

MATERIALS ON
FAMILY RIGHTS IN DECEDENTS' ESTATES

(Including dower and curtesy, election against will, family allowances during administration and homestead and exempt personal property)

A Staff Report to the
Advisory Committee on Probate Law Revision

June 1964

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Oregon Probate Law Revision
Staff Report No. 2

To the Members of the Advisory Committee on
Probate Law Revision:

At your meeting on May 16, 1964, you requested that your staff supply each of you with a copy of the Alaska statutory provision which affords some protection to a wife or husband against inter vivos conveyance of the homestead by act of the other spouse only, by means of a requirement that both spouses join in the conveyance; a copy of a preliminary draft of proposed legislation relating to family rights in decedents' estates prepared in the course of the current Wisconsin study on probate law, and a copy of any other materials relating to dower and curtesy and other family rights in decedents' estates readily available to your staff. This report is an effort by your staff to comply with your request.

This report consists of the following materials:

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In selecting relevant provisions of the Missouri statutes and the Model Probate Code as "other materials" relating to dower and curtesy and other family rights in decedents' estates, your staff does not intend to represent that these provisions constitute ideal approaches to the handling of the subject or that they are representative of approaches which have been adopted by the several states. It appears that many different approaches are embodied in the statutes of the

several states, as well as many variations of similar approaches. In addition, a considerable body of literature on the subject has been published in recent years. The selection of the Missouri statutes and the Model Probate Code might well be ascribed to the circumstance that they were readily available to your staff. More valid reasons may be that the Missouri statutes are part of a relatively recent (1955 and 1957) probate law revision in another state, which attempt to adapt some of the ideas presented by the Model Probate Code, and that the Model Probate Code, although published in 1946, contains some relatively new ideas on the subject.

Since the most recent revision of probate law in another state was enacted by the Iowa legislature in 1963, you may be interested in the provisions of the 1963 Iowa Probate Code on the subject. Each of you received a copy of this Code at your meeting on April 18, 1964. The Iowa election against will provisions are embodied in sections 236 to 258 of that Code, while section 332 gives the surviving spouse exempt personal property and sections 374 to 377 and 433 provide an allowance for the surviving spouse and minor children.

Your staff hopes that the materials contained in this report will prove useful in your consideration of the matter of dower and curtesy and other family rights in decedents' estates.

Robert W. Lundy
Chief Deputy Legislative Counsel

Salem, Oregon
June 1964

I. ALASKA STATUTES

At present the Alaska statutes do not appear to provide for either dower or curtesy. According to a recent study (Alaska Legislative Council, Study on the Proposed Alaska Probate Code (1961)), statutes adopted in 1913 provided for both dower and curtesy, but in 1923 the wife was empowered to convey or sell any real property held by her without her husband joining in the conveyance, in which event such property was not subject to any curtesy right in the husband, and in 1935 the estate by curtesy was completely abolished. Statutory provisions for dower continued until 1963 (Alaska Stat. §§ 13.35.010-210 (1962)). The primary dower provision read as follows:

"The widow of a deceased person is entitled to dower, or the use during her natural life of one-third part in value of all the lands whereof her husband died seized of an estate of inheritance." (Alaska Stat. § 13.35.010 (1962))

It may be of interest to note that the pre-1963 Alaska statutes on dower included a provision on the right of the widow to remain in the dwelling house of her husband and to sustenance (Alaska Stat. § 13.35.150 (1962)) identical to the provision by ORS 113.070 for Oregon.

The Alaska dower statutes (Alaska Stat. §§ 13.35.010-210 (1962)) were repealed by an Act of the 1963 Alaska legislature (Alaska Laws 1963, ch. 38), effective July 1, 1963, which included a new statutory provision on election against will reading as follows:

"(a) If a testator or testatrix leaving a surviving wife or husband bequeaths or devises away from the surviving wife or husband more than two-thirds of his or her net estate, the surviving wife or husband, in his or her option and notwithstanding the will, may take and receive one-third of the net estate of the testator or testatrix. The right to receive one-third of the net estate may be waived in writing in a premarital or submarital agreement.

"(b) The surviving wife or husband must exercise the option by filing in the court in which the will is admitted to probate, within three months thereafter, his or her election, in writing, to take and receive one-third of the net estate unless election has been waived by a premarital or submarital agreement. Upon the filing of the election within that time, the will is inoperative as to that one-third of the net estate. The failure to make and file the election within the three-month period is conclusive evidence of consent to the provisions of the will by the surviving wife or husband.

"(c) If the surviving spouse is incompetent, the guardian of the spouse or, if there is no guardian, the court shall make the election for the spouse, which is considered more advantageous to the spouse and the election is considered as effectual as if made by a competent spouse.

"(d) The election set out in this section may be made and filed within three months from the admission to probate of any will admitted to probate before the effective date of this section. Failure to make and file the election within the period of three months is conclusive evidence of consent to the provisions of the will by the surviving wife or husband." (Alaska Stat. § 13.05.105 (Supp. 1963))

Prior to 1963 and at present, an Alaska statutory provision afforded and affords some protection to a wife or husband against inter vivos conveyance of the homestead by act of the other spouse only, by means of a requirement that both spouses join in the conveyance. This provision reads as follows:

"(a) A conveyance of land, or of an estate or interest in land, may be made by deed, signed and sealed by the person from whom the estate or interest is intended to pass, who is of lawful age, or by his lawful agent or attorney, and acknowledged or proved, and recorded as directed in this chapter, without any other act or ceremony whatever.

"(b) In a deed or conveyance of the family home or homestead by a married man or a married woman, the husband and wife shall join in the deed or conveyance.

"(c) The requirement that a spouse of a married person join in a deed or conveyance of the family home or homestead does not create a proprietary right, title or interest in the spouse not otherwise vested in the spouse.

"(d) Failure of the spouse to join in the deed or conveyance does not affect the validity of the deed or conveyance, unless the spouse appears on the title. The deed or conveyance is sufficient in law to convey the legal title to the premises described in it from the grantor to the grantee when the deed or conveyance is otherwise sufficient, and (1) no suit is filed in a court of record in the judicial district in which the land is located within one year from the date of recording of the deed or conveyance by the spouse who failed to join in the deed or conveyance to have the deed or conveyance set aside, altered, changed, or reformed, or (2) the spouse whose interest in the property is affected does

not file, within one year in the office of the recorder for the recording district where the property is situated, a notice of his interest in the property." (Alaska Stat. § 34.15.010 (1962))

In a decision involving the homestead conveyance provision of the statute set forth above, the United States District Court in Alaska indicated that the homestead interest embodied in the provision did not constitute a restriction on alienation and that only as it regarded a right of occupancy would it be treated as such; that the provision constituted a right to occupy the homestead during marriage regardless of title in a third party, but gave no right, title or interest by reason of occupancy; and that the right to occupy did not survive divorce. Spracher v. Spracher, 17 Alaska 698 (1958).

The nature of a "homestead" in Alaska is described in the statutory provision relating to exemption of the homestead from judicial sale. The pertinency, if any, of this description to the "family home or homestead" referred to in the homestead conveyance provision of the statute set forth above is not clear. The homestead exemption provision reads as follows:

"The homestead of any family is, or the proceeds of the homestead are exempt from judicial sale for the satisfaction of any liability contracted or judgment on debt except as provided in this section. The homestead consists of the actual abode of and owned by the family or some member of the family. It shall not exceed \$8,000 in value, and not exceed 160 acres in extent if located outside a town or city laid off into blocks or lots, or not exceed one-fourth of one acre if located in a town or city. This section does not apply to decrees for the foreclosure of a mortgage or deed of trust properly executed. If the owners of a homestead are married, it shall be executed by husband and wife. When an officer levies upon a homestead, the owner or the wife, husband, agent, or attorney of the owner may notify the officer

that he claims the premises as his homestead, describing it by metes and bounds, lot or block, or legal subdivision. The officer shall notify the creditor of this claim, and, if the homestead exceeds the maximum in this section and he deems it of greater value than \$8,000, then he may apply to the court for the appointment of three disinterested persons to appraise the homestead, commencing with the 20 acres of the lot upon which the dwelling is located, appraising each lot or 20 acres separately; and, if the homestead exceeds \$8,000, then the officer shall proceed to sell all in excess of \$8,000 by lots or smallest legal subdivisions, offering them in the order directed by the judgment debtor if he chooses to direct; otherwise, he shall sell them so as to leave the homestead as compact as possible. The homestead is exempt from sale or legal process after the death of the person entitled to the homestead for the collection of a debt for which it could not have been sold during his lifetime." (Alaska Stat. § 09.35.090 (1962))

The Alaska statutory provisions similar to ORS 116.005 (possession of homestead, wearing apparel and furniture before inventory; provision for support) 116.010 (setting apart property exempt from execution) and 116.015 (further order for support), respectively, read as follows:

"Until administration of the estate has been granted and the inventory filed the widow and minor children of the deceased are entitled to remain in possession of the homestead, all the wearing apparel of the family, and household furniture of the deceased, and also to have a reasonable provision allowed for their support during

the period, to be allowed by the judge." (Alaska Stat. § 13.30.120 (1962))

"(a) After the filing of the inventory, if the deceased died leaving a widow or minor children, the judge, upon such notice as may be fixed by him, upon being satisfied that the funeral expenses, expenses of last illness and of administration have been paid or provided for, and upon petition for that purpose, shall award and set off to the surviving widow or minor children property of the estate not exceeding the value of \$8,000, exclusive of any mortgage or mechanic's, laborer's or other lien upon the property so set off, which property so set off shall include the home and household goods, if any, and all property of the deceased exempt from execution. The award shall be by an order or judgment of the judge and vest the absolute title, and there shall be no further administration upon the portion of the estate so set off and awarded, but the remainder of the estate, if any, shall be settled as other estates. The property thus set apart, if there is a widow, shall be decreed by the judgment, her property to be used and expended by her for the maintenance of herself and the minor children of the deceased, if any, or if there is no widow it shall be decreed the property of the minor child, or if there are more than one, of the minor children in such proportions as the judge considers proper, taking into consideration their age and the expense of maintenance, to be used and expended in the nurture, maintenance and

support of the child or children, until they become of legal age, by the guardian thereof, as the law may direct. The judgment, decree and award shall specifically describe the property set apart and is final, except in case of appeal or for fraud.

"(b) In probate proceedings commenced before April 30, 1961, the award allowed in (a) of this section is \$4,000." (Alaska Stat. § 13.30.130 (1962))

"In addition to the award provided for in § 130 of this chapter, the judge may make further reasonable allowance out of the estate as may be necessary for the maintenance of the widow and minor children, according to their circumstances and condition in life, during the progress of the settlement of the estate, as he considers proper, and the allowance shall be paid by the executor or administrator in preference to all other charges except funeral charges, expenses of last illness, and expenses of administration." (Alaska Stat. § 13.30.140 (1962))

II. WISCONSIN PRELIMINARY DRAFT

[Note: As pointed out in Staff Report No. 1 ("Probate Law Revision in Oregon -- An Initial Staff Report to the Advisory Committee on Probate Law Revision," dated April 1964), a Probate Study Committee of the Wisconsin Bar Association commenced work on a revision of that state's probate law in January 1963. Among other matters, the Wisconsin committee has considered study memorandums and preliminary drafts of proposed legislation on family rights in decedents' estates (including dower and curtesy, election against will, family allowances during administration and related matters). These memorandums and drafts were prepared by Professor Richard W. Effland, University of Wisconsin Law School, who is serving as Research Reporter to the Wisconsin committee. Except for some change in form and style, the following is a copy of a preliminary draft of proposed legislation relating to family rights in decedents' estates, with explanation and comment by the draftsman, prepared for the Wisconsin committee by Professor Effland and dated February 10, 1964.]

CHAPTER ON RIGHTS OF FAMILY IN DECEDENT'S ESTATE

- Sec. 1. Definitions (partially drafted)
- Sec. 2. Dower and curtesy replaced by elective share.
- Sec. 3. Right to elective share.
- Sec. 4. How elective share barred.
- Sec. 5. Denial of election or reduction of share when decedent and surviving spouse are living apart.
- Sec. 6. Action to recover elective share in nonprobate property transferred in fraud of surviving spouse.
- Sec. 7. Partial intestacy; right of surviving spouse to share in intestate property.
- Sec. 8. Procedure for electing (to be drafted).
- Sec. 9. Power of sale in will not affected by elective right.
- Sec. 10. What property assigned out of probate estate as elective share.
- Sec. 11. Allowances to family during administration of the estate.

Wisconsin Preliminary Draft (cont'd.)

Sec. 12. Selection of exempt personal property by surviving spouse.

Sec. 13. Special allowance for support and education of minor children.

Sec. 14. Exemption of property to be assigned to surviving spouse.

General Memo on Rights of Family in Decedent's Estate:

This chapter is the result of our prior frustration in trying to work out a satisfactory solution to several related problems: (1) protection of the surviving spouse against inadequate and unfair testamentary provisions, in lieu of dower or curtesy rights, (2) allowances to the surviving spouse and family, and (3) a modern exemption from creditors in place of the present homestead statute. After carefully exploring a much more flexible approach of the kind suggested by text and Law Review writers, we have abandoned such an approach because it is (a) too drastic a departure from our well established institutions to have much chance of legislative enactment, (b) too complex to be acceptable to the Bar and the public without an extensive educational campaign, and (c) subject to possible wide variation in administration by the various county judges, despite the verbal standards set. The present chapter is designed to moderate the changes and narrow the scope of judicial discretion. * * *

The principal features of the new draft are:

(1) It abolishes inchoate dower, dower and curtesy and substitutes a fixed elective share for the surviving spouse.

(2) The surviving husband is given the same rights in his wife's estate as she has in his.

(3) The power to elect is cut down in two kinds of situations: the spouse cannot elect if the decedent makes adequate provision under the will or by nonprobate assets (life insurance, joint tenancy, living trust, etc.) for the surviving spouse; and the court has discretion to reduce or cut out the elective share where the husband and wife have separated.

(4) The surviving spouse is entitled to a share in nonprobate assets only under very restricted conditions, with the burden of proving that the transfers were made for the purpose of defeating the spouse's rights. This reverses our original proposals which would have automatically given the spouse a share in certain kinds of transfers which are really testamentary in essence (life insurance, joint tenancy, etc.).

(5) The allowances have been liberalized but with some attempt to limit them when creditors will be unduly prejudiced, at least to the extent of requiring the court to balance the needs of the family against the rights of creditors.

(6) A \$10,000 exemption from creditors, regardless of the kind of property, has been substituted for the cumbersome and fixed homestead exemption. Again the court has discretion to consider the fairness of the need for such an exemption in order to protect the family, where other assets pass to the family free of creditors and outside of probate (again the life insurance, joint tenancy, etc.).

This package represents a compromise (as indeed must any solution in this field where there are so many conflicting interests -- the decedent's wishes, the rights of creditors, and the interest of the family). It introduces some flexibility, primarily to take account of the growing problem of interrelation of probate and nonprobate assets, yet retains fixed standards (a flat one-third elective share, maximum dollar limits on allowances and exemptions).

You may find instructive the bill which the Temporary Commission on the Law of Estates has just introduced in the New York Legislature. It is not unlike the proposal which we considered earlier and discarded. It treats certain kinds of nonprobate transfers as "testamentary provisions . . . insofar as the surviving spouse is concerned": gifts causa mortis, Totten trusts, half of joint bank accounts, all joint tenancies, and living trusts over which decedent retained the power to revoke or a power to invade principal. This feature automatically gives the spouse a share in such nonprobate assets if election is made against the will and at the same time considers such assets in determining whether the spouse is entitled to elect. Several other features of the proposed N.Y. law are worth considering. The surviving spouse gets one-third if there are issue, but one-half where there is no surviving descendant, as elective share. If the surviving spouse is given the income under a trust of more than the elective share, he or she can withdraw \$10,000 but the balance of the will stands and there is no election. In every other case the elective share is reduced by the value of any testamentary provision in favor of the spouse; in other words, the surviving spouse can only elect the difference between the testamentary provisions and the elective share. The bill also provides for a waiver or release during lifetime of the decedent; our present draft allows the elective right to be barred by a contract, although our prior drafts permitted a simple release.

This chapter cannot be understood except in the total probate situation. Allowances and exemptions affect both creditors and the normal testate or intestate plan. In the case of the intestate estate, the allowances affect intestate distribution: (a) by increasing the share of the surviving spouse (sec. 12) and (b) by increasing the share of the minor children over children who have reached majority and to some extent placing minor children ahead of the surviving spouse (sec. 13) since such an allowance comes ahead of the normal plan for distribution. In the case of an estate disposed of by will, the allowances alter the testator's plan, since the allowances come out of the residue; and if the surviving

spouse elects against the will, the elective share (sec. 3) is actually supplemented by allowances under secs. 11 and 12. Where the estate is insolvent, or almost so, assignment of property to the surviving spouse ahead of creditors (sec. 14) displaces both the will and the elective share and may thus give the spouse a greater share in that limited situation; but in most intestate situations, since the spouse would receive the first \$25,000 anyway, this section does not alter the intestate distribution (although it would in the less common case where there are issue by a prior marriage -- but remember that if any of those issue is a minor, he can be protected under sec. 13 which has priority over this section). Actually there is nothing new or startling about these principles, which are inherent in our present sec. 313.15 and the homestead laws.

My prediction is that the present proposal will reduce both the actual number and the threat of elections against wills. Most elections today are in order to take a share outright although the will amply provides for the widow by a trust, or to take a share of the probate estate where the widow has been amply provided for by insurance, joint tenancy or a living trust. Such cases are eliminated under sec. 4(2) of the proposed chapter. My guess is that this will eliminate 95% of the election cases so far as the widow is concerned. However, it is not so clear what impact will result from conferring an election right on the widower, a right he does not have at present. We can only speculate on the incidence of this right: (1) wives outlive their husbands in the majority of cases; (2) husbands have less need and are perhaps less inclined to assert rights where the wife has disposed of her independent estate (perhaps due to that intangible "male pride"); (3) there may be tax reasons for the husband to elect in a few situations (to get the immediate benefit of the marital deduction even though the husband's estate is thereby increased), but in most cases of moderate and large estates the husband will be deterred by the tax structure from electing; (4) this leaves a few situations where the husband has little separate property and will elect because he needs to. I think we must rely on the contract as a means of barring election in the remarriage situation, and the Bar should be encouraged to educate the public on the need for contracts in such cases.

Sec. 1. Definitions. (1) "Probate estate" means all property passing under the will and under the law of intestate succession.

(2) "Net probate estate" means the probate estate after deducting allowances, expenses of administration, and debts and claims but before payment of taxes.

(3) "Property in joint names" means all property held or owned under any form of ownership with right of survivorship, including conventional joint tenancy, cotenancy with remainder to the survivor, stocks, bonds or bank accounts in the name of two or more persons payable to the survivor, United States government bonds either in co-ownership form or payable on death to a designated person, shares in credit unions or building and loan associations payable on death to a designated person or in joint form, etc.

[Balance to be drafted.]

Sec. 2. Dower and curtesy replaced by elective share.

Dower, including inchoate dower, and curtesy are abolished. In lieu thereof the surviving spouse has the right to elect a share as provided in this chapter.

Sec. 3. Right to elective share. If decedent dies testate, the surviving spouse has a right to elect to take the share provided in this section rather than any provision made for such spouse by decedent's will. An election to take under this section forfeits all right to take under the will and under the law of intestate succession. The elective share consists of property equal to one-third of the net probate estate. The right to elect may be barred under sec. 4 or may be denied or the share reduced under sec. 5.

Note to Committee on Sec. 3:

Assuming we agree on the general shape of this chapter, one problem to be decided is whether the surviving spouse forfeits any power of appointment created by the will, if the

spouse elects against the will. The present law is that the spouse retains such powers unless the will provides otherwise (a fairly common practice). Certainly the spouse should forfeit any general power of appointment, which is tantamount to ownership. Special powers (as to appoint among issue) are analogous to trusts, yet often have beneficial aspects. I merely want to point out a problem which eventually must be covered by this section, or perhaps by a new section dealing with impact of election on the estate.

Sec. 4. How elective share barred. (1) By written agreement. The surviving spouse may be barred by the terms of a written agreement signed by the surviving spouse whereby he or she has agreed to give up all rights in the decedent's estate, or to accept the terms of the decedent's will, or to accept any other provision outside the will in lieu of rights in the estate. Such an agreement may be entered into before or after marriage.

(2) By adequate provision for the surviving spouse. The surviving spouse is barred from electing to take under this chapter if adequate provision has been made for such spouse by the decedent. Any of the following provisions are deemed adequate:

(a) If the surviving spouse has received from decedent property adequate for his or her support and comfort, including property passing under the will or by intestate succession, transfers during lifetime (outright or in trust), property in the joint names of both spouses to the extent to which decedent furnished the consideration, and the proceeds of life insurance for which decedent paid the premiums.

(b) If the surviving spouse receives at least one-half of the total of all property passing under will or by intestate

succession, the proceeds of life insurance for which decedent paid the premiums, all gratuitous transfers within two years of death, and property in the joint names of the decedent and one or more persons to the extent to which decedent furnished the consideration. For this purpose, the surviving spouse is deemed to "receive" any property as to which he or she is given the income and there is a power, either in the spouse or in a trustee, to invade or consume the corpus or principal of the property for the support and comfort of the spouse, or a general power of appointment.

Sec. 5. Denial of election or reduction of share when decedent and surviving spouse are living apart. In any case where the decedent and the surviving spouse were living apart at the time of the decedent's death, whether or not there has been a judgment for legal separation, the court in its discretion may deny any right to elect against the will, may reduce the share of the spouse to such amount as the court deems reasonable and proper, or may grant the full elective share in accordance with the circumstances of the particular case. The court shall consider the following factors in deciding what elective share, if any, should be granted: Length and cause of separation, length of the marriage, whether the marriage was a first or second marriage for either or both of the parties, the contribution of the surviving spouse to the decedent's property either in the form of services or transfers of property, and any other relevant circumstances.

Sec. 6. Action to recover elective share in nonprobate property transferred in fraud of surviving spouse. (1) If the surviving spouse elects to take the share provided under sec. 3, such spouse may also maintain an action to recover a one-third share of any of the following items if the court finds that the decedent transferred the property or furnished the consideration for such property primarily for the purpose of defeating the rights of the surviving spouse under this chapter:

(a) Property acquired by gift from decedent, or traceable to such a gift, if the gift was made within two years of decedent's death in contemplation of death;

(b) Proceeds of life insurance under policies owned by decedent at the time of his death and payable either to a named beneficiary or a trustee;

(c) Property acquired as a result of the death of decedent by survivorship or beneficiary designation to the extent that the decedent furnished the consideration for such property;

(d) Property transferred by decedent during lifetime in trust over which decedent had at the time of his death a power, exercisable alone or in conjunction with any other person, to alter, amend or revoke.

The spouse must bring suit directly against the holder of the property or insurance proceeds to recover under this section. Until served with notice of such suit, an insurer, trustee or other person has no liability to the surviving spouse and nothing in this section affects the power or duty of such a

third party to make payment, or to transfer good title to property, in accordance with normal rules of law.

(2) Such action must be commenced within one year of decedent's death.

Note to Committee on Sec. 6:

Obviously this section is one on which there may be doubts and questions. Is such a provision necessary at all? If we had sufficient funds, we ought to do some studies to determine how frequently, if ever, the surviving spouse is unfairly cut off. Remember that many of the present elections would be barred under the new proposed provisions: (1) the widow can no longer elect merely to get her share outright, since she would be barred under sec. 4(2) (b) in almost all instances I can think of; (2) where the widow is deliberately cut off, it is usually because of a marital fight; in some of these cases the husband is justified and the widow would probably be barred under sec. 5 from any election. Further, sec. 5 of the Wills chapter takes care of the outmoded will executed prior to marriage with no provision for the surviving spouse. This leaves only the extreme case: the person who deliberately transfers the bulk of his estate during life out of cussedness, but who cannot be found to lack capacity. I think we have to leave the back door open for such a case by a section like this. We can hedge this right substantially if you wish by setting forth a heavy burden of proof and by requiring the surviving spouse to get permission from the probate court before bringing separate actions to recover such nonprobate assets. It is significant that New York may be moving toward a far more drastic approach, treating will substitutes such as joint tenancy and revocable trusts as "testamentary" for purposes of the widow's election.

Some worry has been expressed that this kind of provision may drive trust business out of the state. I think this is unrealistic. If I am correct, a suit like this would lie under our present law and there has been no great exodus of trust business. Second, there is no reason to adopt a law permitting particular conduct which we condemn, merely because business may go elsewhere (gambling is an example). Third, if this is a real problem, I believe we can draft a constitutional statute, which other states might have to recognize under full faith and credit, to reach trusts set up by Wisconsin residents in other states to avoid Wisconsin laws.

There remain numerous procedural problems. Must the surviving spouse bring separate actions for each nonprobate asset and in what court? Can the probate court be given jurisdiction or at least some control over such actions? Would there be any advantage to having the personal representative bring the action rather than the surviving spouse?

As presently drafted this chapter contains an obvious loophole for the person who wishes to defraud the surviving spouse. He or she can make nonprobate transfers and die intestate as to the small remaining balance; since nothing in this chapter provides for election against the intestacy laws, there would have to be a special provision for this kind of case. If we can agree on the basic theory of this section, I shall of course "button-up" this loophole.

Sec. 7. Partial intestacy; right of surviving spouse to share in intestate property. (1) In case of partial intestacy, an election to take under the will does not affect the right of the surviving spouse to take property not disposed of by the will, under the law of intestate succession as provided in sec. [2 of the Intestate Succession chapter], unless decedent's will clearly provides otherwise.

(2) An election to take under sec. 3 gives the surviving spouse only the share provided by that section, and such spouse has no additional rights in intestate property.

Note to Committee on Sec. 7:

Subsection (1) is a reversal of the Wisconsin rule of Chapman v. Chapman, 128 Wis. 413, 107 N.W. 668 (1906) but accords with Model Probate Code § 40. Most cases of partial intestacy are caused by oversight on the part of the will draftsman, such as inadvertent failure to dispose of all fractional shares of the residue (Will of Uihlein, 264 Wis. 362, 59 N.W. 2d 641 (1952)) or lapse. Usually a gift under the will to the surviving spouse does not manifest an intent to cut out the spouse from any intestate share. The Chapman decision was based on the language of present 233.13 and not on any policy reasoning. Most states follow the rule as proposed in sub. (1). The only doubt I have is whether the spouse in such a case should take the first \$25,000 of the intestate property in such a case, or only a fractional share, if there are issue. As presently drafted, sec. 2(2) of the Intestate Succession chapter would reduce the first \$25,000 of intestate property by the amount of the gifts to the spouse under the will.

Subsection (2) retains the present rule of Will of Uihlein, cited above. The spouse has by electing against the

will already received a share in the intestate property, since sec. 3 gives the spouse a one-third share of the entire probate estate (defined to include intestate property); hence any intestate property should be used to make up the share of those affected by the election. See also sec. 10.

Sec. 8. Procedure for electing.

[To be drafted.]

Note to Committee on Sec. 8:

This section will displace present 233.14. I have no firm convictions about procedure, with one exception discussed hereafter, although any procedure ought to be simple and clear. I think the right to elect should be personal to the surviving spouse (but exercisable by a guardian if the spouse is incompetent). Death of the spouse ought to end the right to elect, since the provisions for election are intended to provide for continuing support of the spouse. While such a proposal may result in some loss of tax benefits under the marital deduction, I see no reason why we should shape our general law to confer a tax benefit on a fraction of the estates, a principle we have previously agreed upon.

Do we put the burden on the surviving spouse of initiating an election? Or should the court require an affirmative election for or against the will? As you know, our present statute adopts the first approach; the widow is deemed to take under the will unless she files an election against the will within one year, or in certain cases an extended period. Further, the personal representative has no duty to inform the widow that she has a right to elect. Ludington v. Patton, 111 Wis. 208, 86 N.W. 571 (1901). Some county courts have adopted the practice of notifying her of such a right, and this practice might be codified in the statute. In some other states the surviving spouse must file an election one way or the other before he or she is deemed to have elected. Our present rule has the advantage of encouraging distribution in accordance with the will, and there has not been any great dissatisfaction with the rule so far as I know. There may be some cases where the widow loses her rights by default because of ignorance. The rule requiring an affirmative election creates problems for the rare case where a widow or widower is missing, although possibly this could be settled under sec. 5 on the grounds that the surviving spouse has abandoned the decedent and should be barred completely.

In our preliminary drafts of a flexible statute to protect the surviving spouse against unfair death transfers (7/18/63 and 8/2/63) subsection (5) set a six months period for filing of a petition. This reflected the sentiment that a

shorter period than the present one year would facilitate settlement of estates, but the problems were also more complicated under the earlier proposals than under the present draft where the spouse gets a fractional share.

Sec. 9. Power of sale in will not affected by elective right. Whenever an executor or trustee is given a power of sale by a will, the right of the surviving spouse to elect against the will does not prevent the exercise of the power as to any property in the estate. Title to property sold under such a power or under order of the court shall be free and clear of any elective share.

Sec. 10. What property assigned out of probate estate as elective share. The elective share is to be assigned by the court in cash or property or both in such manner as will least disrupt the testator's plan for disposition of his estate, subject to the following guiding rules:

- (a) Intestate property shall be assigned first;
- (b) Upon request of the surviving spouse, the home may be assigned as part of the share;
- (c) Property given to the spouse outright by the terms of the will shall be assigned next if needed to make up the share;
- (d) Unless the will directs otherwise, each beneficiary under the will must contribute proportionately to the share; and
- (e) Any interests given to the surviving spouse under the terms of the will, which are forfeited by election to

take against the will and not assigned under (c), are to be marshalled by the court for the benefit of beneficiaries forced to contribute to the elective share.

Sec. 11. Allowances to family during administration of the estate. The court may by order provide an allowance to the surviving spouse for the support of such spouse and any minor children, or to the minor children alone if there be no surviving spouse, in an amount adequate for support during the administration of the estate. In making or denying such order the court shall take into consideration all assets and income available for the support of the spouse and children outside of the probate estate. The allowance hereunder shall have priority over debts, funeral expenses, expenses of last illness and administration expenses; but if the estate is insolvent, the allowance may not be granted for more than one year after date of death.

Sec. 12. Selection of exempt personal property by surviving spouse. The following items of personal property shall be turned over to the surviving spouse upon filing of a special inventory of such items: decedent's wearing apparel, jewelry, household furniture, furnishings and paintings, all not to exceed a total of \$3,000 in value; and other personal property selected by the spouse not to exceed \$2,000 in value. This section does not apply to any items which decedent has specifically bequeathed to other persons, but otherwise applies

whether the estate is testate or intestate. These items are not subject to further administration nor to payment of debts or expenses.

Sec. 13. Special allowance for support and education of minor children. (1) If decedent is survived by a minor child or children, the court may in its discretion order an allowance for the support and education of each such minor child until he reaches a specified age, not to exceed 21. This allowance is made in recognition of the continuing obligation of a decedent to provide out of his estate for the support and education of his minor children and may be made whether the estate is testate or intestate; but no allowance may be made if the decedent has amply provided for such child by the terms of his will and if the estate is sufficient to carry out such terms after payment of all debts and expenses, or if such support and education have been provided for by any other means, or if the surviving spouse is legally responsible for such support and education and has ample means to provide such support and education in addition to his or her own support. The amount set by the court for such an allowance shall not exceed \$10,000 for each minor child. In its discretion the court may, in addition to or as part of such allowance, in any case where the decedent is not survived by a spouse allot directly to the minor child or children the household furniture and furnishings.

(2) The court may set aside property to provide such allowance and may appoint a trustee to administer the property,

subject to the continuing jurisdiction of the court. If at any time the property held by such trustee is no longer required for the support and education of the minor child, or when the child dies or reaches 21, any remaining property is to be distributed by the trustee as directed by the court.

(3) All allowances under this section and the allotment of household furniture and furnishings under sub. (1) take priority over claims of creditors except expenses of administration, reasonable funeral expenses and necessary expenses of last illness; but the court must take into account the effect of an order under this section on claims of creditors and balance the needs of the minor child against the nature of the creditors' claims in setting the amount allowed hereunder.

Note to Committee on Sec. 13:

This section retains the basic principle of 313.15(3) that the decedent has an obligation for support and education of his minor children that extends after death. Normally this accords with the decedent's intent, of course. While it may seemingly result in a greater share going to minor children than adult children, it should be remembered that the decedent has already discharged his obligation to the adult children, and the allowance under this section merely equalizes the shares in the same manner as the law of advancements does with regard to inter vivos gifts of property. The proposed draft would impose a limit on the allowance for any one child (\$10,000) and also provide machinery for recovery of any part of the allowance not actually needed for support and education. Those features are lacking in the present statute.

Should this section include an allowance for adult children who are in fact dependent on the decedent? This would be particularly important in the intestate situation. Normally the decedent who has executed a will or other estate planning documents has provided specially for an incompetent or incapacitated adult child, but the intestate law has no such provision.

Sec. 14 (Alternative 1). Exemption of property to be assigned to surviving spouse. After the allowances under sections 11-13 have been made and the amount of claims against the estate has been ascertained, the court may enter an order assigning to the surviving spouse, after payment of necessary expenses of administration, reasonable funeral expenses and necessary expenses of last illness but prior to payment of all other debts, an amount of property reasonably necessary for the support of such spouse but not to exceed \$10,000, if it appears that the assets are insufficient to pay all the debts and still leave the surviving spouse such an amount of property. In determining the necessity of an assignment under this section and the amount of property to be assigned, the court must take into consideration the availability of a home to the surviving spouse and other assets for support of such spouse, including the value of property passing to the spouse on death of the decedent by reason of survivorship, life insurance payable to the spouse, annuities and pensions payable to the spouse by reason of the death of decedent (including social security and veteran's benefits), and any gifts made to the spouse in contemplation of death. If the decedent's estate includes a home the court may upon petition of the spouse include as part or all of the amount of property assigned to the spouse hereunder either a fee or a life interest in the home. If the value of the interest in the home requested by the spouse would exceed the amount set by the court under this section, the court may nevertheless assign such an interest to the spouse upon payment to the

estate of the excess of the value of such interest over the amount set by the court hereunder.

Sec. 14 (Alternative 2). Exemption of property to be assigned to surviving spouse. (1) After the allowances under sections 11-13 have been made and the amount of claims against the estate has been ascertained, the surviving spouse may petition the court to set aside for such spouse property not to exceed \$10,000 in value as exempt from the claims of creditors, but after payment of necessary expenses of last illness, reasonable funeral expenses and the expenses of administration.

(2) The court shall grant such petition if it determines that such an assignment ahead of creditors is reasonably necessary for the support of such spouse. In determining the necessity and the amount of property to be assigned, the court must take into consideration the availability of a home to the surviving spouse and other assets available for support of such spouse, including the value of property passing to the spouse on death of the decedent by reason of survivorship, life insurance payable to the spouse, annuities and pensions payable to the spouse by reason of the death of decedent (including social security and veteran's benefits), and any gifts made to the spouse in contemplation of death.

(3) An assignment of property hereunder shall be deemed in lieu of any right of the surviving spouse to take under the will, under the intestate succession law, or under the elective share provided by sec. 3 of this chapter, except that if after payment of all debts, claims and expenses, sufficient

assets remain in the hands of the personal representative so that the surviving spouse would receive a greater amount of property had no assignment been made hereunder, then the remaining property shall be distributed accordingly.

(4) If the decedent's estate includes an interest in a home, the court may upon request of the spouse include as part or all of the property assigned to the spouse hereunder either a fee or a life interest in the home, to the extent of the decedent's interest therein. If the value of the interest in the home requested by the spouse would exceed the amount set by the court under this section, the court may nevertheless assign such an interest to the spouse upon payment to the personal representative of the excess of the value of such interest over the amount set by the court hereunder; for this purpose the court may require a new appraisal or use the value as appraised in the estate under sec. 312.01.

III. MISSOURI STATUTES

[Note: As pointed out in Staff Report No. 1 ("Probate Law Revision in Oregon -- An Initial Staff Report to the Advisory Committee on Probate Law Revision," dated April 1964), in 1955 the Missouri legislature enacted a new probate code for that state, which was drafted under the supervision of a joint legislative committee and with the assistance of an advisory committee consisting of probate judges and lawyers. The following are selected provisions of the Missouri probate code relating to family rights in decedents' estates, taken from the Revised Statutes of Missouri as compiled in Vernon's Annotated Missouri Statutes through 1963.]

474.110. Curtesy and dower abolished. The estates of curtesy and dower are hereby abolished, but any such estate now vested is not affected by this code.

[Note: This section is patterned after section 31 of the Model Probate Code. Curtesy was abolished in Missouri in 1921. Dower was abolished by this section, effective January 1, 1956.]

474.120. Inheritance and statutory rights deemed waived, when. The rights of inheritance or any other statutory rights of a surviving spouse of a decedent who dies intestate shall be deemed to have been waived if prior to, or after, the marriage such intended spouse or spouse by a written contract did agree to waive such rights, after full disclosure of the nature and extent thereof, including the nature and extent of all property interests of the parties, and if the thing or promise given to the waiving party is a fair consideration under all the circumstances.

474.130. Estate conveyed determines on failure of contractual bar. When any deed, conveyance, assurance, agreement or contract in lieu of the inheritance or other statutory rights

of a spouse, through any default, fails to be a legal bar to such rights and the surviving spouse demands his inheritance and statutory rights, then the estate and interest so conveyed to the surviving spouse ceases and determines.

474.140. Inheritance and statutory rights barred on misconduct of spouse. If any married person voluntarily leaves his spouse and goes away and continues with an adulterer or abandons his spouse without reasonable cause and continues to live separate and apart from his spouse for one whole year next preceding his death, or dwells with another in a state of adultery continuously, or if any wife after being ravished consents to her ravisher, such spouse is forever barred from his inheritance rights, homestead allowance, exempt property or any statutory allowances from the estate of his spouse unless such spouse is voluntarily reconciled to him and resumes cohabitation with him.

474.150. Gifts in fraud of marital rights--presumptions on conveyances. 1. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

2. Any conveyance of real estate made by a married person at any time without the joinder or other written express

assent of his spouse, made at any time, duly acknowledged, is deemed to be in fraud of the marital rights of his spouse, if the spouse becomes a surviving spouse, unless the contrary is shown.

3. Any conveyance of the property of the spouse of an incompetent person is deemed not to be in fraud of the marital rights of the incompetent if the probate court authorized the guardian of the incompetent to join in or assent to the conveyance after finding that it is not made in fraud of the marital rights. Any conveyance of the property of a minor or incompetent made by a guardian pursuant to an order of court is deemed not to be in fraud of the marital rights of the spouse of the ward.

[Note: Subsection 1 of this section is patterned after section 33(a) of the Model Probate Code.]

474.160. Election by surviving spouse to take against will, effect. 1. When a married person dies testate as to any part of his estate, a right of election is given to the surviving spouse solely under the limitations and conditions herein stated.

(1) The surviving spouse, upon election to take against the will, shall receive in addition to exempt property and the allowance under section 474.260 one-half of the estate, subject to the payment of claims, if there are no lineal descendants of the testator; or, if there are lineal descendants of the testator, the surviving spouse shall receive one-third of the estate subject to the payment of claims;

(2) When a surviving spouse elects to take against the

will he shall be deemed to take by descent, as a modified share, such part of the estate as comes to him under the provisions of this section, and shall take nothing under the will.

(3) Whenever there is an effective election to take against a will which provides for benefits to accrue upon the death of the surviving spouse, the election has the same effect as to the benefits as if the surviving spouse had predeceased the testator, unless the will otherwise provides.

2. The rights of the surviving spouse under this section are not given in lieu of the homestead allowance under section 474.290, but any homestead allowance made to the surviving spouse shall be offset against the share taken under this section.

[Note: The first sentence and subdivision (2), subsection 1 of this section are patterned after parts of section 32 of the Model Probate Code.]

474.170. Notice of right to elect. The clerk of the court, after the will of a married person is admitted to probate, shall, within one month thereafter, mail by ordinary mail a written notice, directed to the testator's surviving spouse at his last known residence address, informing him that a written election must be filed by or on behalf of the surviving spouse in order to take against the will, within ten days after the expiration of the time limited for contesting the will of the decedent, unless the time is extended pursuant to law. Failure of the clerk to mail or of any surviving spouse to receive the notice herein required does not affect

the time for making an election as prescribed by section 474.180. If the court is informed that a surviving spouse had been adjudicated incompetent or of unsound mind but has no guardian the notice need not be given but the court may appoint a guardian to make the election.

[Note: The first sentence of this section is similar to section 34 of the Model Probate Code.]

474.180. Time for making of election. The election by a surviving spouse to take the share herein provided may be made at any time within ten days after the expiration of the time limited for contesting the will of decedent, except that if, at the expiration of the period for making the election, litigation is pending to test the validity or to determine the effect or construction of the will, or to determine the existence of issue surviving the decedent, or to determine any other matter of law or fact which would affect the amount of the share to be received by the surviving spouse, the right of the surviving spouse to make an election shall not be barred until the expiration of ninety days after the final determination of the litigation.

[Note: This section is similar to section 35 of the Model Probate Code.]

474.190. Form of election, filing. The election to take the share hereinbefore provided shall be in writing, signed and acknowledged by the surviving spouse or by the guardian of his estate and shall be filed in the office of the clerk of the court. It may be in the following form:

I, A. B., surviving wife (or husband) of C. D., late of the county of _____ and state of _____ do hereby elect to take my legal share in the estate of the said C. D., and do hereby renounce all provisions in the will of the said C. D. inconsistent herewith.

(Acknowledgment)

Signed,
(Signature)

[Note: This section is the same as section 36 of the Model Probate Code.]

474.200. Right of election personal to surviving spouse.

The right of election of the surviving spouse is personal to him. It is not transferable and cannot be exercised after his death; but if the surviving spouse is incompetent or a minor, his guardian may elect for him with the approval of the court or, on application of an interested person, the court may order his guardian to elect for him.

[Note: This section is patterned after section 37 of the Model Probate Code.]

474.210. Election not subject to change. An election by or on behalf of a surviving spouse to take the share provided in section 474.160 once made is binding and is not subject to change except for such causes as would justify an equitable decree for the rescission of a deed.

[Note: This section is the same as section 38 of the Model Probate Code.]

474.220. Waiver of right to elect. The right of election of a surviving spouse hereinbefore given may be waived before or after marriage by a written contract, agreement or

waiver signed by the party waiving the right of election, after full disclosure of the nature and extent of the right, if the thing or the promise given to the waiving party is a fair consideration under all the circumstances. This written contract, agreement or waiver may be filed in the same manner as hereinbefore provided for the filing of an election.

[Note: This section is the same as section 39 of the Model Probate Code.]

474.230. Effect of failure to elect to take against will.

When a surviving spouse makes no election to take against the will, he shall receive the benefit of all provisions in his favor in the will, if any, and shall share as heir, in accordance with the provisions of sections 474.010 to 474.030, in any estate undisposed of by the will. By taking under the will or consenting thereto, he does not thereby waive his right to a homestead allowance, to exempt property or to an allowance under section 474.260 unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of such rights or any of them.

[Note: This section is patterned after section 40 of the Model Probate Code.]

474.250. Exempt property of surviving spouse or minor children. The surviving spouse, or unmarried minor children of a decedent are entitled absolutely to the following property of the estate without regard to its value: The family bible and other books, all wearing apparel of the family, all household electrical appliances, all household musical and other amusement instruments and all household and kitchen furniture,

appliances, utensils and implements. Such property shall belong to the surviving spouse, if any, otherwise to the unmarried minor children in equal shares.

474.260. Family allowance of spouse and minor children.

In addition to the right to homestead allowance and exempt property the surviving spouse and unmarried minor children of a decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of one year after the death of the spouse, according to their previous standard of living, taking into account the condition of the estate of the deceased spouse. The allowance so ordered may be made payable in one payment or in periodic installments, and shall be made payable to the surviving spouse, if living, for the use of the surviving spouse and the unmarried minor children, unless the court finds that it would be just and equitable to make a division thereof, otherwise to the guardians or other persons having the care and custody of any unmarried minor children. The court may authorize the surviving spouse to receive any personal property of the estate in lieu of all or part of the money allowance authorized by this section, and in any case where the court makes such allowance in money, the surviving spouse shall be entitled to select and receive any personal property of the estate, of a value not exceeding such allowance in money, which shall be in lieu of and which value shall be credited against the allowance. The right of selection provided for herein is subject to the provisions of section 473.620, RSMo. The allowance

herein authorized is exempt from all claims.

[Note: Parts of this section are patterned after section 44 of the Model Probate Code.]

474.270. Exempt property applied for, when. The surviving spouse or other custodian of unmarried minor children shall apply for the property named in section 474.250 before the same is distributed or sold, but the property so delivered shall in no case be liable for the payment of the claims against the estate.

474.280. Proceeds of sale of exempt property paid over, when. If the surviving spouse or unmarried minor children do not receive the property allowed him or them under section 474.250 and the same is sold by the executor or administrator, the court shall order the money to be paid to the surviving spouse or unmarried minor children at any time before the same is paid out for claims or distributed.

474.290. Homestead allowance--partition of real estate selected, procedure--waiver. 1. At any time after the return of the inventory, the court, on application of the surviving spouse or of the guardian or person having custody of the persons of the unmarried minor children of a decedent, shall make an allowance to the surviving spouse or unmarried minor children of an amount not exceeding fifty per cent of the value of the estate, exclusive of exempt property, and the allowance made under section 474.260, but in no case shall the allowance exceed seven thousand five hundred dollars. Such allowance shall be known as a homestead allowance and is in

addition to the exempt property and the allowance to the surviving spouse and unmarried minor children under section 474.260. The homestead allowance is exempt from all claims against the estate. The homestead allowance shall be offset against the share to which the surviving spouse or any minor child who receives it is entitled as a distributee of the estate, but the allowance shall not be diminished if it is greater than the distributive share. The allowance may consist, in whole or in part, of money or property, real or personal, and subject to the provisions of section 473.620, RSMo, property may be selected as hereinafter provided. The homestead allowance is the property of the surviving spouse, if any; otherwise it is the property of the unmarried minor children in equal shares. When a decedent is survived by married minor children or children of full age, or both, and also by unmarried minor children but no spouse, the homestead allowance as determined under the foregoing provisions of this section shall be divided by the total number of all of the children of the decedent and the shares of the unmarried children as so determined shall, notwithstanding the foregoing provisions, constitute the homestead allowance. The selection of property shall be made by the surviving spouse, if any, otherwise by the guardian of each unmarried minor child for such child, or by a person designated by the court, but no real estate may be selected or included in any homestead allowance unless selection of the specific real estate is requested in the application filed within the time provided by subsection 2 [7?].

2. If real estate is included in the homestead allowance, the executor or administrator shall convey the same as determined by this section by deed to the person entitled thereto.

3. If a surviving spouse selects, as a homestead allowance, an interest in property having a value in excess of the homestead allowance, the court shall order the executor or administrator to convey the property to the surviving spouse upon the payment to the estate by such spouse of an amount of money equal to the difference between the value of the property and the homestead allowance or it shall order the executor or administrator to convey an undivided interest in the property to the surviving spouse which is equivalent to the ratio which the homestead allowance bears to the value of the property, at the option of the spouse.

4. If the court finds that real estate selected by the surviving spouse is a part of a larger tract and that the real estate selected may be separated from the residue of the larger tract without great prejudice to the owners, the probate court may proceed to set off to the surviving spouse the real estate constituting the homestead allowance in the same manner as is provided for the circuit court by sections 528.200 to 528.240, RSMo, for the partition of real estate, and this portion so set off shall be conveyed by the executor or administrator, by deed, to the surviving spouse.

5. In all proceedings under this section the court may order such appraisals of the property selected as it deems necessary and it shall determine the value of the property after

due notice to all interested parties in manner as ordered by the court under section 472.100, RSMo, and hearing pursuant thereto.

6. If within five days after the court's determination of the value of the property any interested party files written exception thereto and avers therein that the amount so determined is excessive or inadequate and if the court finds that a sale of the property would be in the best interests of the estate, then the court, in lieu of the procedures provided in subsections 1 and 2, may order a public sale of such property in the manner provided by sections 473.507 and 473.510, RSMo. Upon such sale, if the surviving spouse be the high bidder, the amount of the homestead allowance shall be credited against the purchase price. Within ten days after such sale a report thereof shall be filed and upon approval thereof by the court, the executor or administrator shall execute, acknowledge and deliver a conveyance to the purchaser according to the order of approval which in form and substance shall be the same as that provided for in subsection 2 of section 473.520, RSMo, omitting any reference to certificate of appraisal.

7. If no application for setting apart and allowance herein authorized is filed within ten days after expiration of the time allowed for filing of claims, the homestead allowance is deemed waived by the surviving spouse or the unmarried minor children and the spouse or the unmarried minor children have no right to homestead or homestead allowance under any law of this state.

8. The allowance made under this section is in lieu of all dower and homestead rights in the property of a decedent. After January 1, 1956, no right of homestead under sections 513.495 and 513.500, RSMo, vests in the surviving spouse or minor children of any decedent, but neither this section nor the repeal of sections 513.495 and 513.500, RSMo, affects homestead rights heretofore vested in any surviving spouse or minor children.

474.300. Effect of death of spouse or child or marriage of minor on family and homestead allowances. When a surviving spouse dies, or if an unmarried minor child dies, marries or comes of age, no allowance shall be made under section 474.260 for his maintenance for any period after such death, marriage or coming of age. When a surviving spouse dies without having received the homestead allowance, it may be paid (if it has been allowed but not paid) or may be allowed (if not already deemed waived) to the unmarried minor children. If an unmarried minor child entitled to homestead allowance, dies, marries or comes of age before his homestead allowance has been made, and within the time for applying for it, he shall not be entitled to such allowance, but if he dies, marries or comes of age after it has been allowed but before it was paid, he shall be entitled to it.

IV. MODEL PROBATE CODE

[Note: As pointed out in Staff Report No. 1 ("Probate Law Revision in Oregon -- An Initial Staff Report to the Advisory Committee on Probate Law Revision," dated April 1964), the Model Probate Code was prepared for the Probate Law Division of the Section of Real Property, Probate and Trust Law of the American Bar Association by the Division's Model Probate Code Committee in cooperation with the Research Staff of the University of Michigan Law School. The code, with comments on the provisions thereof and monographs on problems in probate law prepared by two of the principal draftsmen of the code, were published in 1946 (Simes, Problems in Probate Law (1946)). The following are selected provisions of the code relating to family rights in decedents' estates, with the comments, or parts thereof, which appear under those provisions.]

§ 31. Dower and curtesy abolished. The estates of dower and curtesy are hereby abolished.

Comment. Estates of curtesy and dower tend to clog land titles and make alienation more difficult. Moreover, at the present time, when so much of the wealth of a decedent is likely to be in the form of bonds and shares, these estates do not make adequate provision for a surviving spouse. For this reason, this section, which is in accordance with modern statutory trends, abolishes dower and curtesy. * * *

The substitutes for dower and curtesy provided in the Model Code are § 22(a), the share of the surviving spouse in case of intestacy, and §32, the spouse's share in case of election against the will. While these shares are ordinarily much more liberal than dower in case of a solvent estate, they are both subject to the decedent's debts.

To the effect that a statute which extinguishes existing inchoate dower interests is not unconstitutional on that ground, see cases collected in 20 A.L.R. 1330. It should be noted that accrued rights are excepted by § 2(b) hereof. Hence, to the extent that existing dower or curtesy interests are deemed accrued rights, they are excepted from the operation of this Code.

§ 32. When surviving spouse may elect to take against the will. When a married person dies testate as to any part of his estate, a right of election is given to the surviving

husband or wife solely under the limitations and conditions hereinafter stated.

(a) Extent of election. The surviving spouse may elect to receive the share in the estate that would have passed to him had the testator died intestate, until the value of such share shall amount to [\$5,000], and of the residue of the estate above the part from which the full intestate share amounts to [\$5,000], one-half the estate that would have passed to him had the testator died intestate.

(b) Effect of election. When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modified share, such part of the net estate as comes to him under the provisions of this section.

Comment. The general plan of subsection (a) follows the provisions for a widow's election against the will as to personal property as provided in Mich. Stat. Ann. § 27.3178 (139). Doubtless, a statute of this type can be regarded as caring for the needs of a surviving spouse in that the percentage of the estate given by it is greater in small estates. In a sense it may be said to provide a kind of allowance, subject, however, to the rights of creditors.

* * *

Subsection (b) is inserted to eliminate a prolific source of litigation. Much difficulty has arisen under some election statutes in determining whether the share which the surviving spouse takes against the will is taken as heir or in some other capacity. This problem has arisen in connection with the construction of devises "to heirs" and in statutes in which the word "heirs" is used with reference to inheritance taxes and many other matters. This subsection specifically states that the surviving spouse takes by descent.

* * *

In view of the fact that there is no single accepted theory on which statutory provisions for the election of a surviving spouse are based and that a satisfactory statute could be drawn based on entirely different theories from those involved in the above section, it seems desirable to present,

as an alternative, the following provisions, which can be substituted for § 32 hereof:

"§ 32. When surviving spouse may elect to take against the will. When a married person dies testate as to any part of his estate, a right of election is given to the surviving husband or wife solely under the limitations and conditions hereinafter stated.

"(a) Net estate not over [\$20,000]. If the value of the net estate does not exceed [\$20,000] and the value of all legacies and devises given absolutely to the surviving spouse plus the value of any portion of the net estate undisposed of by the will which passes to the surviving spouse as an intestate share is less than half the value of the net estate, then the surviving spouse may elect to receive that amount which, when added to the value of such items, will equal one-half the value of the net estate. In so electing, the surviving spouse is deemed to renounce any legacies and devises not given absolutely.

"(b) Net estate over [\$20,000]. If the value of the net estate exceeds [\$20,000], the surviving spouse may act under the provisions of one or the other, but not both, of the following subdivisions:

"(1) Election to receive one-half with life income from a trust credited at value of principal. If the value of the net estate exceeds [\$20,000] and if the total value of the legacies and devises given to the surviving spouse, when valued in the manner hereinafter stated, plus the portion of the net estate undisposed of by the will which passes to the surviving spouse as an intestate share, is less than half the value of the net estate, then the surviving spouse may elect to receive, in addition to all legacies and devises given to him by the will and the intestate share in any portion of the net estate undisposed of by the will, the difference between the value of such items and the value of half the net estate. When, by the terms of the will, property of the net estate is left in trust with the income to be paid to the surviving spouse for life, the value of such gift, for purposes of determining the amount the surviving spouse is entitled to receive under the will, shall be the value of the principal from which such income is to be paid. All other legacies and devises given to the surviving spouse from the net estate shall be valued at the actual value of the interests given to the surviving spouse.

"(2) Election to receive [\$10,000] in value absolutely. If the value of the net estate exceeds [\$20,000] the surviving spouse may nevertheless treat the net estate as if it were of the value of not over [\$20,000] and make an election in accordance with the provisions of subdivision (a) hereof, provided, however, that the total value of all items which the surviving spouse may receive from the net estate when this election is made shall be [\$10,000] and no more.

"(c) Effect of election. When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modified share, such part of the net estate as does not come to him by the terms of the will."

The alternative provisions just stated proceed on the theory that, except in larger estates, a surviving spouse should receive one-half of the estate of a deceased spouse. However, they also follow a modern trend to limit the surviving spouse to a life interest in a trust of half of the estate which the surviving spouse may elect to receive. It is believed that in the case of a smaller estate one spouse probably contributed about as much to its accumulation as the other. Moreover, such a share is in recognition of the strong moral obligation to provide support for a surviving wife. However, it is likely that larger estates were acquired by the testator from some ancestor; and it is deemed fair to permit him to pass them on pretty much as he wishes after he has made adequate provision for the maintenance of the surviving spouse. The plan of limiting the spouse to life interests in the case of larger estates follows legislation in New York and Massachusetts. See Mass. Ann. Laws (1932) c. 191, § 15, and N. Y. Dec. Est. Law, §18.

* * *

It should be observed that, although the proposed substitution is quite liberal in permitting a surviving spouse to demand a large share in the estate, it goes much farther than most statutes in compelling a surviving spouse to take what is given under the will. Thus, the tendency to upset a testamentary scheme by an election is minimized as far as is consistent with an adequate provision for the surviving spouse.

By way of comparison, it may be noted that § 32 represents an older but simpler solution of the problem. The proposed substitution is more complicated but goes much farther in leaving a testator's will intact. In both sections, the amounts stated are necessarily somewhat arbitrary and may be varied to suit local needs.

* * *

§ 33. Gifts in fraud of marital rights. (a) Election to treat as devise. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking

from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

(b) When gift deemed fraudulent. Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary.

Comment. This section makes no attempt to define the expression "in fraud of marital rights." It is believed that only by judicial decision can that be done. Among the situations which courts would have to classify in this connection is that where a married person sets up an inter vivos trust reserving to himself a life estate and a power to revoke the trust. It has sometimes been held that such a transfer could be set aside at the instance of the surviving spouse, particularly where it deprived the settlor of most of his estate. It is sometimes said that the transfer is set aside because it is illusory. See 44 Mich. L. Rev. 151 (1945). But it is believed to be more satisfactory to say that it is fraudulent as to the share of the surviving spouse. A similar problem arises where a married person sets up a so-called savings bank trust. It is believed that no statute could adequately indicate all cases which might properly be regarded as actually or constructively fraudulent as to the share of the surviving spouse.

Subsection (b) lays down an aid in determining whether a gift is fraudulent where the proof is slight. Under this section it is possible to show that a gift made within two years of the death of a married person is not fraudulent, but the burden of proof is upon the person asserting the absence of fraud.

§ 34. Notice of right to elect. It shall be the duty of the clerk of the court, within one month after the will of a married person is admitted to probate, to mail a written notice, directed to the testator's surviving spouse at his last known residence address, informing him of the date before which a written election must be filed by or on behalf of such surviving spouse in order to take against the will.

§ 35. Time limitation for filing election. The election by a surviving spouse to take the share hereinbefore provided may be made at any time within one month after the expiration of the time limited for the filing of claims; provided that if, at the expiration of such period for making the election, litigation is pending to test the validity or to determine the effect or construction of the will, or to determine the existence of issue surviving the deceased, or to determine any other matter of law or fact which would affect the amount of the share to be received by the surviving spouse, the right of such surviving spouse to make an election shall not be barred until the expiration of one month after the final determination of the litigation.

§ 36. Form of election; filing. The election to take the share hereinbefore provided shall be in writing, signed and acknowledged by the surviving spouse or by the guardian of his estate and shall be filed in the office of the clerk of the court. It may be in the following form:

I, A.B., surviving wife (or husband) of C.D., late of the county of _____ and state of _____ do hereby elect to take my legal share in the estate of the said C.D., and I do hereby renounce all provisions in the will of the said C.D. inconsistent herewith.

(Acknowledgment)

Signed,
[Signature]

Comment. If the alternative form proposed in the comment to § 32 is used, the following sentence should be added to the form of election, immediately before the signature:

"If it is determined that the net estate exceeds [\$20,000]

in value, I elect to take against the will under the terms of section 32(b)(1) [or section 32(b)(2)]."

§ 37. Right of election personal to surviving spouse.

The right of election of the surviving spouse is personal to him. It is not transferable and cannot be exercised subsequent to his death; but if the surviving spouse is incompetent, the court may order the guardian of his estate to elect for him.

§ 38. Election not subject to change. An election by or on behalf of a surviving spouse to take the share provided in section 32 hereof once made shall be binding and shall not be subject to change except for such causes as would justify an equitable decree for the rescission of a deed.

§ 39. Waiver of right to elect. The right of election of a surviving spouse hereinbefore given may be waived before or after marriage by a written contract, agreement or waiver signed by the party waiving the right of election, after full disclosure of the nature and extent of such right, provided the thing or the promise given to such waiving party is a fair consideration under all the circumstances. This written contract, agreement or waiver may be filed in the same manner as hereinbefore provided for the filing of an election.

Comment. It is clear that at common law the right of a surviving spouse to take an intestate share against the will may be waived under certain circumstances. But the rules applied to determine the validity of the waiver are unique and involve something quite distinct from the requirements for the execution of a simple contract. This section is designed to express the common-law doctrine. * * *

§ 40. Election by surviving spouse to take under will.

When a surviving spouse makes no election to take against the will, he shall receive the benefit of all provisions in his favor in the will, if any, and shall share as heir, in accordance with the provisions of sections 22 and 23 hereof, in any estate undisposed of by the will. By taking under the will or consenting thereto, he shall not thereby waive the rights of homestead, to exempt property or to a family allowance, unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of such rights.

Comment. The first sentence of this section is in accord with the general rule that mere expressions in a will of intent to disinherit an heir do not exclude him from the inheritance; there must be an effective devise of the entire estate to someone else. * * *

The second sentence of this section follows in substance Kan. Gen. Stat. (Supp. 1943) § 59-404.

§ 42. Homestead. At any time after the return of the inventory the court, of its own motion or upon application, shall set apart the homestead to the persons entitled thereto. The homestead so set apart shall not be subject to administration and shall be exempt from all claims against the estate excepting any lien thereon at the time of the decedent's death. The title to the land set apart for the homestead property shall pass, subject to the right of homestead, the same as other property of the decedent and shall be included in the decree of final distribution.

Comment. Statutes or constitutional provisions are found in nearly every state, exempting the homestead from the claims of unsecured creditors. While there is great diversity in these legislative provisions, their principal function appears

to be to reserve a residence for the use of the family. See, for example, Mich. Stat. Ann. (1938) § 27.1572.

It is obviously impracticable to work out in detail legislation of this sort as a part of a model probate code. In the first place the homestead law is much broader than the law of decedents' estates. Thus, it deals with claims of creditors which are asserted by action before the decedent dies; and, also, with claims of creditors of the wife and children of the decedent, if a homestead is subsequently established for them. In the second place, in a number of states, provisions for the homestead are inserted in the constitution, and it is hardly to be expected that these provisions will be amended in the near future. Furthermore, the diversity of legislative provisions for the homestead makes it impossible to indicate in this code more than in barest outline, the relation of the law of decedents' estates to them. Therefore, in this section, homestead is not defined, nor are the requirements for this exemption from the claims of creditors of the decedent stated. But it is assumed that adequate provisions along these lines will be found elsewhere in the statute books.

While in a few jurisdictions the homestead is a fee simple interest, in most states it appears to be either a much more limited possessory estate or else is regarded merely as a privilege of occupation exempt from claims of creditors. In either of these two cases, if the decedent owned the property covered by the homestead in fee, there would be a non-possessory interest not covered by the exemption. According to the last sentence of this section, this interest passes like any other property of the decedent.

If the homestead is limited in value, as is the case in many states, it may be necessary to add provisions for its sale and a division of the proceeds where the property exceeds the value fixed in the statute and is not susceptible of division without injury. See, for example, Mich. Stat. Ann. (1943) §§ 27.3178(520) to 27.3178(522) and Cal. Prob. Code Ann. (Deering, 1944) §§ 664 to 666. Moreover, even if there is no such limitation, it might be desirable to sell, since the surviving members of the family may wish to live somewhere else and there is no reason for forcing them to remain in the homestead in order to retain the benefit of their exemption. For such a statute see Mass. Ann. Laws (1932) c. 188, § 8. If provisions for sale are added, it might be desirable to have a specific statement as to the exemption of the proceeds or of the substituted residence. Of course, if the homestead is regarded as an estate, it should be possible to alienate it without specific legislation. See *Roberts v. First National Bank*, 126 Kan. 503, 268 P. 799 (1928). But in some states it is held that an attempted sale is an abandonment. See *Graves v. Simms Oil Co.*, 189 Ark. 910, 75 S.W. (2d) 809 (1934). Moreover, there may be a question whether the surviving spouse can

sell without the consent of minor children. If a section providing for sale of the homestead is desired, the following form might be inserted:

"The surviving spouse may convey the homestead interest and pass good title thereto regardless of the existence of minor children. If the minor children are entitled to possession of the homestead, their interests may be conveyed by the guardians of their estates upon order of the court as in other cases for sale of lands of minors. If two or more minors become entitled to the proceeds of the sale of the homestead interest the proceeds shall be divided between them in proportion to the number of years during which they would otherwise have been entitled to the possession of the homestead."

Commonly the homestead exemption may be asserted against all creditors except lien creditors whose liens attached prior to the death of the decedent. But in some states a mechanic's lien for improvements might attach after the owner dies. See Minn. Stat. (1941) §§ 510.01 and 510.05.

It is thus apparent that in many states a substantial amount of adaptation may be necessary before the provision for the homestead herein presented can be used. Moreover, a legislature might well consider whether it would not be desirable to revise, simplify and rationalize the whole law of homestead exemption, in its relation to exemption statutes generally, to the family allowance and to the provisions for the election of a distributive share by a surviving spouse. But such a task is obviously far beyond that undertaken in this Code.

As to liability of the homestead for debts, see comment to § 44.

§ 43. Distribution of exempt property. The surviving spouse or minor children of a decedent shall be entitled absolutely to such personal property of the estate as may be exempt from execution or forced sale under the constitution and laws of this state or such other personal property as shall be selected, of the total appraised value of [\$2,000], whichever is greater, any portion or all of which may be taken in money. Such property shall belong to the surviving spouse, if any, otherwise to the minor children in equal shares. The selection

shall be made by the surviving spouse, if living; otherwise by the guardian of the estate of each minor child for such child, or by the court. At any time after the return of the inventory the court, of its own motion or upon application, shall set apart the exempt property to the persons entitled thereto. Such property shall not be subject to administration and shall be exempt from all claims against the estate except any lien thereon at the time of the decedent's death.

Comment. This section, similar to the preceding one on homestead, sets off to the surviving spouse or children, the property exempted to the head of the family under other provisions of the constitution and statutes. Because of the diversity of these provisions, no attempt is made here to enumerate such property. Many of these exemption statutes are now archaic and in view of the tendency to permit a selection of other property or money in lieu of the property so exempt, such a provision is incorporated here. It permits the greatest degree of flexibility in accordance with the needs and desires of the individual members of the family. It also permits the selection of articles of sentimental family value and of an automobile for family use. As to liability of the exempt property for debts, see comment to § 44.

§ 44. Family allowance. In addition to the right to homestead and exempt property the surviving spouse and minor children of a decedent shall be entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration according to their previous standard of living, which allowance must not continue for longer than one year in the case of an insolvent estate. Such allowance may be made upon petition at any time after the filing of the inventory, but a temporary allowance may be made prior thereto in case of great need. The allowance so ordered may be made payable in one payment or in periodic installments, and shall be payable to the surviving spouse, if living, for

the use of such surviving spouse and the minor children; otherwise to the guardians or other persons having the care and custody of any minor children; but in case any minor child shall not be living with the surviving spouse, the court may make such division of the allowance for maintenance as it deems just and equitable.

Comment. The purpose of this section is to provide an allowance to the surviving spouse and minor children of the decedent during the period of administration for their support in the manner to which they have been accustomed. See § 142, providing that administration and funeral expenses have priority over the family allowance; but the homestead and exempt property are not liable for these expenses, and do not constitute assets for any purpose except to benefit the family.