as whether the wife is entitled to a probate homestead, exempt property, and a family allowance. The following form is taken from "Forms of Wills and Trusts," distributed by Security-First National Bank of Los Angeles:

> Election and Waiver on the Part of the Wife
>
> I, ..., wife of ....., hereby certify that I have read the foregoing Will of my husband and fully understand that he disposes not only of his separate property but also of our community property now owned or hereafter to be acquired, if any, including my half of that property. Being fully satisfied with its provisions, I hereby elect to accept and acquiesce in the provisions of the Will, waiving all claims to my share of any community property and all other claims that I may have upon any of the property disposed of by the Will, but not including my right to a family allowance out of my husband's estate during probate (optional: or to a probate homestead and to property exempt from execution). This instrument is not a transfer or release of my right, title or estate in any property now owned or hereafter acquired by me, is revocable by written instrument executed by me and de-

The tax situation of the parties should not be affected by an inter vivos election agreement.[325] Although the wife is deprived of her freedom of election when the husband dies, there is no reason to include her property in his gross estate,[326] especially since the instrument does not transfer any property interest to the husband before his death.

PART III: TAX CONSEQUENCES IN A COMMUNITY PROPERTY STATE

For purposes of this part, unless otherwise indicated, the following assumptions are made: (1) the husband is the first spouse to die;[327] (2) the husband's will provides that the entire community estate, including the wife's one half, shall be placed in trust with a life estate in the entire corpus reserved to the wife, remainder over to the children; and (3) neither spouse owns separate property. The problem in regard to whether the wife may elect to take her homestead, family allowance, and exempt property, in addition to benefits under the husband's will, are beyond the scope of this part. Therefore, it will be assumed that the husband's will makes adequate provisions for the wife with reference to these items and that she is not faced with an election between them and the provisions of the will.

---

livered to my husband during his lifetime, and shall be effective and valid for any purpose only after the decease of my husband and provided I survive him, and upon the condition that the foregoing Will shall be duly admitted to probate by a court of competent jurisdiction and that it shall not be successfully contested or probate revoked.

Dated at ....., the ..... day of ....., 19.....

On the ..... day of ....., 19....., at ....., Texas, ...,

wife of ....., subscribed the foregoing instrument in our presence, and we at her request and in her presence have signed below as witnesses to her signature.

It is desirable to have the wife's separate acknowledgement attached. For other forms, see: P-H Wills-Trusts—Estate Planning Forms ¶ 69,504; Frank Sbicca, 35 T.C. No. 14 (October 24, 1960); Pacific Nat'l Bank, 40 B.T.A. 128, 130 (1939); In re Rider's Estate, 199 Cal. 724, 251 Pac. 799, 801 (1926); Opp v. Frye, 70 Cal. App. 2d 478, 161 P.2d 235, 237 (1945); Security-First Nat'l Bank v. Stack, 32 Cal. App. 2d 586, 90 P.2d 337, 339 (1939); In re Wyss' Estate, 112 Cal. App. 487, 297 Pac. 100, 101 (1931); O'Neil v. Ross, 98 Cal. App. 306, 277 Pac. 123, 126 (1929). See also Rice, Family Tax Planning, ch. 23, § 8, at 1002 (1960).

[325] See Westfall, supra note 321, at 1283.

[326] Pacific Nat'l Bank, 40 B.T.A. 128 (1939) (no transfer during the husband's lifetime, but only at his death).

[327] The doctrine of election applies equally to either spouse, and in the usual course of events, the husband predeceases the wife. Even if the wife should die first, it would rarely be advantageous to present the husband with an election situation since the usual object of the wife's will is to preserve control of the community property in the husband. This may be accomplished by having the wife make a testamentary disposition of her community interest to the husband as trustee. See Brawerman, How to Draft a Will with the Widow's Election, 1956 So. Calif. Tax Inst. 359, 361; Brookes, The Tax Consequences of Widows' Elections in Community Property States, 1951 So. Calif. Tax Inst. 83.

I. Estate Tax Consequences of the Widow's Election at the Husband's Death

A. *Composition Of The Husband's Gross Estate*

Chronologically, the first tax incurred by the use of a "widow's election will" is the estate tax at the husband's death. The husband's gross estate is comprised of all property to the extent of his interest therein.[328] Although all of the husband's separate property is included in his gross estate, that part of the community property which is included is only the one-half interest over which he possesses a power of testamentary disposition.[329] The other one half of the community estate belongs to the wife and is not included in the husband's gross estate, even though her interest is subject to the husband's control during his lifetime. Although the theory of the estate tax is to tax the husband's community interest and the wife's community interest on their respective deaths, a double tax is imposed on the portion of the husband's estate which passes to the wife and, remaining unexhausted at her subsequent death, is included in her gross estate also.[330] This double tax may be avoided if the husband creates a testamentary trust composed of the entire community estate, with the wife as life beneficiary, remainder over to the children. This is the typical "widow's election will" and it effectively avoids the second tax.

B. *Effect Of The Wife's Election*

The fact that the husband's will presents the wife with an election situation does not of itself cause her community interest to be included in his gross estate since the husband owns no interest in her property at his death and has no right to make a testamentary disposition thereof.[331] Even if the wife actually elects under the hus-

[328] Int. Rev. Code of 1954, § 2033.

[329] This was not always the case. Prior to the enactment of Int. Rev. Code of 1939, § 811(e)(2), added by ch. 619, 56 Stat. 798 (1942), there was no provision prescribing the method of taxing a community property estate. Under Int. Rev. Code of 1939, § 811(a), however, the courts considered only one half of the value of the community property to be includable in the estate of the first spouse to die. Section 811(e)(2) required the entire value of the community estate to be included in the estate of the first decedent, with certain exceptions. The Revenue Act of 1948 restored the prior status to the community property owners and the 1954 Code effects the same result.

[330] Because the marital deduction provision specifically exempts community property from the adjusted gross estate (from which 50 per cent of decedent's property can be passed to a surviving spouse tax-free) Int. Rev. Code of 1954, § 2056, there is no deduction available to a decedent who transfers community property to a surviving spouse. Moreover, Int. Rev. Code of 1954, § 2013, allows a diminishing credit for prior taxes, based on the number of years which has elapsed since the tax was paid. This credit does not fully compensate the decedent for the loss incurred by having the property taxed in both estates, however.

[331] Int. Rev. Code of 1954, § 2033.

band's will, an early G.C.M.[332] ruled that her election does not increase his gross estate by the value of her community interest. The result is not changed when the husband creates a testamentary trust composed of the entire community estate with the wife as the life beneficiary, and the wife subsequently elects to adopt this testamentary disposition in lieu of her community interest.[333] Even if the wife executes an inter vivos agreement contemporaneously with the execution of the husband's will, his gross estate is not increased by the value of the wife's community interest which she waived upon her subsequent election under his will.[334] The basis for this holding is that the wife's inter vivos election does not constitute a transfer to, or a vesting of, any interest in the husband.[335]

It is arguable that the reason the wife's election to take under the husband's will does not result in the inclusion of her community interest in his gross estate is because the wife's freedom of action during the husband's lifetime has not been restricted by her election.[336] It is clear that an election by the wife *after* the husband's death does not curtail her freedom of action in any way during the husband's lifetime.[337] By her election after his death, the wife merely allows her community interest to pass in the manner prescribed by

[332] G.C.M. 7773, XI-2 Cum. Bull. 426 (1930). This ruling involved a situation where the wife elected to take her legacy under the husband's will which purported to dispose of the entire community in addition to his separate property. The property was devised to the wife and her two children, share and share alike.

[333] Coffman-Dobson Bank & Trust Co., 20 B.T.A. 890 (1930), acq., X-1 Cum. Bull. 13 (1931) (Washington community property). The wife did not attempt to accomplish a transfer of her community interest to the decedent's estate; further, such a transfer cannot be accomplished under the community property laws by the mere election under the will, without other formality. Her community interest under Washington law is subject to her power of testamentary disposition.

[334] Pacific Nat'l Bank, 40 B.T.A. 128 (1939). This case also found that no outright transfer by the wife to the husband was made since the transfer was limited by the condition precedent that the husband predecease her. The court held that the wife made an inter vivos gift in trust on the condition named.

[335] See Int. Rev. Code of 1954, § 2033.

[336] See Westfall, supra note 321, at 1274.

[337] Professor Westfall also expresses the opinion that the husband's powers over the wife's community interest are so extensive that some portion of her community interest arguably should be included in the husband's gross estate under the provision relating to general powers of appointment, Int. Rev. Code of 1954, § 2041. Such a contention is in conflict with the theory of the community property system. The husband's power of management over the community exists only during the life of the community and not after its dissolution. In a case involving a joint and mutual will, where the surviving wife received a life estate in the entire community, remainder to the children, she did not acquire a taxable power of appointment over the entire community. Kay v. Phinney, CCH 59-1 U.S. Tax Cas. ¶ 11,869 (W.D. Tex. April 20, 1959). On appeal it was determined that the will gave the wife a general power of appointment, and thus the entire community estate was included in her gross estate. Phinney v. Kay, 275 F.2d 776 (5th Cir. 1960). However, a life estate in the entire community with remainder to the children, without more, does not appear tantamount to a general power of appointment over the entire community. By analogy, therefore, it is arguable that the husband's gross estate should not be taxed on the value of a power of appointment over the wife's community interest.

the husband's will and no grounds exist for the argument that the wife has restricted her freedom of choice during the husband's lifetime.[338] Whether the wife's freedom of choice is curtailed by her inter vivos election, however, is not settled and this issue will probably depend upon the effect of the agreement under local law. Assuming that the wife's freedom of choice is restricted, the only argument for including it in the husband's gross estate is that by virtue of the inter vivos election the wife is deemed to have created a general power of appointment in the husband over her community interest.[339] This argument is refuted because the wife's consent is necessary before the power is effective; therefore, no part of the property is includable in the husband's gross estate since it is exempt as being a joint power, exercisable only with the concurrence of the creator.[340]

From a practical standpoint, the determination of whether the wife's community interest is includable in the husband's gross estate turns on the answer to another question, *viz.*, did the wife transfer some interest to the husband prior to his death?[341] Therefore, in drafting an inter vivos election agreement, extreme care must be taken to prevent any possible construction that the execution of the agreement transfers any property interest to the husband during his lifetime.

In *Frank Sbicca,*[342] the wife executed an inter vivos election agreement[343] to take under the husband's will, which disposed of property acquired in a common-law jurisdiction. Under California law[344] the wife has a mere expectancy in this property, similar to that in pre-1927 community property. Since such an expectancy is a marital right,[345] relinquishment thereof is not "consideration in money or money's worth" under section 2043(b) of the 1954 Code. Therefore, the entire value of the property is includable in the husband's gross estate without a reduction for consideration and without a reduction for the one half that is owned by the wife at

[338] The wife is not subject to state inheritance taxes on her community interest although she elects to take under the husband's will which purports to dispose of the entire community upon the theory that there is no transfer but only a partition of the community property. State v. Jones, 5 S.W.2d 973 (Tex. Comm. App. 1928); see also Falknor, Liability of the Entire Community Estate for the Payment of State Inheritance Tax Where Husband Undertakes to Dispose of Entire Community Estate by Will and Wife Elects to Take Under the Will, 5 Wash. L. Rev. 55 (1930).

[339] See Westfall, supra note 321, at 1276.

[340] Int. Rev. Code of 1954, § 2041(b)(1)(C)(i).

[341] See 1 Beveridge, Federal Estate Taxation § 5.08, at 188 (1956).

[342] 35 T.C. No. 14 (Oct. 24, 1960).

[343] Similar to the agreement in note 324 supra.

[344] Cal. Prob. Code § 201.5.

[345] Rickenberg v. Commissioner, 177 F.2d 114 (9th Cir. 1949), cert. denied, 338 U.S. 949 (1950).

his death. This decision leaves the inference that the wife's surrender of a vested community interest would be consideration for the husband's testamentary transfer of his separate property, thereby reducing his estate. This implication seems patently erroneous. The consideration provisions of section 2043 apply only to inter vivos transfers. There is no precedent for allowing the property that the wife surrenders to act as consideration for the husband's testamentary disposition, thereby reducing his gross estate.

C. *Marital Deduction*

The marital deduction may be of little consequence in the usual community property estate plan since section 2056(c)(2)(B) of the 1954 Code disqualifies community property from its application. To the extent that the husband's estate consists of separate property, however, the marital deduction is important. Although the marital deduction provision does not specifically refer to the effect of a widow's election, the Regulations under section 2056(e) indicate that the husband's separate property may qualify for the marital deduction even though the wife must elect with reference to it.[346] Thus, the marital deduction is available if the husband's will purports to dispose of the wife's separate property in trust for the children and devises his separate property to her in lieu thereof. If the husband's will only devises a life estate to the wife, the marital deduction is not available because of the terminable interest rule of section 2056(b).

Although the husband's testamentary disposition of his separate property under a widow's election will qualifies for the marital deduction, a difficult problem of valuation is presented. Section 2056(b)(4)(B) provides that

> where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

Obviously this provision needs interpretation since the terms "encumbrance," "obligation," and "taken into account" are not sufficiently precise.[347] The Regulations define the government's position on the question of what constitutes an "encumbrance" or "obligation." Generally, property passing to the survivor (1) which is

[346] Treas. Reg. § 20.2056(e)-2(c) (1958).
[347] See 4 Mertens, Federal Gift and Estate Taxation § 29.53 (1959).

subject to a mortgage, (2) which imposes an obligation on the surviving spouse to satisfy some debt, or (3) which is in satisfaction of a debt owing to the surviving spouse, constitutes an "encumbrance" or "obligation" and must be deducted from the value of the property otherwise qualifying for the marital deduction.[348]

In addition, however, the government contends that the value of the separate property passing to the wife for purposes of the marital deduction must be reduced by the value of the community (or other property) interest which the wife must relinquish if she elects under a widow's election will.[349] In *Stapf v. United States*,[350] the husband purported to make a testamentary disposition of the entire community and all of his separate property by devising one third to the wife and two thirds in trust for the children. The court rejected the government's contention and held that the will did not impose "an obligation" on the wife within the meaning of the statute. The election presented to the wife, *viz.*, to accept one third of the combined estates under the will (including the husband's separate estate) or to retain her community interest at law, was a mere option, and at most, a condition. The court held that a pecuniary obligation annexed directly to the property is necessary in order to constitute an "encumbrance." Example (3) of section 20.2056(b)-4(b) of the Regulations apparently was overturned by implication as an erroneous overgrowth of exposition.[351]

Once the property is found to be "encumbered in any manner," the extent to which such encumbrance "shall be taken into account" in determining the value of the interest passing to the surviving spouse becomes paramount. Although the *Stapf* case apparently never

[348] Treas. Reg. § 20.2056(b)-4(b) (1958).

[349] Treas. Reg. § 20.2056(b)-4(b) example (3) (1958) provides:

> A decedent bequeathed certain securities to his wife in lieu of her interest in property held by them as community property under the law of the State of their residence. The wife elected to relinquish her community property interest and to take the bequest. For the purpose of the marital deduction, the value of the bequest is to be reduced by the value of the community property interest relinquished by the wife.

See a special ruling dated Nov. 21, 1956, reported in 1959 Fed. Est. & Gift Tax Rep. ¶ 8102.

[350] CCH 60-2 U.S. Tax Cas. ¶ 11,967 (N.D. Tex. 1960).

[351] The court points out that neither the statute, Int. Rev. Code of 1939, § 812(e)(1)(E)(ii), added by ch. 168, 62 Stat. 110 (1948) (now Int. Rev. Code of 1954, § 2056(b)(4)(B)) on which example (3) is based, nor the committee report, S. Rep. No. 1013, pt. 2, 80th Cong., 2d Sess. 4 (1948), makes any reference to community property. The only contingencies which were recognized as being relevant to the value of the property are enumerated in examples (1) and (2), and reflect an intent to guard against a marital deduction based on an inflated valuation.

The strongest argument in support of the court's holding is that the real purpose of the statute is to guard against the allowance of the marital deduction in a sum which is greater than the net value of the property involved, e.g., when it is encumbered with a mortgage or subject to an obligation of some kind.

reached this question because the property was held to be unencumbered, some noteworthy observations were made on this point in dictum. The court observed that the "taking into account" of any encumbrance is to be done in the same manner as if the amount of a gift to the surviving spouse of such interest were being determined. Apparently the court considers that this language refers to a determination of value for gift tax purposes because the value is the price at which the property would change hands between a willing buyer and a willing seller under the Gift Tax Regulations.[352] The net value to the donee (wife) is held to be an extraneous factor and the fact that she gives up more than she receives does not properly affect the valuation of the transfer.[353]

Thus, the husband's separate property may qualify for the marital deduction and also act as consideration for the wife's election under the will if it is transferred to a marital deduction trust which meets the statutory requirements and gives the wife a benefit in the form of a life estate upon the relinquishment of her property.[354] Two

[352] Treas. Reg. 108, § 86.19(a) (1948) (now Treas. Reg. § 25.2512-1); see 4 Mertens, op. cit. supra note 347, § 2953.

[353] It is difficult to see how the wife has parted with anything of value by the transfer of her property to a testamentary trust, especially if she retains full right to the income, and her transfer of a remainder interest is subject to a reserved testamentary power of appointment which causes the property to be taxed to her estate but does not subject it to the gift tax. Rev. Rul. 54-342, 1954-2 Cum. Bull. 315; see Brown, The Widow's Election as a Tax-Saving Device, 96 Trusts & Estates 30, 31 (1957); Nossaman, Trusts Under the Revenue Act of 1948, 1950 So. Calif. Tax Inst. 459, 472 (a criticism of the transfer, showing why it might not be an election in all events).

In the Stapf case, the transfer is analogized to an inter vivos gift by the husband to the wife of his one-third interest in the whole estate, both separate and community, subject to the understanding that the wife would then give her community interest to a trust for the children's benefit. It was reasoned that since this would be a taxable gift under Commissioner v. Wemyss, 324 U.S. 303 (1945), although the husband's inter vivos gift is less than what the wife transferred in trust for the children's benefit, under the willing seller-willing buyer test it sells for no more or no less because of the value of the community interest that the wife relinquishes. The gift of one third of the separate property and the devise of the one third of the separate property are similar. Thus, the estate tax liability is not canceled simply because the gift has no net value to the donee. Although the purpose of the marital deduction is to provide a respite in taxation until the wife's subsequent death, property given by the husband to the wife under the present facts is taxed in both estates. It is taxed to the husband's estate, and being a valuable right, it is also taxed to the wife's estate.

[354] It would seem advisable to create a separate trust, over which the wife has a power of appointment, for the reception of the husband's separate property that qualifies for the marital deduction. To avoid an estate tax at the wife's subsequent death, the trust may provide the wife with an unlimited power to invade the corpus, thereby permitting her to exhaust the property in the "marital deduction trust" prior to her death. An unlimited power to invade corpus is the equivalent of a power to appoint the corpus to herself. Treas. Reg. § 20.2056(b)-5(g)(i) (1958). This method allows the husband's gross estate to deduct the property by virtue of the marital deduction. At the wife's subsequent death, this property interest is excluded from her gross estate to the extent that she has exhausted it. See Brookes, supra note 327, at 108.

If the wife retains a power over the property she relinquishes upon her election, she is deemed to have made an incomplete gift. Although there is no gift tax at the time of her election, this property is included in her estate upon her subsequent death without

observations seem relevant with reference to the result reached by the *Stapf* case. First, on the basis of policy, it seems that the requirements for the marital deduction are intended to be strictly construed to limit the available deduction. Therefore, the language "encumbered in any manner" would apparently disqualify an interest that passes to the wife only upon her election under the will. Logically, such language could encompass a condition or even an option, which the *Stapf* case construed a widow's election to be. Nevertheless, the Tax Court had previously rejected the Commissioner's contention that the phrase "in any manner" disqualifies all encumbered property without exception.[355] Consequently, the widow's election may be an encumbrance, but not of a character which disqualifies the property from the benefits of the marital deduction. The second observation is that the failure to reduce the value of the property passing to the wife for purposes of the marital deduction under the holding of the *Stapf* case may prevent property that the wife relinquishes upon her election from qualifying as "insufficient consideration" which reduces her gift tax under section 2512(b) or her estate tax under section 2043. Since neither of these sections refers to a determination of the value by taking an encumbrance into account under the principles used to determine the value for gift tax purposes, the holding of the *Stapf* case should not prevent a "netting" of what the wife relinquishes against what the husband devises under a widow's election will. If a "netting" of the two property interests was not intended by Congress, the statute should be amended.

D. *Charitable Contributions*

Another possible deduction which the husband's estate may claim is the charitable deduction. This deduction is limited to "the value of the transferred property required to be included in the gross estate."[356] Suppose the husband attempts to devise the entire community estate to a testamentary trust which provides the wife with a life estate in the corpus, remainder over to charity. May the husband's estate claim a deduction for the full value of the remainder in both halves of the community upon the wife's election under the will?[357] As the wife's election does not require the inclusion of her community interest in the husband's gross estate, any deduc-

reduction for any consideration which may have been received, viz., the life estate in her husband's property. Lela Barry Vardell, 35 T.C. No. 8 (Oct. 17, 1960).

[355] D. Byrd Gwinn, 25 T.C. 31, 40 (1955); see Mertens, op. cit. supra note 347 § 29.53, at 605; Casner, Estate Planning 655 n.44 (2d ed. 1956, Supp. 1960).

[356] Int. Rev. Code of 1954, § 2055(d).

[357] Westfall, supra note 321, at 1274.

tion would be limited to the value of the remainder in the husband's community interest. The reason is that the remainder in his community one half would be all that is required to be included in his gross estate.[358]

E. *Joint Wills*

The similarity between joint wills and the widow's election will seems sufficiently great to strengthen the argument that the wife's interest is not taxed to the husband's estate upon her election under his will. For example, if the husband and wife make a joint will devising all of the community property to a trust upon the death of the first spouse, income payable therefrom to the survivor for life, remainder vested in another, only one half of the corpus is included in the gross estate of the first decedent.[359] Thus, if the husband dies first, his estate would not be taxed with the wife's community interest because her community interest is not transferred to his gross estate by executing a joint will. Furthermore, the use of a joint will should not be considered a waiver of the wife's community rights resulting in the inclusion of the value of her community interest in the husband's gross estate.[360]

II. Gift Tax Consequences of the Widow's Election.

The widow's election will gives rise to several gift tax questions. First, if a widow renounces the benefits of the will and elects to take her community interest, does she make a taxable gift of the rejected legacy to the other beneficiaries of the will? Second, if she elects to take under the will, does she make a taxable gift of the property interest which she relinquishes by virtue of her election? Third, if there is a taxable gift by her election under the will, at what value is the gift taxed? Finally, how may the gift tax problem be eliminated and the widow's election will still be used?

At the outset it should be noted that the gift tax applies to any transfer by way of gift whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real

[358] In an analogous case, McFarland v. Campbell, 213 F.2d 855 (5th Cir. 1954), the parties by an irrevocable joint will provided for a life estate to the wife in the husband's community one half. Upon the death of the survivor all of the property was to go to charity. The court disallowed the full deduction because nothing passed to charity from the wife's estate during her lifetime, although she was bound by the terms of the joint will upon the husband's death.

[359] See McFarland v. Campbell, supra note 358; Scofield v. Bethea, 170 F.2d 934 (5th Cir. 1948), cert. denied, 336 U.S. 944 (1949); Commissioner v. Masterson, 127 F.2d 252 (5th Cir. 1942) (This case shows the perils of using a joint will.); see generally Casner, op. cit. supra note 355, at 53 n.19.

[360] 1 Beveridge, op. cit. supra note 341, at 187-88.

or personal, tangible or intangible.[361] Thus, all transactions whereby property, property rights, or interests are gratuitously passed to or conferred upon another, regardless of the means or device employed, constitute gifts subject to the tax.[362] Absence of donative intent does not of itself exempt a transfer from the operation of the gift statute.[363] Moreover, the application of the gift tax is not confined to the common-law concept of gifts, *i.e.*, transfers made without a valuable consideration, but rather it embraces sales, exchanges, and other dispositions of property for a consideration to the extent that the value of the property transferred by the donor exceeds the value in money or money's worth of the consideration given therefor.[364]

A. *The Wife's Renunciation As A Taxable Gift*

The wife's renunciation of the property under the husband's will (or the laws of descent and distribution) may be deemed a taxable gift to the other beneficiaries whose portion is increased thereby (or to the heirs at law who receive a larger share of the intestate's property). Generally, a distinction is made between renunciation under the will and renunciation under the laws of descent and distribution. In the former, the wife's renunciation is not a taxable gift since she is free either to accept or to reject the benefits of the will.[365] If the decedent dies intestate, renunciation is considered a gift to the extent of the renounced property because an heir may not prevent title from vesting by renouncing his share.[366] In Texas, however, the distinction between the two situations apparently does not exist. The Texas statute[367] provides that devises under a will shall vest title in the devisee immediately upon the testator's death. In *Rodgers v. United States*,[368] an attempted renunciation of a testamentary disposition was held to result in a taxable gift even though the will was never admitted to probate. Under such a statute it seems advisable to avoid renunciation in either situation unless one is willing to run the risk of making a taxable gift.

B. *The Wife's Election Under The Will As A Taxable Gift*

Since it has been held that an irrevocable transfer of a remainder

[361] Int. Rev. Code of 1954, § 2511(a); Treas. Reg. § 25.2511-1(a) (1958).
[362] Treas. Reg. § 25.2511-1(c) (1958).
[363] Treas. Reg. § 25.2511-1(g)(1) (1958).
[364] Treas. Reg. § 25.2512-8 (1958); see Int. Rev. Code of 1954, § 2512(b).
[365] William L. Maxwell, 17 T.C. 1589 (1952); cf. Brown v. Routzahn, 63 F.2d 914 (6th Cir.), cert. denied, 290 U.S. 641 (1933).
[366] Hardenbergh v. Commissioner, 198 F.2d 63 (8th Cir.), cert. denied, 344 U.S. 836 (1952); Frances Marcus, 22 T.C. 824 (1954), acq., 1955-1 Cum. Bull. 5.
[367] Tex. Prob. Code Ann. § 37.
[368] 218 F.2d 760 (5th Cir 1955).

interest to a trust is a taxable gift,[369] once the wife is deemed to have transferred her remainder interest in the community to the husband's testamentary trust by her election under the will, it logically follows that she has made a taxable gift. The two cases[369a] in which a court has faced the question of whether the wife's election under a widow's election will is a gift are *Chase Nat'l Bank*[370] and *Commissioner v. Siegel.*[371] In *Chase Nat'l Bank,* the taxpayer contended that the wife had no donative intent and merely exchanged her community property rights for a life interest in a much larger principal, a transaction deemed to her economic advantage. In the *Siegel* case, the taxpayer made the same contention but also argued that in any event she received "adequate and full consideration in money or money's worth" for the remainder interest which was transferred to the husband's testamentary trust as a result of her election. Thus, it was argued that the value of the remainder interest in the wife's community one half was not subject to the gift tax. Both the Tax Court and the court of appeals held that because the terms of the gift tax statute are to be construed in their broadest and most comprehensive sense, the wife makes a gift by electing to take under the husband's will. Exemption from the gift tax statute occurs only when an arm's length bargaining situation exists without a showing of donative intent, *i.e.,* when one party simply makes a better bargain.[372] In these cases no arm's length relationship existed between persons bargaining one with the other in the ordinary course of business.[373] Thus, the transactions were not exempt from the gift tax under the "business transfer exception,"[374] but were subject to the gift tax which is imposed on transfers for "less than an adequate and full consideration in money or money's worth."[375]

C. *Valuation Of The Gift*

Once the wife is deemed to make a taxable gift by electing to take the benefits under the husband's will in lieu of her community property rights, the principal problem is one of valuation of the gift.

[369] Smith v. Shaughnessy, 318 U.S. 176 (1943).

[369a] A third case, Zillah Mae Turman, 20 CCH Tax Ct. Mem. Dec. 24,721(M) (March 20, 1961), was decided too recently to be included in the text. The Tax Court followed the Siegel case and the opinion of the Tax Court in the Chase case.

[370] 25 T.C. 617 (1955), rev'd on other grounds sub. nom. Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), cert. denied, 359 U.S. 913 (1959) (The court of appeals held that the wife was not presented with an election by the terms of the husband's will).

[371] 250 F.2d 339 (9th Cir. 1957).

[372] Treas. Reg. § 25.2512-8 (1958).

[373] Cf. Robinette v. Helvering, 318 U.S. 184 (1943).

[374] Lowndes and Kramer, Federal Estate and Gift Taxes 747-49 (1956).

[375] Int. Rev. Code of 1954, § 2512(b); Commissioner v. Wemyss, 324 U.S. 303 (1945).

Section 2512(a) of the Internal Revenue Code of 1954 provides that the value at the date of the gift is to be considered the amount of the gift. Section 2512(b) reads as follows:

> Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

The Regulations under this section provide that a sale or transfer in the ordinary course of business (a bona fide, arm's length transaction without donative intent) is considered made for an adequate and full consideration.[376] Relinquishment of dower or curtesy, or statutory estates created in lieu of dower or curtesy, or other marital rights in the spouse's property is not deemed consideration in money or money's worth to any extent.[377]

The problem of valuation of the gift is further compounded by the question of whether the value of the wife's gift to the testamentary trust, *viz.*, the remainder in her community interest, may be reduced by the value of a life estate in the husband's community one half which she receives by her election to take under his will.[378] For years the language in *Robinette v. Helvering*[379] and *Giannini v. Commissioner*[380] was thought to preclude a life estate in the husband's community interest from being consideration which would reduce the value of the wife's gift of her remainder. In the *Robinette* case, however, the taxpayer contended that she made *no gift* because the transfer of a remainder interest to an inter vivos trust was supported by "full consideration in money or money's worth," *viz.*, an *agreement* to execute identical trusts concerning the disposition of property rather than the value of the property itself which was received in exchange therefor.[381] The Supreme Court held[382] that (1) the agreement is not adequate and full considera-

[376] Treas. Reg. § 25.2512-8 (1958).

[377] See ibid.; Merrill v. Fahs, 324 U.S. 308 (1945); Commissioner v. Wemyss, 324 U.S. 303 (1945) (Community property is not included in this statutory prohibition since it is an actual property right and is not created in lieu of common-law marital rights).

[378] See 5 Mertens, op. cit. supra note 347, § 34.28.

[379] 318 U.S. 184 (1943).

[380] 148 F.2d 285 (9th Cir.), cert. denied, 326 U.S. 730 (1945).

[381] A daughter, contemplating marriage, created an inter vivos trust with successive life estates first to herself, then to her parents, with remainder to her issue. The parents created a similar trust with successive life estates first to themselves, then to the daughter, with remainder to the daughter's issue. The purpose of this transaction was to keep the daughter's fortune in the family. The Commissioner contended that the parents made a taxable gift of the remainder to the daughter's issue. The taxpayer contended that the *agreement* between the parties to create the trusts was sufficient consideration to exempt the remainder from the gift tax statute.

[382] 318 U.S. at 188.

tion for the transfer since it is not subject to valuation for gift tax purposes, and (2) this is not a transaction "in the ordinary course of business" which would be deemed made for an "adequate and full consideration in money or money's worth." Hence, the transaction is subject to the gift tax. Although the Supreme Court in the *Robinette* case held that a transfer of a remainder is subject to the gift tax because it is not in the ordinary course of business, this holding does not preclude the argument that the transfer is *reduced* by any consideration received. This possibility is not mentioned by the Supreme Court. In the *Giannini* case, which involved an estate tax question, the court of appeals found that a transaction similar to that in the *Robinette* case is not exempt from the estate tax under the "business transfer exception."[383] The court, however, went beyond the *Robinette* case by holding that what is now section 2043[384] is inapplicable because the transfer to the trust, if a gift, cannot also be an exchange for an insufficient consideration.

The reasoning of the *Giannini* case appears erroneous and is apparently overruled *sub silentio* by *Commissioner v. Siegel* and *Chase Nat'l Bank*. These two cases held that a wife's election to accept a life estate in the entire community under her husband's will is a taxable gift to the extent that the value of her remainder interest in the community, which she relinquishes to the testamentary trust, exceeds the value of the life estate in the husband's community interest, which she receives under the will.[384a] In other words, a taxable gift is effected by the wife's election under the will, but the value of the gift for tax purposes is equal to the value of the property

[383] Here, a family trust was created to which each of the three children contributed ten per cent of the corpus and the parents contributed the remainder. The net income was divided equally among the three children for their lives with the remainder going to their nominee. The Commissioner contended, and the court held, that at the death of one of the children the value of his ten per cent contribution should be included in his estate for estate tax purposes because he had retained a life estate therein.

[384] Formerly, Revenue Act of 1926, ch. 27, § 302(i), 44 Stat. 71 (now Int. Rev. Code of 1954, § 2043(a)) which reads as follows:

> If any one of the transfers, trusts, interests, rights, or powers enumerated and described in sections 2035 to 2038, inclusive, and section 2041 is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

[384a] In Zillah Mae Turman, 20 CCH Tax Ct. Mem. Dec. 24,721(M) (March 20, 1961), the taxpayer's argument that the value of a life estate in the entire community should be the consideration for her election, thereby reducing the value of her gift of the remainder, was rejected. The Tax Court found no reason to deviate from the rule in the Chase and Seigel cases.

which the electing spouse relinquishes, reduced by the value of the consideration received under the will.[385] Both the Tax Court and the court of appeals refuted the taxpayer's contention that the trustee's discretionary power to distribute principal should further reduce the value of the taxable gift. The court reasoned that this power is incapable of valuation because it gives the widow a mere possibility of receiving a distribution.[386] The theory of the *Chase* and *Siegel* cases seems to be that the wife makes a partly gratuitous exchange of her community interest for an advantageous life estate by electing under the husband's will.[387] This theory seems consistent with the spirit and purpose of section 2512(b).

The effect of the *Chase* and *Siegel* cases, *viz.*, a reduction of the amount of the taxable gift by the value of the property that the donor receives as consideration from a third party in the same transaction, has been criticized as an illogical solution to a question which is basic to the application of the gift tax.[388] The reasoning behind this criticism is that if the gift tax is applicable at all, the entire value of the gift should be taxed without a reduction for property that the donor receives as consideration from a third party in the same transaction; or the transaction should escape the gift tax completely. Moreover, it is argued that if the wife elects to acquiesce in the husband's testamentary disposition of the remainder in her community interest as the price of receiving a life estate in his community one half, without regard to the remainderman's identity, the gift tax should be wholly inapplicable.[389] The theory is that the wife merely appraises the respective values of the life estate in the husband's community interest and the remainder in her community one half and concludes that the former is more valuable to her than the latter. In other words, she is motivated solely by "economic self-interest"[390] and a donative intent is entirely lacking.

[385] Provision should be made for payment of gift taxes by the trust since, in the normal case, the wife has no assets after her election out of which the gift tax can be paid.

[386] But cf. Commissioner v. Vander Weele, 254 F.2d 895 (6th Cir. 1958) (transfer to trust, reserving a life estate and power to distribute principal to donor in the sole discretion of the trustee held not to be a taxable gift because there was no assurance that anything would pass to the remaindermen).

[387] See Westfall, Estate Planning and the Widow's Election, 71 Harv. L. Rev. 1269 (1958). Although the property that the wife relinquishes does not reduce the value of the property passing from the husband for purposes of the marital deduction under the "encumbrance" test, see text at note 351 supra, the property passing from the husband to the wife is still deemed consideration under section 2512(b), which reduces the gift tax. In Stapf v. United States, CCH 60-2 U.S. Tax Cas. ¶ 11,967 (N.D. Tex. 1960), it was assumed that a gift tax was due upon the wife's election in an amount equal to the excess of the value of her relinquished community interest over the one third of the total estate devised by the will.

[388] See Westfall, supra note 387, at 1277-78.

[389] Id. at 1278.

[390] Lowndes and Kramer, op. cit. supra note 374, at 747-49; see also Comment, Tax

As previously indicated a gift tax is imposed on transfers made without donative intent,[391] but transfers made "for an adequate and full consideration in money or money's worth" are exempt from the gift tax. Therefore, if the wife's bad business bargains are to escape the gift tax, her conclusion as to the relative values of the life estate and remainder interest, when motivated solely by economic self-interest, should be accepted in preference over values set forth in actuarial tables which do not reflect her state of health or possible preference for an assured life income. If the wife's conclusion as to the value of respective property interests is accepted, the transfer would be exempt from the gift tax because it is made for "an adequate and full consideration in money or money's worth."[392] If the remaindermen are her children, however, as opposed to strangers to whom she has no desire to pass her property at death, it will be doubtful whether she is motivated solely by economic self-interest.

Another possible exclusion from the gift tax was abrogated by the holding in the *Robinette* case, *viz.*, that a transfer motivated by a "desire to pass the family fortune on to others" can hardly be in the "ordinary course of business" which exempts the transfer from the gift tax. Furthermore, a transfer motivated by such a desire could not also be motivated solely by the donor's economic self-interest. In conclusion, (1) because it is doubtful that a widow's election is motivated solely by the wife's economic self-interest when the remaindermen are her children, and (2) because a transfer by virtue of the widow's election is not made "in the ordinary course of business" if it is motivated by the desire to preserve the family fortune, and (3) if the basic proposition is correct, *viz.*, that either the gift tax is applicable or wholly inapplicable to the entire value of the gift without a reduction for property the donor receives from a third person in the same transaction, the gift tax should be imposed on the full amount of the remainder which is transferred by the wife's election under the will.

In support of the holding in the *Chase* and *Siegel* cases, it may be argued that when the transferee-remainderman is a natural object of the couple's bounty, a partially false appearance of consideration is better than an inquiry into the wife's subjective intent, of which even

Aspects of Widow's Election, 1 Ariz. L. Rev. 105, 109 (1959). The business transfer exception is applied to transfers unconnected with a business where the transferee's sole motive was economic betterment. For the origin of the term economic self-interest see note 321 supra.

[391] Treas. Reg. § 25.2511-1(g)(1) (1958).

[392] Cf. Int. Rev. Code of 1954, § 2512(b).

she may not be sure, to determine if she is motivated solely by economic self-interest.[393] Clearly, imposition of the gift tax on the full amount of the transfer upon the wife's election to take under the will is not desirable when, in reality, her election may be supported by consideration. Stubborn adherence to an arbitrary rule that all inter-family transfers are without consideration because they are not motivated by economic self-interest will surely result in inequities. If the transfer resulting from the wife's election under the will is motivated solely by economic self-interest or is "in the ordinary course of business," complete exclusion from the gift tax may be more desirable from the taxpayer's viewpoint. The revenue may be better protected, however, by striking a median between the two extremes of complete exclusion from, and immutable subjection to, the gift tax. This compromise would consider the actuarial values of the property transferred to the wife as consideration for her election regardless of her motive. In other words, although some property escapes the gift tax, *viz.*, an amount equal to the value of the property received by the widow as consideration for making an election when she is motivated solely by a donative intent, it will be partially recovered by a gift tax on the transfer resulting from the election by a widow who is motivated solely by economic self-interest and which might have been excluded from the gift tax. Any inquiries into the difficult question of subjective intent will be averted. In order to have the tax follow the economic realities, however, the application of the tax should be governed by the wife's intent.

The decisions of *Chase* and *Siegel* may seem correct when the wife is required to elect *either* the benefits under the will *or* her community interest. The argument for reducing the value of her gift by the value of a life estate in the husband's community interest, as the consideration which she receives, is considerably weakened if the will allows her to receive benefits from his community interest even if she also claims her community rights at law.[394] In drafting a

[393] See Comment, supra note 390, at 109-10. In many cases the wife's motives may not be at either extreme of the spectrum of taxable intent, but rather somewhere in between, thus incapable of determination even by herself. In the Chase case, the court stated that the value of the remainder which was transferred to the inter vivos trust was not reduced for gift tax purposes by the life estate in the husband's community interest. This result may be distinguished from the election situation arising upon the husband's death. In the former case, both parties are living and capable of bargaining at arm's length with each other for benefits. In the normal election situation, however, one party is deceased and therefore it is only the survivor who is faced with the decision as to which choice will be to his or her economic betterment.

[394] See Weingarten, Gift and Estate Tax Consequences of Widow's Election in Community Property States, 42 A.B.A.J. 1163 (1956). If the wife repudiates the will, she destroys her right in a trust created for purposes of the marital deduction. This result

widow's election will the wife must be prohibited from receiving both the benefits under the will and her property rights at law.

When the husband has separate property which is included in the testamentary trust, in addition to his community interest, the value of the remainder relinquished by the wife is probably less than the value of that which she receives under the will. Therefore, it follows that the wife has not made a taxable gift. The same result occurs if the widow is very young because the values of remainder interests and life interests are determined by actuarial tables.[395] When the actuarial value of the life estate is fifty per cent or more of the total value of the community one half, no gift tax results from the wife's election to take under the will.

D. *How To Avoid The Gift Tax Problem*

Aside from merely diminishing the gift tax liability by reducing the amount of the gift by the amount of consideration received, the gift tax problem may be entirely avoided by careful drafting of the will. For example, the gift tax is avoided when the transfer results in an incomplete gift[396] or when the wife retains a power of appointment over her community interest.[397] This power may be exercisable in favor of her descendants and only at her death.[398] Although use of the foregoing suggestions may avoid the gift tax, that part of the wife's community interest which escapes the gift tax and which remains unexhausted at her death is subject to the estate tax.[399] Moreover, the part of the wife's community which remains un-

---

can be prevented by giving the remaining benefits under the will to the wife regardless of her election. Nossaman, supra note 353, at 472. By doing this, however, the argument for holding the life estate in the husband's community one half as consideration is weakened.

[395] Example: Suppose there is a community estate of $200,000 which the husband attempts to place in his testamentary trust. What is the wife's gift tax liability when she elects to take under her husband's will that devises her a life estate in the entire community in lieu of the property rights which she surrenders?

	W age 55	W age 50	W age 55*
Value of wife's community interest transferred to trust	$100,000	$100,000	$100,000*
Less: value of reserved life estate to wife	45,926	51,970	45,926
Value of wife's gift to husband's testamentary trust	54,074	48,030	54,074
Less: value of life estate in husband's community interest	45,926	51,970	91,852*
Taxable gift	8,148	—0—	—0—

*Assume further that the husband also created a life estate in $100,000 of his separate property for the wife as consideration for the relinquishment of the remainder in her community interest.

[396] A gift in trust is not incomplete merely because the trustee is authorized to use the trust income and corpus for the donor's support. Rev. Rul. 54-538, 1954-2 Cum. Bull. 316; but cf. Commissioner v. Vander Weele, 254 F.2d 895 (6th Cir. 1958).

[397] Int. Rev. Code of 1954, § 2511.

[398] Treas. Reg. § 25.2511-2(b) (1958).

[399] Int. Rev. Code of 1954, § 2041; see Sanford v. Commissioner, 308 U.S. 39 (1939).

exhausted at her death and is included in her estate may not be reduced by the value of the life estate in the husband's community interest which was consideration for the election, if the gift is incomplete.[400] Because of this subsequent estate tax, it may be desirable for the husband to create two trusts, one composed entirely of his community interest and the other composed entirely of the wife's community interest. The wife could retain a testamentary power of appointment over that trust which contains her community interest. Under this plan, the wife does not make a taxable gift upon her election. To insure that the wife has not made a gift by her election, all inheritance, succession, and federal estate taxes should be charged to the trust composed of the husband's community interest.[401] Moreover, by using this plan the wife's income tax may be minimized by splitting the income between the two trusts. If, in addition, the wife must exhaust the principal of the trust containing her community interest before she is entitled to any right of support from the trust containing the husband's community interest, her estate tax will be correspondingly reduced to the extent that she exhausts her estate. Obviously, exhausting the principal of the trust containing the wife's community interest first reduces that trust's earning power and this may not be desirable. The marital deduction, however, may be utilized by creating one of the trusts in conformity with the requirements necessary to qualify for the deduction when the husband's separate property is involved.

III. Income Tax Consequences of a Widow's Election Will

Although it has never been so held, a wife conceivably could be subject to income tax liability upon her election to take under a widow's election will. By electing, the wife may realize a taxable gain on the heretofore unrealized appreciation of her remainder interest by relinquishing it in exchange for a life estate in the husband's community interest. Such a situation is an exchange for an adequate and full consideration in money or money's worth or one deemed to be for an adequate and full consideration in money or money's worth. Another potential problem is how to split the subsequently earned trust income between the wife and the husband's estate to obtain the most advantageous tax results.

[400] Lela Barry Vardell, 35 T.C. No. 8 (Oct. 17, 1960); see generally section IV at p. 156, infra.

[401] See Brown, supra note 353, at 31; Brawerman, How to Draft a Will with the Widow's Election, 1956 So. Calif. Tax Inst. 359, 366.

A. *Possible Gain Recognized Upon The Wife's Election*

To the extent that a transfer is made for a consideration in money or money's worth, as in the *Chase* and *Siegel* cases, it is exempt from the gift tax. A transfer for consideration, however, may be subjected to the operation of the income tax statutes to the extent that the appreciation in value of the remainder interest which the wife relinquishes is unrealized. The theory is that the wife has purchased a life estate with her remainder interest by her election under the husband's will. It is possible, however, that the wife's election is not a sale or exchange unless she is held to have purchased a present income interest in the husband's estate by relinquishing the remainder interest in her community one half.[402] If a sale or exchange does exist, the gain recognized from the transaction should be taxed at capital gains rates. Furthermore, the wife should be allowed an amortization deduction with reference to the life estate in the husband's community interest in order to recover her cost in the event that a gain is recognized.[403]

B. *How To Measure The Gain*

Assuming that the wife's election is a taxable exchange of the remainder in her community interest for the life estate in the husband's community interest, a possible measure of the "realized" gain has been said to be "the difference between that part of [the wife's] basis for the remainder in her one half allocable in actuarial terms to a remainder following her life estate, and the fair market value of a life estate in [the husband's] one half, likewise determined actuarially."[404] This statement may be illustrated by the following two examples, assuming that the total community estate is $200,000 ($100,000 for the husband and $100,000 for the wife). (1) If the

[402] See generally Brookes, The Tax Consequences of Widows' Elections in Community Property States, 1951 So. Calif. Tax Inst. 83, 90. Thus far, it has never been held that the wife realizes a taxable gain upon her election to take under her husband's will in exchange for relinquishing the remainder interest in her community one half devised to other beneficiaries under the husband's will. See also Ferguson v. Dickson, 300 Fed. 961 (3d Cir.), cert denied, 266 U.S. 628 (1924), where it was held that the wife's release of her dower rights in the husband's property constitutes a sale.

[403] See Bell v. Harrison, 212 F.2d 253 (7th Cir. 1954); William N. Fry, 31 T.C. 522 (1958), non-acq., 1960-2 I.R.B. 7, aff'd, 60-2 U.S. Tax Cas. ¶ 9738 (6th Cir. Oct. 18, 1960).

[404] Westfall, supra note 387, at 1282. This result appears consistent with the holding of Reginald Fincke, 39 B.T.A. 510 (1939), acq., 1939-2 Cum. Bull. 12. There the taxpayer transferred property in trust for his children, charging the trust with an amount equal to his cost although the market value of the property was considerably greater. It was held that the taxpayer realized no profit on the transaction. The transaction was a sale for cost, plus a gift of the excess. See also ALI Fed. Income, Estate & Gift Tax Stat. 116-22 (Tent. Draft No. 10, 1955); I.T. 3335, 1939-2 Cum. Bull. 193, revoking I.T. 2681, XII-1 Cum. Bull. 93.

actuarial value of the wife's life estate in the husband's community interest at the time of the husband's death is $60,000 (remainder $40,000) and the basis in the life estate and remainder are $30,000 and $20,000 respectively, the taxable gain to the wife upon her election under the husband's will is $40,000, which is an amount equal to the difference between the actuarial value of the life estate in the husband's community interest and the basis in the wife's community interest which is allocable to the remainder therein ($60,000 - $20,000 = $40,000). (2) If, however, the actuarial value of the wife's life estate in the husband's community interest at the time of the husband's death is $40,000 (remainder $60,000) and the basis of the life estate and remainder are $20,000 and $30,000 respectively, the taxable gain to the wife upon her election to take under the will is $10,000, which is an amount equal to the difference between the actuarial value of the life estate in the husband's community interest and the basis in the wife's community interest which is allocable to the remainder therein ($40,000 - $30,000 = $10,000).

As pointed out in the *Chase* and *Siegel* cases, the gift tax is applicable to the extent that the *present value* of the remainder, determined actuarially, which the wife is deemed to surrender by her act of election under the husband's will, exceeds the value of a life estate in the husband's community interest which she receives under his will in exchange therefor. Thus, in example (2) above, a gift tax is payable (in addition to the income tax) on $20,000, which is the excess of the present value of the wife's remainder interest over the life estate in the husband's community one half ($60,000 - $40,000 = $20,000). Therefore, the total amount subject to taxation is $30,000 ($10,000 income tax + $20,000 gift tax). In example (1), however, since the present value of the remainder which the wife relinquishes does not exceed the value of the life estate in the husband's community one half which she receives in exchange therefor, the wife is not deemed to have made a taxable gift. Therefore, the total amount subject to taxation is $40,000, which is an amount equal to the value of the heretofore unrealized appreciation in the wife's remainder interest. If the *Chase* and *Siegel* cases are correct in holding that the wife makes a taxable gift by electing under a widow's election will whenever the present value of the remainder she surrenders exceeds the value of the life estate she receives, as in example (2), then it logically follows that when the value of the life estate the wife receives exceeds the present value of the remainder she surrenders, as in example (1), the excess should be held a bequest

or devise to the wife and exempt from the income tax.[405] At any rate, the situation presented in example (1) is rare and would normally occur only in two instances. First, if the wife is not over fifty years of age at her husband's death, the value of the life estate in the husband's community interest will be greater than the remainder she surrenders. Second, if the husband gives part of his separate property to the wife as a benefit to induce her election under his will, the life estate in his separate property, coupled with the life estate in his community interest may make the benefit under his will greater than the remainder she surrenders by her election under his will.

In a community property jurisdiction, however, the unrealized appreciation in the wife's remainder interest escapes the income tax upon her election under a widow's election will because of the operation of section 1014(b)(6) which gives the surviving spouse's community interest a "stepped-up" basis equal to the fair market value of the decedent's community interest at the time of his death.[406] Thus, although a gain may be realized by the wife upon her election, it is not recognized. The proposed method of measuring the taxable gain upon the wife's election is nullified when community property is involved, yet it is of great importance if the wife elects to relinquish her separate property in exchange for a gift of the husband's separate property.[407] Cognizance of this possible measure of gain is also of importance in a common-law jurisdiction when the wife

[405] Int. Rev. Code of 1954, § 102(a).

[406] Int. Rev. Code of 1954, § 1014(b)(6).

[407] Assume that the husband's will creates a testamentary trust consisting of his separate property, having a fair market value of $100,000 at his death, and the wife's separate property, which also has a fair market value of $100,000 at his death. Assume further that the terms of the trust provide the wife with a life estate in the corpus and remainder to the children upon her death, provided that she elects to accept the benefits under the will. Assume further that the actuarial values of the life estates in the respective properties to the wife, and the wife's adjusted basis in the properties are as follows:

	Wife's separate property	Husband's separate property
Value at the husband's death	$100,000	$100,000
Actuarial value of life estate to wife	50,000	50,000
Actuarial value of remainder	50,000	50,000
Wife's adjusted basis	50,000	
Wife's adjusted basis allocable to life estate	25,000	
Wife's adjusted basis allocable to remainder	25,000	

Under these facts the wife incurs no gift tax liability because the value of the remainder she is deemed to have surrendered is equal to the value of the life estate she receives in exchange therefor. For income tax purposes, however, a gain may be recognized in the amount of $25,000, i.e., the wife receives a life estate in the husband's separate property (valued at $50,000) in exchange for the remainder in her separate property (valued at $25,000). If the exchange is of property of like kind, which is used in the trade or business or held for investment, no gain is recognized. Int. Rev. Code of 1954, § 1031. Securities and other property which are not held for investment or in the trade or business do not qualify for the non-recognition provisions.

relinquishes her property rights in exchange for benefits under the husband's will.

C. *Splitting The Subsequently Earned Income*

If the community estate is large, provisions should be made so that the wife is taxed only on the income from her community interest after her election under the will. Placing the husband's community interest in one testamentary trust (hereinafter referred to as trust H) and the wife's interest in another testamentary trust (hereinafter referred to as trust W) may accomplish this purpose. In general, trust H should provide for the accumulation of income during the wife's lifetime with distribution of corpus and accumulated income to her children upon her death. Trust W should provide for a current distribution of all income to the wife during her lifetime with a general testamentary power of appointment to avoid the gift tax upon her election. Under this procedure the wife is taxed on no more income than if she had not elected under the will. For the wife to be given the requisite benefit to present an election situation, she should receive the equivalent of a life estate in the entire community when she elects to take under the husband's will. In order to provide the wife with the equivalent of a life estate in the entire community, the trustee of trust W should be directed to distribute to the wife, in addition to the current income, an amount of the corpus of the trust which is equal to the estimated annual income of trust H, after payment of taxes. The trustee of trust H should be empowered to loan trust W the equivalent of its net income for each year and the trustee of trust W should be authorized to borrow indiscriminately from trust H to obtain funds for the payments which are to be made out of corpus.[408] At the wife's death, her estate is reduced by the amount of indebtedness to trust H. Although these two trusts may be attacked as a method of evading taxes, no provision of the Internal Revenue Code enables the Commissioner to change the effect of the two trusts if an honest indebtedness exists between them.[408a]

Instead of borrowing from trust H to acquire the funds with which to make payments out of principal, trust W could sell assets

[408] Brawerman, supra note 401, at 369. If trust W is deemed an incomplete gift, it will be included in the wife's gross estate without reduction for the value of the life estate in trust H given as consideration for the election. Cf. Lela Barry Vardell, 35 T.C. No. 8 (Oct. 17, 1960).

[408a] It has been suggested that this plan may be subject to attack under the "step transaction" doctrine and therefore that it is undesirable. See Rice, Family Tax Planning, ch. 12, § 40, at 395 (1960). Cf. Boyce v. United States, 7 Am. Fed. Tax R.2d 714 (W.D. La. Feb. 15, 1961).

sufficient in amount to enable it to make the payments. Since trust H has accumulated its income and since the amount which is to be paid out of the corpus of trust W is equal to the amount of income accumulated by trust H, trust H will always have available funds to invest, assuring a ready market for the assets of trust W. This plan would eventually exhaust the corpus of trust W and when this occurs the wife should be allowed a right of support out of trust H.[409] The provision for the wife's support should not make the income of trust H taxable to the wife during the years of accumulation if the wife is not the trustee.[410] Both of the above plans reduce the corpus of trust W first, thereby reducing the estate tax payable by the wife's estate at her subsequent death.[411]

The husband's estate apparently is taxed only with the income from his interest in the community during administration and not with the income from the wife's interest.[412] The wife's execution of an inter vivos election contemporaneously with the execution of the husband's will, whereby she agrees to accept the provisions of the will in lieu of her community rights at law, may cause the income from her community one half to be taxed to the husband's estate during administration, but only if it passes some property to the husband during his lifetime.

IV. Estate Tax Consequences to the Wife Who Elects

It is the possible estate tax saving at the time of the wife's subsequent death that makes the widow's election will so attractive to a community property estate plan. A properly drafted widow's election will may permit the wife's community interest to pass at her death with a reduced estate tax or with no estate tax, according to the facts in each case. Such a will may also permit the husband's community interest, which passes to the wife, to escape the second estate tax at her subsequent death. These advantages are in addition

[409] Brown, The Widow's Election as a Tax-Saving Device, 96 Trusts & Estates 30 (1957).

[410] Int. Rev. Code of 1954, § 678.

[411] In the case of borrowed funds the debt may be repaid to the husband's trust upon the wife's subsequent death, and then the husband's trust should further reduce the income tax liability by dividing the corpus into multiple trusts for the children. But cf. Boyce v. United States, 7 Am. Fed. Tax R.2d 714 (W.D. La. Feb. 15, 1961).

[412] Sneed v. Commissioner, 220 F.2d 313 (5th Cir. 1955) (husband and wife both received income); see Jackson, Community Property and Federal Taxes, 12 Sw. L.J. 1, 34 (1958); cf. G.C.M. 9086, X-1 Cum. Bull. 243 (1931); but see Barbour v. Commissioner, 89 F.2d 474 (5th Cir. 1937). Here the wife had the power to negate the effect of her inter vivos election by withdrawing fifty per cent of the corpus. Therefore, the husband's estate was taxed only on one half of the income.

to the other methods of reducing the wife's gross estate, thereby minimizing the estate tax at her subsequent death. Since no estate tax cases have decided this point, resort must be had to the applicable provisions of the Internal Revenue Code and gift tax cases.[413]

A. *The Code Provisions*

Section 2031 delimits the gross estate as including the value at the decedent's death of all property as provided in the subsequent sections. Section 2036 provides for the inclusion of the value of property transferred if the decedent retains a life estate, except in the case of a sale for "an adequate and full consideration in money or money's worth." Similarly, section 2041 provides for the inclusion of the value of any property in which the decedent possessed a power of appointment exercisable in favor of himself or his estate. Section 2043 provides that when a transfer or power is made or created for a consideration "but is not a bona fide sale for an adequate and full consideration in money or money's worth" and is described in sections 2036 and 2041, only the excess of the fair market value at the time of the decedent's death over the value of the consideration received therefor is included in the gross estate.

If the wife elects under the will, apparently she has made a transfer with a retained life estate.[414] Otherwise, the wife's property would not be taxed at her death since she has relinquished all control over it except for the life estate which expires at her death. Furthermore, such an interest is not taxed to the husband's estate by reason of the wife's election under his will.[415] In a recent case involving a joint and mutual will, the wife's election to abide by its terms which gave her a life estate in the entire community, remainder over, with a power to sell or consume the corpus as she desired, caused the entire community to be included in her gross estate.[416] Upon analysis, however, the language of the will seems to create a general power of appointment in the wife's favor. Thus, unless the statute is "tracked"

[413] In Lela Barry Vardell, 35 T.C. No. 8 (Oct. 17, 1960), the court did not reach this question as it decided the case on other grounds. See text at note 422 infra.

[414] Int. Rev. Code of 1954, § 2036. But see Petitioner's Brief in Reply, p. 7, Lela Barry Vardell (Tax Court Docket No. 75855). The wife's executor argued that the election at the husband's prior death resulted in an exchange of her fee interest in one half of the community estate for a life estate in the whole community; hence, nothing was left in the wife's estate, i.e., the transfer was for full "consideration in money or money's worth." The court held, however, that the transfer was includable in the wife's gross estate as a transfer with a retained life estate. Lela Barry Vardell, 35 T.C. No. 8 (Oct. 17, 1960).

[415] See discussion of the estate tax consequences to the husband's estate upon the wife's election under the will in the text at note 328 supra, and income tax consequences during administration of the estate in the text at note 412 supra.

[416] Phinney v. Kay, 275 F.2d 776 (5th Cir. 1960).

with care, the entire community may be taxed in the wife's gross estate upon her subsequent death.

B. *Valuation For Purposes Of The Estate Tax*

Valuation of the community interest which is includable in a wife's gross estate on her death subsequent to an election to take under her husband's will is a difficult question. Conceivably, the property that the wife receives by electing under the will may be deemed consideration, thereby reducing the value of the property which is included in the gross estate in the same manner as in the computation of gift taxes. A "sale transaction" must occur before the life estate in the husband's community interest is treated as consideration.[417] In *Ferguson v. Dickson*,[418] the husband's transfer of property to a trust in which the wife had a contingent life estate, pursuant to an ante-nuptial contract whereby the wife released her dower interest, constituted a sale.[419] It appears that this resembles an exchange more than a sale. Apparently, the court's interpretation of "sale" includes what is normally thought of as an exchange.[420]

In the *Chase* and *Siegel* cases, as previously discussed, the life estate was held to be consideration for gift tax purposes, reducing the value of the taxable gift. Does it follow that these cases support the proposition that a life estate in the husband's community interest constitutes consideration for the wife's election under a widow's election will for purposes of the estate tax? Before the enactment of the 1954 Internal Revenue Code, the Supreme Court held that the gift and estate tax provisions are to be construed harmoniously, and where obvious reasons do not compel divergent treatment, identical language is to be given identical meaning.[421] Section 2512 of the gift tax statute and section 2043 of the estate tax statute utilize the same concept of consideration, *viz.*, "bona fide sale for an adequate and full consideration in money or money's worth." Under the reasoning of the *Chase* and *Siegel* cases, the courts could hold that the life estate in the husband's community interest is consideration for estate

[417] For substantive law purposes the wife is treated as purchasing a life estate for value when she renounces her vested interest in the community and elects under the will. Cf. Borden v. Jenks, 140 Mass. 562, 5 N.E. 623 (1886); Muse v. Muse, 186 Va. 914, 45 S.E.2d 158 (1947).

[418] 300 Fed. 961 (3d Cir.), cert. denied, 266 U.S. 628 (1924). The action arose under the Revenue Act of 1918, which required a "bona fide sale for a fair consideration in money or money's worth."

[419] Such a sale was also found to be made for a "fair" consideration although the court indicated that it was not an adequate and full consideration.

[420] Int. Rev. Code of 1954, § 2043(b), now precludes dower from being consideration to any extent.

[421] Merrill v. Fahs, 324 U.S. 308, 313 (1945); see Lowndes and Kramer, op. cit. supra note 374, at 308-10.

tax purposes when a widow's election will is used. In *Lela Barry Vardell*,[422] it was contended that the wife made a sale or exchange of her entire community interest for a life estate in the community as a whole by her election under the husband's will.[422a] Since this exchange was alleged to be for "adequate and full consideration in money or money's worth," it was contended that no part of her community interest was includable in her gross estate. The court held that under this particular will the wife made an incomplete gift.[423] As a result, the value of her entire community interest was included in her gross estate without a reduction for the consideration she received by electing under the will. Nevertheless, the court made the following statement in dictum: "Were it not for the language in Vardell's will . . . it might well be that none of the property in question should be included in the decedent's gross estate."[424] It is not certain whether this dictum indicates that the court would adopt the taxpayer's contention, *viz.*, that the wife exchanged her entire community interest for the life estate in the community as a whole.[424a] On the other hand, because of the property valuations in this case, no other combination of values would result in total exclusion from the wife's estate. To find that the wife's election under a widow's election will results in an exchange of her community interest for a life estate in the entire community seems to contradict the spirit and purpose of the *Chase* and *Siegel* cases. If this result were sustained, the life estate that the wife retains in her community interest, which requires her community interest to be included in her gross estate, would also act as consideration which reduces the value of the interest that is included in her gross estate. For this reason, the dictum in the *Vardell* case should not be followed.

If the wife's election under the will results in a transfer with a retained life estate or a transfer subject to a power of appointment, section 2043 should reduce the amount included in her gross estate by the value of the life estate in the husband's community interest which acts as consideration for the election.[425] It has been suggested

[422] 35 T.C. No. 8 (Oct. 17, 1960).

[422a] The same contention was made for gift tax purposes in Zillah Mae Turman, 20 CCH Tax Ct. Mem. Dec. 24,721(M) (March 20, 1961), and the court rejected it.

[423] The husband's will gave the wife a life estate in the entire community, remainder to the children in trust. The wife had a power to invade the corpus for her own benefit. Thus, it was said that she might deprive the remaindermen of the property.

[424] 35 T.C. No. 8 (Oct. 17, 1960).

[424a] Apparently the court would not accept the taxpayer's contention in light of the fact that it was rejected for gift tax purposes in Zillah Mae Turman, 20 CCH Tax Ct. Mem. Dec. 24,721(M) (March 20, 1961). Thus, the dictum cannot be given much weight.

[425] Assume that at the husband's death there is a community estate of $1,000,000 after payment of his estate tax. The husband leaves the usual widow's election will and

that the Commissioner might contend that a transfer cannot be for "an adequate and full consideration" if its effect is to reduce the taxable estate.[426] More specifically, in the case of a widow's election will the consideration received, *viz.*, a life estate in the husband's community interest, is exhausted during the wife's lifetime. Therefore, since nothing remains at her death, the life estate is said not to qualify as consideration. This argument necessarily assumes that the wife will exhaust the life estate she receives as consideration before her death. One answer may be that the determination of the status of the life estate as consideration for a widow's election should not be based on her propensity to dissipate the life estate before her subsequent death.

The date at which the consideration is to be valued for purposes of the estate tax is not a problem for purposes of the gift tax.[427] It has been held that the value of a life estate for purposes of the estate tax is to be determined at the time of the transfer and not upon the wife's subsequent death when the value of the life estate can be known for certain.[428] This view eliminates many problems which may arise by virtue of changed conditions which may exist upon the wife's subsequent death, *e.g.*, no assets with which to pay the tax. On the other hand, however, some support may be found for the proposition that when a life estate is the consideration received by the wife, the actual value thereof at her death, rather than the actuarial value at the time of the exchange, should be used in deter-

his wife elects to take thereunder after his death. Upon the wife's death, assuming that she has been unable to exhaust her community interest and the values are the same as at the husband's death, her estate tax consequences are as follows (for simplicity the gift tax is not taken into account in this example):

Gross estate of the wife if she is:	Age 60	Age 50
Retained life estate in wife's community interest	$500,000	$500,000
Less: consideration (life estate in husband's community interest):	198,395	259,850
Total	301,606	240,150
Less exemption	60,000	60,000
Net estate	241,605	180,150
Tax	63,181	44,745

If there had been no election, the estate tax on the wife's community interest would have been $126,500. Thus, a considerable saving is made. Of course, if the wife has exhausted part of her estate by the time she dies, there will be a corresponding reduction of the tax.

[426] Brawerman, supra note 401, at 574; see also Lowndes and Kramer, Federal Estate and Gift Taxes 313-17 (1956).

[427] Westfall, supra note 387, at 1280. The question is posed whether some fractional part of the property transferred is excluded from the estate or the dollar value of the consideration is deducted from the estate.

[428] Ithaca Trust Co. v. United States, 279 U.S. 151 (1929); Lincoln Rochester Trust Co. v. McGowan, 217 F.2d 287, 293 (2d Cir. 1954); Commissioner v. Bensel, 100 F.2d 639 (3d Cir. 1938).

mining the amount to be included in her gross estate.[429] If the latter view prevails, it is obvious that the value of the consideration may be different for purposes of the estate and gift taxes. In the *Vardell* case, the wife lived twenty-one years after her election under the will. Since the benefits she received were known, the taxpayer contended that the actual value thereof (rather than the actuarial value at the time of election) should be used in computing the consideration. Alternatively, the taxpayer contended that the present value of the benefits received, or the present value of the life estate in the entire community, based on the wife's actual life of twenty-one years after her election should be used. The taxpayer also contended that the value of the wife's community interest at the date of her election rather than at the date of her death should be used in determining the amount that is to be included in her gross estate. There seems to be no good reason to value the wife's community interest at the date of the election rather than at the time of her death. Indeed, a reading of section 2031 shows that the value at the time of the decedent's death is the amount that is included. Finally, it is believed that the same reasoning that causes the life estate in the husband's community interest to be deemed consideration for gift tax purposes should cause the same life estate to be consideration for estate tax purposes.

C. *Property Passing Outside Of Probate*

Property that passes to the wife other than by the husband's will[430] is taxed at the husband's death and subsequently at the wife's death to the extent that it is not exhausted during her lifetime. The second tax may be avoided by reducing the consideration she receives under the will for her election to compensate for the property passing outside of probate. In other words, the husband's will should provide that the amount of property passing to the wife under the will shall equal one half of the value of the entire community estate which is subject to probate administration, less the value of one half of the property passing to the wife outside of probate. To insure that the wife has this property in mind when she elects, the will should provide that her election to take thereunder is in consideration of the property passing outside of the probate proceeding as well as that passing under the will, and that unless she receives such property the election is not binding upon her.[431] Usually the husband can do

[429] Nourse v. Riddell, 143 F. Supp. 759 (S.D. Cal. 1956). Here the life estate was held adequate and full consideration and therefore no estate tax was due.

[430] E.g., Probate homestead, insurance, family allowance, exempt property.

[431] See text at note 394 supra.

nothing to prevent the wife from receiving the property passing outside of probate. Thus, if the wife receives such property regardless of whether she elects under the will or against it, the argument for treating such property as consideration for her election is very weak.[432]

V. Conclusion

In common-law jurisdictions[433] the estate plan normally is based on the marital deduction allowed by section 2056.[434] If the husband transfers up to one half of his property to his wife, a deduction from his gross estate of an amount not to exceed one half of his adjusted gross estate is allowed. The purpose of the marital deduction is to equalize the taxation in common-law and community property jurisdictions,[435] and in the "classic situation" at common law, *viz.*, when the husband owns all of the property[436] and predeceases the wife, the marital deduction accomplishes its purpose.

In a community property jurisdiction the spouses own equal portions of the community estate and are taxed the same irrespective of which spouse dies first. If, however, the "classic situation" does not exist at common law, *e.g.*, the spouse who dies first has no property or the smaller share of the property, an inequality exists in the tax treatment for the survivor, as compared with a survivor in a community property jurisdiction. The result is that little or no

---

[432] Ibid.

[433] Many of the conclusions and examples which follow can be found in Anderson, The Marital Deduction and Equalization Under the Federal Estate and Gift Taxes Between Common Law and Community Property States, 54 Mich. L. Rev. 1087 (1956).

[434] This section provides for a deduction from the gross estate of the decedent, of an amount not to exceed 50 per cent of the "adjusted gross estate," for the value of any property interest which passed from the decedent to his surviving spouse, provided that such interest qualifies as a deductible interest, i.e., generally, it must be includable in the surviving spouse's gross estate.

[435] If the gross estate consists of community property, the marital deduction is not available.

[436] Assume a community estate valued at $1,000,000 and also a common-law situation where the husband owns all of the property valued at $1,000,000. If the husband dies first in both cases, the results are as follows:

	Common Law	Community Property
Husband's gross estate	$1,000,000	$500,000
Less: marital deduction	500,000	-0-
Total	500,000	500,000
Less: specific exemption	60,000	60,000
Taxable estate	440,000	440,000

On the initial tax, the estate tax is equal, and on the wife's subsequent death, the $500,000 which escaped taxation in the common-law jurisdiction will be taxed in her estate. Therefore, both the community property wife and the common-law wife have an estate of $500,000 and are subject to the same tax.

estate tax is paid upon the death of the first decedent, but the survivor's estate is subjected to a large estate tax at his or her subsequent death. If the property were owned equally by each spouse, as in community property jurisdictions, the tax would be divided on their separate deaths. Although the marital deduction reduces the decedent's estate by the amount transferred to the survivor, the latter's estate is correspondingly increased by the amount of the transfer unless it is exhausted during his or her lifetime. Since the estate tax is graduated upward, the second estate, now larger, is taxed at a still higher rate.[437] Therefore, if the first decedent in a common-law jurisdiction does not own most of the property, the resulting tax treatment cannot equal that of community property residents. If each spouse's property is approximately equal in value, the tax result is similar to that which exists when the survivor owns some property, but less than that once owned by the first decedent. In either situation, use of the marital deduction may not be advantageous if one estate is made larger than the other.[438]

Historically, a typical common-law estate plan provided that the husband would leave a life estate to the wife with a remainder to the children. This would not increase the wife's gross estate. When

[437] Suppose that H and W are residents of a community property jurisdiction and own a community estate valued at $1,000,000. In a common-law jurisdiction H-1 owns $750,000 and W-1 owns $250,000. If the wife dies first, the tax results are as follows:

	Marital Deduction	No Marital Deduction	Community Property
W's (W-1's) estate	$250,000	$250,000	$500,000
Less: marital deduction	125,000	-0-	-0-
Total	125,000	250,000	500,000
Less: specific exemption	60,000	60,000	60,000
Taxable estate	65,000	190,000	440,000
Tax	10,900	47,700	126,500
On H's subsequent death, the transfer from W must be added to his estate with the following result:			
H's (H-1's) estate	750,000	750,000	500,000
Add: W's (W-1's) transfer	125,000	-0-	-0-
Total	875,000	750,000	500,000
Less: specific exemption	60,000	60,000	60,000
Taxable estate	815,000	690,000	440,000
Tax	257,250	212,200	126,500
Total tax on both estates	268,150	259,900	253,000

[438] If the marital deduction were used in these situations, the first estate tax would be considerably less than that imposed on the estate of the first decedent in a community property jurisdiction, but the second tax would be much greater, provided the property was not exhausted during the survivor's lifetime. Generally, the total tax is usually greater than the total tax in the community property jurisdictions. Another alternative is to have one or both spouses make inter vivos gifts. Of course, this may not be desirable from the standpoint of the parties because they would have to relinquish control of the property.

the marital deduction was enacted, the "terminable interest rule"[439] prohibited a "life estate to the wife, remainder to the children" limitation from qualifying for the marital deduction. Otherwise, the life estate to the wife would be excluded from her gross estate because it terminated at her death; and if it also qualified for the marital deduction (exclusion from the husband's gross estate), it would pass to the beneficiaries without the payment of any estate tax. This type of transfer was excluded from the marital deduction by the "terminable interest rule" for another reason, *viz.*, it was thought that a community property decedent could not control the disposition of the survivor's community interest by the terms of his will.[440] Apparently, quantitative equality was sought in the types of testamentary dispositions available to residents of each jurisdiction. Now, common-law residents achieve favorable tax results by the husband's devise of a life estate in all property to his wife with a general power of appointment over one half of the remainder and a devising of the other one half of the remainder to their children. The one half over which the wife has a general power of appointment is included in her gross estate but qualifies for the marital deduction from the husband's estate.

By using a widow's election will, community property residents may achieve the same substantive results achieved by the historical common-law estate plan of "life estate to the wife, remainder to the children." The tax results of the widow's election will are similar to those achieved under the historical estate plan of common-law decedents, which utilizes the marital deduction by employing a general power of appointment, but with the added benefit of having the life estate in the first decedent's one half deemed consideration for the second decedent's transfer of the remainder, reducing the amount subject to the tax.[440a] In the widow's election will the husband controls the entire community and yet the estate tax is computed only on one half of the community estate. Two factors distinguish this from the common-law situation. First, the wife must consent to the disposition. Second, the wife incurs a gift tax upon her election under the will and the property that she is deemed to have relinquished is included in her estate for purposes of the estate tax because of the retained life estate. In community property jurisdictions, the

[439] Int. Rev. Code of 1954, § 2056(b)(1).

[440] S. Rep. No. 1013, 80th Cong., 2d Sess. 1948-1 Cum. Bull. 285, at 305. In other words, he cannot leave the survivor with nothing more than a life estate in the entire community. Apparently the intended result was to achieve equality in a qualitative sense in the mode of testamentary dispositions available to each property system.

[440a] Since the tax results of the widow's election are not settled law, some writers have advised against its use. See Rice, op. cit. supra note 408a, at 391.

substantive rules of community property prevent the property from escaping taxation and the situation is analogous to common-law jurisdictions where the "terminable interest rule" prevents the life estate from qualifying for the marital deduction. As a result, the advantage in favor of community property residents in the type of disposition available is only qualitative in nature, *i.e.*, a common-law husband must choose between the marital deduction and entrusting the property to the wife's power of disposition in the form of an absolute transfer.

In a community property jurisdiction, if a wife elects to take under a widow's election will, two tax advantages may accrue to her benefit: (1) the husband's community property that passes to the wife may escape a second estate tax upon her subsequent death, and (2) the wife's community interest may be subjected to a smaller estate tax. If the life estate in the husband's community interest is deemed consideration for the wife's election to take under the will, her gross estate obviously includes none of the following: (1) the life estate in the husband's community interest, because it terminates at her death, (2) that portion of her surrendered community interest (remainder interest) which is equal in value to the life estate in the husband's community interest, and (3) the portion of her community interest (life estate) which is exhausted before her death. A distinct estate tax advantage to community property residents is apparent.

The difference in treatment between common-law and community property decedents has caused strong criticism of the widow's election will as used in a community property jurisdiction.[441] Changes in the Internal Revenue Code were suggested in anticipation of the affirmance of the *Chase* case.[442] The suggested changes would preclude a life estate in the husband's community interest from being treated as consideration of the wife's election. There is no doubt that this proposed change was not contemplated by Congress when the term "consideration" was first employed.[443] On the other hand, however, an amend-

[441] See generally, Westfall, Estate Planning and the Widow's Election, 71 Harv. L. Rev. 1269 (1958).

[442] ALI Fed. Income, Estate & Gift Tax Stat. 40 (Tent. Draft No. 11, 1956). Although the Chase case was reversed on appeal, it was not reversed on this point.

[443] Int. Rev. Code of 1954, § 2043(b) first appeared in the Revenue Act of 1932. S. Rep. No. 665, 72d Cong., 1st Sess. 50 (1932), accompanying the bill, read as follows:

> This amendment excludes, in determining "consideration in money or money's worth," the value of a relinquished, or a promised relinquishment of, dower, curtesy, or other marital rights in a decedent's property. Sec. 302(a) and (b) of the 1926 act require the value of such an interest to be included in the gross estate, and, if its value may, in whole or in part, constitute a consideration for an otherwise taxable transfer (as has been held to

ment of this nature may be more in adherence with the generally accepted concept of consideration. One disadvantage of such an amendment is that the wife would be precluded from ever making an inter-family transfer in exchange for a life estate in the husband's community interest even in situations where she is motivated solely by "economic self-interest." Another solution would be to include all of the community property in the husband's gross estate and allow a marital deduction if the husband uses a widow's election will or devises up to one half of the property to the wife. This possible solution, however, is in conflict with the basic principles of community property.

---

be so), or an otherwise unallowable deduction from the gross estate, the effect produced amounts to a subversion of the legislative intent expressed in sec. 302(a) and (b).

For example, a decedent dies leaving his estate of $1,500,000 (after payment of all charges), and under State law the surviving spouse is entitled to one-third, or $500,000, of which she can not be deprived by will without her consent. Under existing law the estate is entitled to no deduction on account of her statutory rights, but, if she and decedent had entered into a contract by which she was to receive from his estate a stated sum in consideration of a waiver of her statutory rights, the amount due her under the contract might be held a deductible claim against the estate as having been contracted for an adequate and full consideration in money's worth, namely, the value of her waived marital rights.