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WILLS AND ESTATES

THE RIGHT TO RENOUNCE ELECTION TO TAKE UNDER A WILL

Arkansas. In the case of *Townson v. Townson*[1] the principal question was whether a widow, after having filed a declaration of her decision to take under her husband's will, may later change her mind and elect to renounce the will. The widow had filed an instrument with the probate clerk in which she declared that with full knowledge of her right to a larger share in the estate, she elected to take only that property left to her by her husband's will. However, by a second pleading filed within the time limit allowed by statute for making an election,[2] she undertook to rescind her earlier action and renounced the will, alleging that her election was not binding upon her as a matter of law and that her signature to the first instrument was obtained by fraud. The trial court overruled a demurrer to the issue of fraud and allowed proof of this issue to come into evidence. The court, however, made no express finding upon the question of fraud and entered judgment that she was entitled to renounce her prior election.

On appeal the supreme court compared the situation in this case with the converse situation — that is, where the will is first renounced and then an election to take under the will is made. This latter situation is covered by statute[3] as follows:

> An election made by or on behalf of a surviving spouse to take against the will shall be binding and shall not be subject to revocation,

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[1] ..... Ark. ....., 254 S.W. 2d 952 (1953).

[2] ARK. STAT. 1947 ANN. (1953 Supp.) § 60-503: "The election by a surviving spouse to take against the will may be made at any time within one month after the expiration of the time limited for the filing of claims. . . ." In the portion of the statute (§62-1001) pertinent to the time limit for filing claims, the administrator or executor is required to publish notice that letters testamentary have been granted him and that any person having claims must file them within six months from the date of first publication of notice or else be barred and precluded from any benefits in the estate.

[3] ARK. STAT. 1947 ANN. (1953 Supp.) § 60-506.

> except within the time provided by Section 35[4] for filing an election and prior to any distribution made on the basis of such election....

The supreme court reasoned first that since the statutory provisions for revoking an election to take against the will were very liberal, it was the intention of the legislature to permit the widow to choose which course would be best suited to her interests with the fullest information possible. Secondly, it was stated to be plain that if the widow is free to revoke her original renunciation of the will, then she should be "equally free to rescind her relatively unimportant decision to take under the will." Therefore, the supreme court affirmed the trial court and held that the widow had the right to rescind her election unless a distribution had been made under the will in reliance on her election.

There is a broad principle of equity running through many fields of the law to the effect that a person upon whom inconsistent rights are conferred has the right to choose which of these rights he will take but that he cannot have both.[5] This right to choose between inconsistent rights is known as election.[6] It arises in the case of wills where the testator attempts to deprive the surviving spouse of rights given her by law; or attempts to dispose of property free from another's interest and to give in return a right or interest in property in which the other would otherwise have no interest.[7] In this situation the devisee or legatee is bound to make an election either to accept the provision in the will or retain that which is already his own.[8] An election may be inferred from the acts or conduct of a person as by the acceptance of benefits given in a will,[9] or it may be made expressly by some unequivocal act of the party accompanied by language showing the intention to

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[4] Quoted in note 2 *supra*.
[5] 4 PAGE, WILLS (3d ed. 1941) § 1346.
[6] *Ibid.*
[7] 4 PAGE, WILLS (3d ed. 1941) §§ 1347, 1358.
[8] *Id.*, § 1347.
[9] *Id.*, § 1366.

elect.[10] Thus, the fact of an express election may be shown by the execution of a written instrument declaring the election.[11]

With the foregoing as a background, the general rule may be stated that an unconditional voluntary election to take under or contrary to a valid will cannot be revoked or set aside when made with knowledge of the facts and of the rights of the person making the election, and when not induced by fraud or undue influence.[12] With the factors of fraud or undue influence out of the picture, the rule is based upon the knowledge of the person electing. Of course, when the election is made upon an incomplete set of facts or upon a false assumption, there is no basis for holding the person to his election. But if facts adequate to make an intelligent and discriminating election are before the person together with a knowledge of his rights and the effects of his election, the courts generally hold him bound by his election.[13] This election is binding also upon those parties who claim under him, his heirs and personal representatives.[14]

The Arkansas statute requires that a revocation of an election must be made within the time allowed for filing an election and prior to any distribution made on the basis of the election.[15] However, up until the present case the line of decisions in Arkansas appears to have followed in strict conformity with the general rule in refusing to permit revocation of an election once made with knowledge of the facts. The rule was stated in the case of *Goodrum v. Goodrum*[16] in the following words:

> An election once made, under circumstances which show that the party required to elect had, or might, by the exercise of reasonable diligence, have had, such information, in regard to the relative value of those things between which a choice must be made, as would enable

[10] 2 POMEROY, EQUITY JURISPRUDENCE (5th ed. 1941) § 514.
[11] *Ibid.*
[12] *Id.*, § 519b.
[13] Williams v. Williams, 114 Fla. 733, 154 So. 835 (1934).
[14] 2 POMEROY, EQUITY JURISPRUDENCE (5th ed. 1941) § 516.
[15] Quoted at note 3 *supra.*
[16] 56 Ark. 532, 20 S.W. 353, 354 (1892).

> the party making the election to make an intelligent and discriminating choice, cannot be retracted.

In the *Goodrum* case a widow filed suit within the statutory time limit claiming her dower interest at law instead of the provision in the husband's will bequeathing her a policy of insurance on his life. At the time the proceeds were collected and paid to her, she understood that the bequest was in lieu of dower and was also fully advised of her legal rights. The court held that, although she had never given any receipt for these proceeds and had never expressed either in words or in writing that it was her purpose to make an election, such an election was naturally and legitimately to be inferred. However, an inventory or statement of her husband's estate had not been made at the time she accepted the money, and the court permitted the election to be revoked on the ground she had not had the information necessary to enable her to make an intelligent and discriminating choice between the bequest in the will and her dower interest.

A similar situation arose in the case of *Cypert v. McEuen*,[17] wherein the widow also brought suit within the statutory time limit for her dower interest after having elected to take under the will of her husband. The will had bequeathed her a portion of the husband's personal estate, but here, as a distinction from the *Goodrum* case, the widow on receiving payment under the will executed a receipt by which she acknowledged that the payment was made pursuant to the terms of the will and agreed to accept its terms. An inventory of the estate had not been filed by the executor at the time the widow elected to take under the will, but she knew of the amount of money her husband had when he died, for she had possession of the deposit slips and had delivered them to the executor. Further, she had ample opportunity to inquire and obtain advice as to her rights under the law, and there was no intimation in the record that she was misled or deceived as to her rights. The court found the widow had the requisite knowledge for making an elec-

[17] 172 Ark. 437, 288 S.W. 923 (1926).

tion and, therefore, she was not permitted to revoke her election to take under the will.

Again, the Arkansas Supreme Court followed the rules as to election laid down in the *Goodrum* case in the later case of *McEachin v. Peoples National Bank.*[18] The widow, as sole beneficiary under a will except for a small bequest, had negotiated with and bought her brother-in-law's interest in a partnership owned jointly by him and her deceased husband. The unpaid balance of the partnership interest was covered by notes executed by the widow. When the obligation came due, she attempted to revoke her election to take under the will and to claim her dower rights at law. One of the main questions on appeal was whether the widow had renounced the will and elected to take the rights given by law within the time allowed by statute.[19] However, the court refused to settle this question and, setting up the above quoted statement of law from the *Goodrum* case as the test, held that the widow had elected to take under the will with the knowledge necessary to make a choice, and, therefore, the election was irrevocable.

It is interesting to note the striking similarities between the *Townson* case and the *Goodrum, Cypert* and *McEachin* cases representing the prior line of decisions in Arkansas. First, there was a widow in each case who had, either by acts or express written statements, elected to take under her husband's will and was later attempting to revoke the election and claim dower rights at law. Secondly, the suits to revoke the election were all filed within the statutory time limit for filing elections with the possible exception of the *McEachin* case, and there the court expressly left the ques-

[18] 191 Ark. 544, 87 S.W. 2d 12 (1935).

[19] Prior to 1949, a widow under ARK. STAT. 1947 ANN. § 61-219 had twelve months from the death of her husband in which to file an election to take her dower interest where the will devised her lands or a pecuniary interest, but under § 61-225, if the will devised lands, the widow had eighteen months within which to elect. The widow in the *McEachin* case filed her election after twelve months but before eighteen months, and the question of whether her election was timely filed depended upon the nature of the property devised by the will. These two statutes, §§ 61-219 and 61-225, have been repealed by § 60-503, quoted in note 2 *supra.*

tion undecided. And thirdly, in all but the *Goodrum* case the persons bound to elect had the knowledge necessary to enable them to choose which right to accept and which to reject.

From the reported opinion of the *Townson* case it cannot be determined what influence, if any, the allegations and evidence of fraud had on the supreme court's affirmance of the trial court holding. Certainly, if fraud had been used in inducing the widow to sign the instrument declaring the election, the court could have found ample authority to support a decision allowing her to rescind the election.[20] On the other hand, absent the element of fraud, the court could have supported a decision holding the widow bound to her election not only by earlier decisions of its own but by the general view because of her express election declaring knowledge of the right to a larger share in the estate. Fraud appears to have been no factor here, however, since the trial court made no express finding of fraud and because the supreme court described the filing of an election to take under a will as being "relatively unimportant."

The *Townson* case is made conspicuous by the complete absence of citations on the point under discussion. But even though prior cases are not distinguished, the court's decision appears clearly to be a departure from the long standing Arkansas rule to the effect that an election made with the knowledge necessary to an intelligent and discriminating choice binds a party to his election. Such a decision has much in its favor though, for if no distribution has been made in reliance on the widow's election so that a revocation would do harm to innocent third parties, then permitting the election to be revoked merely allows generous latitude to the widow in making a choice.

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[20] 4 PAGE, WILLS (3d ed. 1941) § 1385.

ELECTION WHEN SURVIVING SPOUSE IS MENTALLY INCOMPETENT

Oklahoma. The case of *Turner v. First National Bank & Trust Co. of Muskogee*[21] presented the question — apparently one of first impression in Oklahoma — of whether a court having jurisdiction over the estate of a mentally incompetent surviving spouse is bound to elect for the incompetent survivor to take under the law rather than the will when such an election will result in a greater pecuniary benefit to the survivor.

The incompetent surviving spouse, the widow, and the deceased had been married almost 50 years at the time of his death. The evidence revealed that theirs had been a most harmonious marriage, both of them having a deep affection of each other, like interests, like business ingenuity, and like sentiments toward charities. For example, the deceased, because he wanted his wife to have as much as he, had given the surviving incompetent during their marriage an estate equal to his own, which amounted to approximately $600,000. She, to show her gratitude towards him, had executed a will leaving her entire estate to him in the event she should predecease him. Further to illustrate their similar attitudes, the incompetent had attended Bacone College as a girl, and afterwards, she, as well as her husband, who was not a former student, had contributed generously to the college and to deserving students attending the college. Some time prior to her husband's death, she suffered a stroke which left her mentally incompetent, and from this condition there was no hope of recovery because of her advanced age of over 80 years.

The will of the deceased devised to his surviving spouse a one-half interest in his estate, and the remainder was devised to Bacone College, except for a life estate in a particular piece of property given to his wife's caretaker. Since no children had been born of the marriage and there were no ascendants, or brothers and sisters living, the surviving spouse was her husband's sole heir and

[21] .....Okla....., 262 P. 2d 897 (1953).

under the succession statute[22] entitled to the entire estate. Thus, by virtue of the forced heir statute[23] she had a right of election because the will gave her less than was provided for her by law. Since she was incapable of making an election, her guardian acted in her place and petitioned the county court to elect for her to take under the law of succession and not under the will. The county court elected for the incompetent spouse to take under the will, and an appeal was taken to the district court where, after a trial de novo, the same result was reached.

The Oklahoma Supreme Court in reaching a decision set up several equitable considerations[24] to serve as guides for a court

[22] 84 OKLA. STAT. ANN. (Perm. ed.) § 213, Fifth: "If the decedent leave a surviving husband or wife, and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife."

[23] 84 OKLA. STAT. ANN. (Perm. ed) § 44: "Every estate in property may be disposed of by will; . . . but no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law. . . ." Under this statute it has been held in *Porter v. Hansen*, 190 Okla. 429, 124 P. 2d 391 (1942), that a will giving to a forced heir less than the heir would receive by inheritance is not void, but is merely voidable as to the heir at his election. In another case construing this statute, *Parnacher v. Hawkins*, 203 Okla. 387, 222 P. 2d 362 (1950), the court held that disinheritance, whether intentional or unintentional, is positively forbidden and that the surviving spouse is a forced heir to the extent that he or she would take under the law of succession.

[24] Apparently the court derived its equitable considerations from the cases of *First National Bank v. MacDonald*, 100 Fla. 675, 130 So. 596 (1930), *In re Harris' Estate*, 351 Pa. 368, 41 A. 2d 715 (1945), and *Van Steenwyck v. Washburn*, 59 Wis. 483, 17 N.W. 289 (1883). The *First National Bank v. MacDonald* case listed several elements as guides for a court, saying: "In determining what is for the best interest of the afflicted widow, the chancellor will generally be influenced by these considerations: (1) The husband's right to dispose of his estate is limited by the right given the widow to renounce the provisions of the will in her behalf and take under the statute, but the sole reason in law for giving the widow the right to renounce is to insure ample provision for her personal needs and comforts. (2) Her personal needs and comforts may not be confined to pure monetary considerations. (3) The matter of enriching the widow's estate and passing something to her kinspeople has no place in the chancellor's consideration. (4) The kinspeople of the wife have no claim direct or indirect on the estate of the husband. (5) The fact that a permanently insane widow knows nothing of the value of money, cannot use it with discretion and has no need for money nor property save to furnish ample comforts and needs, may be considered. (6) It may also be borne in mind that, when the husband has made ample provision for his insane wife, he has an inherent right to dispose of his property as he pleases, provided the disposition be not contrary to public policy." 130 So. at 599. In the case of *In re Harris' Estate* the court said: "It is common knowledge that not every widow disregards her husband's last wishes for the disposition of his property merely because she would obtain a greater quantum of his estate by so doing; sentiment enters into such situations quite as much as considerations of material advantage. . . ." 41 A. 2d at 722.

with jurisdiction over an incompetent's estate in making an election for the incompetent survivor. First, the court considered whether the means provided by the will were ample for her care and comfort during the remainder of her life, since the primary purpose of the law in giving a survivor the right of election is to insure that ample care and comfort is provided. Of this there could be no doubt, for she was over 80 years of age and had an estate in her own right of $600,000 in addition to the approximately $300,000 devised to her by the will. Next, the relatives of the incompetent spouse were briefly considered, but the court stated that where the election is concerned with the estate of a deceased husband in which the relatives have no claim, as in this case, they were not to be considered in making the election. And last, where the evidence showed that the incompetent had great confidence in the deceased and like devotion to the other devisees under the will, and bearing in mind that all widows do not disregard the wishes of their husbands as expressed in their wills, the court held that such evidence should have great weight in determining the election to take under the will. Therefore, the Oklahoma Supreme Court, following the uniform line of decisions in this country,[25] upheld the county and district courts and held that a court with jurisdiction over an incompetent's estate was not bound to elect that the surviving incompetent take under the law because such a choice would result in greater pecuniary benefits.

It is well settled in Oklahoma that where a husband by his will gives his surviving spouse less than she would take under the law of succession, she has a right to elect to take the share given by law.[26] Thus, where a surviving spouse elects to take under the law of succession, the deceased spouse's will, although it may be valid and subsisting as to all others, is invalid and non-existent as to the surviving spouse.[27] The forced heir statute makes no distinction in terms between competent and incompetent surviving spouses

[25] 4 PAGE, WILLS (3d ed. 1941) § 1363; 57 AM. JUR., *Wills*, §§ 1527, 1528.

[26] See note 23 *supra*.

[27] Dixon v. Dixon, 191 Okla. 139, 126 P. 2d 1020 (1942).

but merely says that "no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law."[28] Applying this statute to the facts of the present case, it appears that if the widow were competent, she would have an absolute right to elect to take against the will in spite of her age and the extent of her personal estate. Then, does not the holding in this case discriminate against incompetent survivors? True, she was incapable herself of electing, and the guardian could not make the election,[29] but he had the duty to protect her interests and petitioned the court in her behalf. Further, was not the court indulging in judicial legislation by this holding? The court effectively modified the absolute wording of the forced heir statute so that in situations involving an incompetent survivor, it now means that there is no absolute right of election. Instead, a court with jurisdiction over the incompetent's estate may exercise its discretion and is not bound to elect to take against the will even though it would result in a greater pecuniary benefit to the incompetent. The answer to both of the questions posed would seem to be "Yes."

As indicated above, the holding in the principal case is in accord with the great weight of authority in this country. When viewed from the standpoint of what decision will give the most socially desirable result, it is difficult to offer any valid or worthwhile criticism. The incompetent survivor already had a considerable estate, and this estate would have merely been increased if the guardian's petition had been successful. She was over 80 years of age and hopelessly insane. Therefore, balancing these factors against the benefit which would be derived from using the estate in suit to help educate needy students as well as to care for a faithful servant during her remaining years, the court made the only decision possible from a socially desirable point of view. Cer-

[28] See note 23 *supra.*

[29] 25 AM. JUR., *Guardian and Ward,* § 104.

tainly, the decision will not work a harm on incompetent survivors, since the equitable considerations set up as guides permit a court with jurisdiction over the incompetent's estate to elect to take against the will when the circumstances warrant such an election.

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