

MARITAL RIGHTS UNDER THE MISSOURI PROBATE CODE OF 1955*

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INTRODUCTION

Missouri law dealing with property rights of one spouse in the estate of the other has undergone marked changes as a result of the enactment of the Probate Code of 1955.¹ This article does not purport to be a treatise on the law of marital rights, but rather, its purpose is simply to outline and discuss questions concerning the application of the new code which are likely to arise in everyday practice. Accordingly, case citations are illustrative, and do not represent more than a fraction of the numerous decisions of Missouri appellate courts dealing with the particular points discussed.² All marital rights dealt with in this article are of statutory origin.

I. STATUTORY RIGHTS

A. Property Rights of One Spouse in the Estate of the Other Prior to the Probate Code of 1955

Prior to the effective date of the present Probate Code, a surviving spouse inherited if there were no lineal descendants and no father, mother, brother or sister, or their descendants.³ The surviving spouse also had certain statutory rights, including allowances for one year's support, absolute property, and certain of the tangible and household possessions.⁴

In addition, a surviving spouse had dower rights,⁵ in both real and personal property, the quantum of which depended upon whether there were any children born of the marriage, whether there were any children by a prior marriage, and in some small degree, whether the

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1. Mo. Rev. Stat. §§ 472.010-475.480 (Supp. 1957). The effective date of the new Missouri Probate Code was January 1, 1956. All statutory references in the text are to Missouri Revised Statutes.

2. For a more exhaustive treatment of the field of marital rights law, see 4 Maus, Missouri Practice 1171-1220 (1960).

3. Mo. Rev. Stat. § 468.010 (1949) (repealed).

4. Mo. Rev. Stat. §§ 462.450 and 462.460 (1949) (both repealed).

5. Mo. Rev. Stat. §§ 469.010-469.130 (1949) (repealed).

surviving spouse was the husband or the wife. A right of election could be exercised in lieu of dower. However, these dower sections were repealed by the Probate Code of 1955,⁶ and consequently, today, dower has only historical significance with respect to current problems which may arise regarding property rights of the husband and wife.

In enacting the Probate Code of 1955, the 68th General Assembly repealed, in addition to the dower sections mentioned above, virtually all of the then existing statutes relating to administration of decedents' estates. Further, the new Code *expressly* abolished curtesy and dower, except as to estates vested prior to January 1, 1956.⁷

The widow's homestead interest met a similar fate. Under the old homestead law,⁸ the widow and minor children were vested with a homestead estate, consisting of the right of occupancy during widowhood and minority. When the heirs were children, homestead was not subject to sale for debts of the deceased, unless legally charged during his lifetime, and sale on an administrator's deed under order of the Probate Court, has been held absolutely void and ineffective to pass title.⁹ But a sale to pay the widow's support allowance has been held valid, although subject to her homestead rights.¹⁰ And, when the heirs were other than children, homestead could be sold to pay debts, again however, subject to the widow's rights.

In 1955, homestead was rendered nugatory by the Probate Code,¹¹ and in 1957 it was *expressly* repealed by the 69th General Assembly.¹² The only present importance of dower and homestead is in connection with real estate titles, vested prior to January 1, 1956, which are affected by either dower or homestead.

B. Rights Under the Probate Code of 1955

Right of Inheritance

The new Code, while abolishing dower and homestead,¹³ substitutes new rights in lieu thereof. For example, the surviving spouse is made a *primary* heir-at-law under the new statute of descent, which provides that the surviving spouse is an heir-at-law, receiving one-half

6. Mo. Rev. Stat. § 474.110 (Supp. 1957).

7. *Ibid.*

8. Mo. Rev. Stat. § 513.495 (1949) (repealed).

9. *Kay v. Politte*, 344 Mo. 805, 129 S.W.2d 863 (1939).

10. *Rodewald v. Rodewald*, 297 S.W.2d 536 (Mo. 1957).

11. Mo. Rev. Stat. § 474.290 (Supp. 1957).

12. Mo. Laws 1957, § 1 at 292.

13. Note 11 *supra*.

of the real and personal property if there are descendants, or father, mother, brother or sister, or their descendants; otherwise, the surviving spouse receives the entire estate as sole heir-at-law.¹⁴

The Right of Election

Under the former law, election was a statutory right pertaining to real estate which offered to the surviving spouse the right to choose a statutory share in lieu of dower. When a will was involved, it was necessary for the surviving spouse to make a formal renunciation thereof, in addition to executing the declaration of election. The present right of election is equivalent to equitable election under the old law. It includes a renunciation of the will, and no distinction is made between real and personal property. The right of election¹⁵ is the right to elect to take against the will. If the right is exercised, the surviving spouse takes by descent. If there are children, the surviving spouse's share is one-third, otherwise the share is one-half.

A question arises as to the effect of the provision that the electing spouse takes one-half if there are no lineal descendants. It is to be noted that the statute does not say that if there are no lineal descendants but there is a father, mother, brother or sister or their descendants, the electing spouse takes one-half. Therefore, if the statute is to be construed literally, a testator, whose only heir-at-law would be the surviving spouse, could deprive the surviving spouse of the right of inheritance to the extent of one-half, by making a will in which all or at least one-half of the estate is left to a stranger, or to a charity.

The form of election is prescribed in the statute.¹⁶ The right is personal to the spouse,¹⁷ and is not subject to change except for fraud or mistake.¹⁸ Election must be made within ten days after the time for contesting the will, or, if there is then pending litigation as to the validity or construction of the will, or litigation which would affect the amount of the spouse's share, or litigation to determine whether or not there was issue, the time for the election is extended to ninety days after the final determination of such litigation.¹⁹

One effect of an election²⁰ is that the spouse takes by descent and takes nothing under the will, and any remainders after a life estate to the surviving spouse are accelerated, unless the will otherwise

14. Mo. Rev. Stat. § 474.010 (1) (Supp. 1957).

15. Mo. Rev. Stat. § 474.160 (Supp. 1957).

16. Mo. Rev. Stat. § 474.190 (Supp. 1957).

17. Mo. Rev. Stat. § 474.200 (Supp. 1957).

18. Mo. Rev. Stat. § 474.210 (Supp. 1957).

19. Mo. Rev. Stat. § 474.180 (Supp. 1957).

20. Mo. Rev. Stat. § 474.160 (Supp. 1957).

provides. Existing law under the cases is that the reduction of the estate affects all beneficiaries equally.²¹

It should be noted that the right of election may be waived,²² and that a failure to elect does not affect the spouse's rights in intestate property or the several allowances.²³

Statutory Allowances

The statutory allowances²⁴—exempt property, support, and homestead—all have priority over creditors' rights. Exempt property²⁵ includes all household goods, clothing, and the like, without limit as to amount, but it does not include automobiles and jewelry, and probably not art objects, although there is a division of opinion as to the latter.

The 1955 Code provides for a family allowance,²⁶ which is equivalent to the old year's support allowance. The principal difference between the two is that the right to the family allowance is given to the surviving spouse *and* the unmarried minor children. The allowance is payable to the surviving spouse, 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. If there is no surviving spouse, the allowance is payable to the guardian or other person having the care and custody of any unmarried minor children. The difference just noted may have some effect upon the availability of the allowance as a part of the marital deduction under the Federal Estate Tax, to be referred to later.

The new homestead allowance²⁷ is entirely novel, and has no relation whatsoever to the right of homestead prior to January 1, 1956. The present homestead allowance is measured in a sum of money, not to exceed \$7,500 or one-half the real and personal property in the estate, after deduction of the exempt property and the family allowance, whichever amount shall be the lesser. The homestead allowance is offset against the spouse's distributive share. It is the consensus that this would not apply where the spouse has only an equitable life estate.

The allowance may be taken in specific property, real or personal.

21. *Lilly v. Menke*, 143 Mo. 137, 44 S.W. 730 (1898). But see *Barksdale v. Morris*, 361 Mo. 432, 235 S.W.2d 288 (1950), where a different result was obtained on the theory that the contingent remainder after the remainder interest in the husband, was alternative.

22. Mo. Rev. Stat. § 474.220 (Supp. 1957).

23. Mo. Rev. Stat. § 474.230 (Supp. 1957).

24. See Hensley, *Exempt Property, Family Allowance, Homestead and Election to Take Against the Will*, in *Missouri Estate Administration* 249 (Mo. Bar CLE 1960).

25. Mo. Rev. Stat. § 474.250 (Supp. 1957).

26. Mo. Rev. Stat. § 474.260 (Supp. 1957).

27. Mo. Rev. Stat. § 474.290 (Supp. 1957).

A practical problem arises when a surviving spouse chooses specific property valued in excess of the amount of the allowance.

Until recently, a question also existed as to whether a spouse electing against the will was entitled to the homestead allowance. Two 1959 decisions of the Missouri Supreme Court, construing the new homestead section²⁸ in light of the right of election, have held that the electing spouse is entitled to homestead allowance as well as to the exempt property and support allowances.²⁹ This point is almost moot now by reason of 1957 amendments concerning the right of election.³⁰ However, the cases also deal with the problem which arises when the spouse selects real estate in satisfaction of the homestead allowance, the value of which exceeds such allowance. In such a case, the spouse pays the difference to the estate.³¹ However, the supreme court held erroneous a decree authorizing an administratrix's deed conveying real estate in satisfaction of the homestead allowance, subject to a lien in favor of the other heir in such sum as the latter would be entitled to receive on final settlement of the estate.³²

While the family allowance or allowances for exempt property need not be applied for within any specific time limit, the homestead allowance is deemed waived unless applied for within ten days after the lapse of the period of non-claim. The homestead allowance is stated to be in lieu of all dower and homestead rights in the property of a decedent. However, there is express provision³³ that no right of homestead which vested in the surviving spouse or minor children of a decedent prior to January 1, 1956, is affected.

The Probate Code of 1955³⁴ deals with the effect of a surviving spouse's death on family and homestead allowances. It provides that no allowance for the maintenance of a surviving spouse can be made for any period after his or her death. This provision seriously impairs the qualification of the family allowance for support, as a part of the estate tax marital deduction. In that connection, the Internal Revenue Service has ruled³⁵ in an unpublished ruling, that the family allowance is a terminable interest in view of the language contained in Section

28. *Ibid.*

29. *Owen v. Riffie*, 323 S.W.2d 765 (Mo. 1959); *In re Estate of Bell*, 328 S.W.2d 697 (Mo. 1959).

30. Mo. Rev. Stat. § 474.160 (Supp. 1957).

31. *Owen v. Riffie*, 323 S.W.2d 765 (Mo. 1959), where the trial court so decreed and the supreme court affirmed; *In re Estate of Bell*, 328 S.W.2d 697 (Mo. 1959), where the supreme court so ordered on appeal.

32. *Walton v. Walton*, 330 S.W.2d 834 (Mo. 1960).

33. Mo. Rev. Stat. § 474.290 (Supp. 1957).

34. Mo. Rev. Stat. § 474.300 (Supp. 1957).

35. This ruling notes *Hensley*, *Recent Developments of Rights of Surviving Spouse*, 15 Mo. B.J. 168 (1959).

474.300. This section provides that the homestead allowance, on a surviving spouse's death, goes to the unmarried minor children. If, however, there are no unmarried minor children, the right to the allowance does *not* revert to the estate of the deceased spouse.³⁶

It was held under the former law that the right of a surviving spouse to a year's support allowance vested immediately upon the death of the first spouse, and was enforceable after the surviving spouse's death by the latter's personal representative.³⁷ The right to the family allowance is probably also vested,³⁸ but it may be defeated under Section 474.300, for practical purposes, by the death of the second spouse immediately after the death of the first spouse. In any event, the amount of the family allowance may be materially reduced if the surviving spouse dies within a year after the death of the first spouse, and prior to the making of the allowance and the payment thereof. The unanswered questions arise when the allowance has been made in a lump sum, and the order has become a final judgment, but the surviving spouse dies within the year before the allowance is actually paid. The same problem arises when the surviving spouse dies within the year, after the allowance has been made *and paid* in a lump sum. In such case, it is unsettled as to whether the estate of the second spouse is liable to a refund of any part of the allowance to the estate of the first spouse dying. In the author's opinion there is no liability to refund in such case.³⁹

There are several other sections of the statute, which may be grouped under a miscellaneous heading, which either implement the marital rights already mentioned, or which contain additional rights which are of importance to the surviving spouse.

Refusal of letters testamentary, based on the exempt property and support allowances, small estates, and transfers without administration,⁴⁰ are also dealt with in the new Probate Code. These sections are complete and self-explanatory and will receive no further comment here.

As under the former law, the surviving spouse is granted the first right to administer, in the absence of a will.⁴¹

One other provision of the Code provides a new right for the spouse, and although not specifically limited to spouses, should be mentioned.⁴² This section provides for a discharge, by the estate of the deceased

36. Schubel v. Bonacker, 331 S.W.2d 552 (Mo. 1960).

37. Monahan v. Monahan's Estate, 232 Mo. App. 91, 89 S.W.2d 153 (1936).

38. Hensley, *supra* note 35, at 170.

39. This opinion is shared by Judge Hensley, *ibid*.

40. Mo. Rev. Stat. §§ 473.090-473.107 (Supp. 1957).

41. Mo. Rev. Stat. § 473.110 (Supp. 1957).

42. Mo. Rev. Stat. § 473.290 (Supp. 1957).

spouse, of a lien on another's property to secure the deceased's debt. This would include payment by the deceased's estate of a loan against a life insurance policy, payable to the surviving spouse, or the discharge of a deed of trust or other lien against entirety property.⁴³

II. BARRING OR LIMITING MARITAL RIGHTS

Statutory Provisions

Divorce destroys the several marital rights heretofore mentioned which are granted to the "surviving spouse," that is, exempt property,⁴⁴ family allowance,⁴⁵ homestead allowance,⁴⁶ the right of election to take against the will,⁴⁷ and the right of inheritance.⁴⁸ This is a distinct departure from the former law, which permitted a wife who obtained a divorce for the fault of the husband to retain her inchoate dower. Under the provisions of the new Code,⁴⁹ a divorce has the effect of revoking the provisions of a testator's will in favor of the divorced surviving spouse, and the effect is as though the divorced spouse had predeceased the testator. The statute makes no distinction with respect to which of the divorced parties was at fault.

Mere separation, absent divorce, does not affect marital rights. However, the right of inheritance and rights to the several allowances, may be barred by commission of any of the following acts of misconduct: (1) voluntarily leaving the spouse and continuing with an adulterer; (2) deserting for one year; (3) living in a continuous state of adultery; (4) and, if a wife, having been ravished, consenting to the ravisher. Reconciliation and resumption of cohabitation avoids the statutory bar.⁵⁰

Ante-Nuptial and Post-Nuptial Agreements

The "femme sole" statute,⁵¹ makes possible agreements between a husband and a wife. Another section⁵² provides for ante-nuptial agreements by way of jointure. It provides that the property received, or to be received at the other spouse's death, must be a provision for support for life, and it must be expressly conveyed or given in full

43. See Committee Comment in annotation following Mo. Rev. Stat. § 473.290 (Supp. 1957).

44. Mo. Rev. Stat. § 474.250 (Supp. 1957).

45. Mo. Rev. Stat. § 474.260 (Supp. 1957).

46. Mo. Rev. Stat. § 474.290 (Supp. 1957).

47. Mo. Rev. Stat. § 474.160 (Supp. 1957).

48. Mo. Rev. Stat. § 474.010 (Supp. 1957).

49. Mo. Rev. Stat. § 474.420 (Supp. 1957).

50. Mo. Rev. Stat. § 474.140 (Supp. 1957).

51. Mo. Rev. Stat. § 451.290 (1949).

52. Mo. Rev. Stat. § 474.120 (Supp. 1957).

discharge of all rights of inheritance or other statutory rights. The section states in part that "If any person prior to and in contemplation of marriage, in agreement or marriage contract with his intended spouse, or other person, receives any estate . . . such estate shall be valid. . . ."⁵³ The phrase "or other person" may mean that a parent, for example, can contract with a prospective daughter-in-law or son-in-law to bar rights of inheritance or other statutory rights in the prospective estate of the parent's child.

The new Code further provides, that if a conveyance or contract in lieu of rights fails as a legal bar, and the rights are thereafter demanded, the estate and interest so conveyed, determines.⁵⁴ Past decisions of the appellate courts, however, indicate that the effect of the latter section may be more illusory than real, for seldom, if ever, has the surviving spouse (usually the widow, in the cases) been required to refund or reconvey.

The rights of election to take against the will may be waived either before or after marriage by written agreement, after full disclosure of the particular spouse's property, if the consideration is fair under all the circumstances.⁵⁵

Neither Section 474.120 nor Section 474.220 appears to change the existing case law on the requirements of valid agreements between husband and wife. In fact, the latter section expressly incorporates the language usually used by the cases in testing the validity of such agreements.

Ante-nuptial and post-nuptial agreements have long been upheld when they meet the tests of: (1) full disclosure; (2) adequate consideration; (3) unequivocality; (4) fairness, reasonableness and just nature.⁵⁶ Formerly, however, anti-nuptial agreements did not bar dower, unless they were in strict accord with the old statute on the subject;⁵⁷ but statutory rights to allowances were not within the former jointure statute. Post-nuptial arrangements, in the nature of separation agreements, usually have been upheld.⁵⁸

The leading case on post-nuptial agreements entered into in contemplation of separation and divorce is *North v. North*.⁵⁹ In that case, the parties had entered into a property settlement agreement in

53. *Ibid.* (Emphasis added.)

54. Mo. Rev. Stat. § 474.130 (Supp. 1957).

55. Mo. Rev. Stat. § 474.220 (Supp. 1957).

56. *Jones v. McGonigle*, 327 Mo. 457, 37 S.W.2d 892 (1931); *In re Wood's Estate*, 288 Mo. 588, 232 S.W. 671 (1921).

57. *Broyles v. Magee*, 71 S.W.2d 149 (Mo. Ct. App. 1934).

58. *North v. North*, 339 Mo. 1226, 100 S.W.2d 582 (1936); *Chapman v. Corbin*, 316 S.W.2d 880 (Mo. Ct. App. 1958); *Clark v. Clark*, 228 S.W.2d 828 (Mo. Ct. App. 1950); *Hall v. Greenwell*, 231 Mo. App. 1093, 85 S.W.2d 150 (1935).

59. *North v. North*, *supra* note 58.

anticipation of the filing of the divorce petition, whereby, in consideration of the wife's releasing her claim to support and alimony, the husband agreed to pay her the sum of \$500 per month until her death or remarriage, and the wife further agreed, in the event of her obtaining a divorce, to release her dower rights in his property. The wife obtained a divorce for the husband's fault, and the decree of the trial court awarded her \$500 per month until her death or remarriage. On the husband's subsequent motion to modify, the supreme court held that the trial court's divorce decree was not a decree of alimony but was a decree embodying the contractual provisions of the post-nuptial contract agreement, since the court would have no power to decree alimony beyond the death of the husband. The court further observed that:

The law is too well settled in this state to admit of dispute that husband and wife, in contemplation of a separation and divorce, may, by a valid contract between themselves, settle and adjust all property rights growing out of the marital relation, including the wife's right of dower and claim for alimony, support, and maintenance.⁶⁰

The court also held that the wife's relinquishment of the husband's legal duty to support her during marriage and to provide for her support and maintenance in case of a separation and divorce, together with a release of her dower rights, constituted adequate consideration for the husband's agreements to pay her \$500 per month, even after the death of the husband.

Generally, however, for a variety of reasons, ante-nuptial contracts have not been sustained in cases reaching the appellate level. An ante-nuptial contract has been held invalid for failure of the husband to make a full disclosure of his property to the wife.⁶¹ Where the contract failed to spell out any specific bar of rights, it was held to be the basis for a claim against the deceased husband's estate for payment of a sum of money, in addition to the dower and other marital rights.⁶² Other cases have refused to sustain such contracts where the contract was equivocal and was lacking in consideration;⁶³ where the provision for the wife was so inadequate as to raise a presumption of fraud and concealment;⁶⁴ and where there was a lack of consideration.⁶⁵

60. *Id.* at 1230, 100 S.W.2d at 584.

61. *Mathis v. Crane*, 360 Mo. 631, 230 S.W.2d 707 (1950).

62. *Broyles v. Magee*, 71 S.W.2d 149 (Mo. Ct. App. 1934).

63. *In re Wood's Estate*, 288 Mo. 588, 232 S.W.2d 671 (1921).

64. *Jones v. McGonigle*, 327 Mo. 457, 37 S.W.2d 892 (1931).

65. *Rudd v. Rudd*, 318 Mo. 935, 2 S.W.2d 585 (1927).

The following quotation from *Jones v. McGonigle*⁶⁶ exemplifies how closely courts will scrutinize a contract between a husband and wife to test its validity:

The following may be said to be well settled rules applicable to antenuptial contracts: that the relation existing between a man and the woman whom he is engaged to marry is a confidential one in "an exact and stringent sense" (*Donaldson v. Donaldson*, 249 Mo. 228); that good faith is the cardinal principle in such transactions, making it incumbent upon the prospective husband to fully inform his prospective wife, with respect to the nature and extent of his estate (30 C.J. 643); that such contract must be clearly understood by the wife, be just and reasonable and free from concealment. As to whether the contract is just and reasonable, courts of equity will take into consideration the adequacy of the provision for the wife. [30 C.J. 642.] Ordinarily, inadequacy raises a presumption of fraud and concealment, throwing the burden of proving the absence of fraud and concealment upon the husband or those claiming under him (30 C.J. 644), and the contract and all circumstances attending its execution will be "regarded with the most rigid scrutiny" by courts of equity. [*Carr v. Lackland*, 112 Mo. 1. c. 442; *Egger v. Egger*, 225 Mo. 116; 13 R.C.L. 1374.]⁶⁷

Summing up, it is legally possible to bar inheritance and other marital rights, including the right of election, by either ante-nuptial or post-nuptial contracts, if the following requirements are strictly observed, particularly by the husband: (1) there must be a full and complete disclosure of the spouse's property; (2) there must be adequate provision for the other spouse, or at least a real consideration which is fair under all the circumstances; (3) the contract must be explicit as to the rights to be barred; (4) the contract must be reasonable and just; and (5) particularly as to the wife, the legal effect of the contract must be understood.

Joint and Mutual Wills

It is also possible, by means of a contract to make a joint or mutual will irrevocable, to limit the disposition of an estate by the surviving spouse.⁶⁸ Parol evidence is admissible to show the agreement not to revoke.⁶⁹ An oral contract to make a joint or mutual will, however, requires a high degree of proof.⁷⁰

Such a method of control of ultimate disposition of property is not

66. *Jones v. McGonigle*, 327 Mo. 457, 37 S.W.2d 892 (1931).

67. *Id.* at 464, 37 S.W.2d at 894.

68. *Glueck v. McMehen*, 318 S.W.2d 371 (Mo. Ct. App. 1958).

69. *Ibid.*

70. *In re Opel's Estate*, 352 Mo. 592, 179 S.W.2d 1 (1944).

recommended because of the complete inflexibility of the testament, which may become very outmoded during the lifetime of the second spouse. At the death of the first spouse, the joint will is fixed, and cannot be changed later in any respect.

III. PARTICULAR RIGHTS AND ACTIONS

Torts Against Property

By reason of the "*femme sole*" statute⁷¹ already referred to, one spouse can sue the other as to property torts,⁷² but not as to personal torts.⁷³

In a recent divorce case, the question raised was whether the defendant wife was entitled to sue for an accounting of joint funds and joint personal property allegedly converted by the plaintiff husband. The court held that the conversion involved a disavowal of the joint ownership, so that the accounting prior to the divorce was proper.⁷⁴

Resulting Trusts

It is theoretically possible, although practically difficult, for a husband to establish sole ownership of property by way of a resulting trust, where the property has been purchased by him and conveyed to his wife in her name alone, or to himself and his wife as tenants by the entirety. A recent decision of the supreme court⁷⁵ demonstrates the extreme difficulty encountered by a husband in successfully maintaining such an action. The opinion lays down the requirements that the husband must prove that he paid the whole purchase price out of his separate funds; and he must also prove, by evidence sufficient to rebut the very strong presumption of a gift, that he did not intend to make a gift or provision for his wife. To state the last requirement is to emphasize the husband's small hope of success. Moreover, if the wife be dead, the husband's lips are sealed by the "Dead Man's Statute."⁷⁶ Otherwise, parol evidence is admissible.⁷⁷

Transfers in Fraud of Marital Rights

The principle is well settled that an action by one spouse will lie to set aside a transfer by the other spouse in fraud of the former's

71. Mo. Rev. Stat. § 451.290 (1949).

72. *Smith v. Smith*, 300 S.W.2d 275 (Mo. Ct. App. 1957).

73. *Deatherage v. Deatherage*, 328 S.W.2d 624 (Mo. 1959); *Brawner v. Brawner*, 327 S.W.2d 808 (Mo. 1959).

74. *Ray v. Ray*, 336 S.W.2d 731 (Mo. Ct. App. 1960).

75. *Hampton v. Niehaus*, 329 S.W.2d 794 (Mo. 1959).

76. *Sutorius v. Mayor*, 350 Mo. 1235, 170 S.W.2d 387 (1943).

77. *Hampton v. Niehaus*, 329 S.W.2d 794 (Mo. 1959).

marital rights.⁷⁸ Usually such an action is brought by the wife against the husband's estate or his heirs. The fraudulent transfer complained of can take place either before or during marriage.

In *Breshears v. Breshears*,⁷⁹ the husband, on the eve of his marriage to plaintiff, deeded his property to his children by a former marriage, reserving a life estate. Evidence indicated that the conveyance virtually stripped the husband of property available for support of his wife, that the conveyance was made in direct anticipation of the marriage, and that the conveyance was concealed from the wife. The court held that the conveyance was invalid as to the wife, and set it aside to that extent, so that the grantee's title was subject to the wife's marital rights.

In *Merz v. Tower Grove Bank & Trust Company*,⁸⁰ the husband, during the marriage, conveyed the great bulk of his property by an inter vivos trust, under the terms of which the wife's interest was considerably less than that to which she would have been entitled under the statute, had the property been included in the husband's estate at his death. The inter vivos transfer occurred when the husband, advanced in years, and in ill health, knew that his death was imminent. The evidence further showed that the purpose of the inter vivos trust was to deprive and defraud the wife of her marital rights. The petition alleged the invalidity of the transfer, not only because it was in fraud of the wife's marital rights, but because the inter vivos trust was testamentary in character. The court held for the plaintiff, and set the entire trust aside, finding that the trustee was a participant in the fraud on the wife. Further, the conveyance of property by a husband in contemplation of death, without consideration, and with the intent and purpose of defeating the wife's marital rights, was a fraud on the wife. Finally, the court further declined to allow any deductions for trustee's commissions or for attorney's fees or expenses of the trustee, and ordered the trust estate transferred, one-half to the plaintiff widow, and the other half to the executors of the deceased husband's estate.

In *Wanstrath v. Kappel*,⁸¹ an action by the widow to set aside an inter vivos trust created by the husband, without consideration, while he was conscious of his impending death, the court set aside the trust as to the widow, and decreed that she was entitled to a child's share of one-third, subject to one-third of the taxes and the allowed claims.

78. *Breshears v. Breshears*, 360 Mo. 1057, 232 S.W.2d 460 (1950); *Wanstrath v. Kappel*, 356 Mo. 210, 201 S.W.2d 327 (1947); *Merz v. Tower Grove Bank & Trust Co.*, 344 Mo. 1150, 130 S.W.2d 611 (1939).

79. 360 Mo. 1057, 232 S.W.2d 460 (1950).

80. 344 Mo. 1150, 130 S.W.2d 611 (1939).

81. 356 Mo. 210, 201 S.W.2d 327 (1947).

Evidence showed that the purpose of the trust, which included almost all of husband-grantor's property, was to deprive the wife of her statutory rights. In the second *Wanstrath* case,⁸² involving the same parties in another phase of the same action, the court held that the widow's share of the trust to which she was entitled under the first holding was not subject to trustee's commissions, attorney's fees, guardian ad litem fees or other costs of the litigation.

However, not every transfer by the husband, which deprives the wife or widow of her marital rights, may be set aside. In the early case, of *Hornsey v. Casey*,⁸³ plaintiff had obtained a divorce from the deceased husband for his fault, and therefore retained her inchoate dower interest. Subsequent to the divorce, the husband conveyed real estate of which he had been seized during the marriage. At his death, the divorced wife filed her election to take one-half of the real and personal estate on hand at the time of her former husband's death, in lieu of dower. She also brought an action to set aside the transfer by the husband as being in fraud of her dower right. The supreme court held that a divorced wife who had retained her inchoate dower has the right of election in lieu of dower, which is limited to one-half of the real and personal estate on hand at the husband's death; but that she could not set aside a conveyance after the divorce, as being in fraud of her right of election. The court further held the election was irrevocable, and dower in the conveyed property was lost. Had the plaintiff not made her election she would have had dower, because dower attaches to any property owned during coverture.

Another case,⁸⁴ decided in 1955, illustrates the necessity of meeting the various elements of proof. The husband, during coverture, had created an inter vivos trust into which he placed almost his entire property. The provisions of the trust were highly restrictive as to the wife, and gave her far less than she would have been entitled to under the statute, had there not been such a conveyance. Evidence showed that the purpose and effect of the conveyance was to deprive the wife of her marital rights, although there was some evidence that there might have been another business reason for the creation of the trust. The supreme court, however, in refusing to set aside the transfer in an action by the wife, based its holding upon the ground that there was no evidence that the transfer had been made in contemplation or in anticipation of death. However, a different result might have been reached had the case arisen under the Probate Code of 1955.⁸⁵

82. *Wanstrath v. Kappel*, 358 Mo. 1077, 218 S.W.2d 618 (Mo. 1949).

83. 21 Mo. 545 (1855).

84. *Potter v. Winter*, 280 S.W.2d 27 (Mo. 1955).

85. Mo. Rev. Stat. § 474.150 (Supp. 1957).

While most of the cases have been actions by the wife or her heirs to set aside allegedly fraudulent transfers, it is clear that a husband or his heirs may also bring such a suit.⁸⁶ The supreme court's opinion in *Breshears v. Breshears*,⁸⁷ is illustrative of this point:

However, a voluntary conveyance, one in consideration of love and affection, yields where it constitutes a fraud upon creditors or a widow's marital rights. (Citing cases) A couple to be married in the future stand [sic] in a confidential relationship after the agreement of betrothal. (Citing authorities) With the parties betrothed and occupying a fiduciary relationship of the strictest confidence, and with no valuable consideration passing from the grantees to the grantor, as here; and with the conveyance stripping the husband of his property and ability to meet obligations contemplated by law for the protection of his widow, the burden of going forward with the evidence to sustain the transfer shifted to the grantor husband and his representatives. (Citing authorities)⁸⁸

The new Probate Code of 1955,⁸⁹ as amended in 1957, appears to codify the existing case law.⁹⁰ Paragraph 1 of section 474.150 merely states the existing case law. Paragraph 2 of the section creates a presumption where there is a conveyance of real estate. Paragraph 3,

86. *Hastings v. Hudson*, 359 Mo. 912, 224 S.W.2d 945 (1949).

87. 360 Mo. 1057, 232 S.W.2d 460 (1950).

88. *Id.* at 1065, 232 S.W.2d at 462-63.

89. Mo. Rev. Stat. § 474.150 (Supp. 1957) provides:

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 a minor or incompetent person is deemed not to be in fraud of the marital rights of the minor or incompetent if the probate court authorizes the guardian of the minor or 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. (L. 1955 p. 385 § 251, A.L. 1957 S. B. 1)

90. *Reinheimer v. Rhedans*, 327 S.W.2d 823 (Mo. 1959).

added in 1957, makes practicable a conveyance where the spouse is a minor or incompetent, a former hiatus in the law.

The section has been construed only once by the Missouri Supreme Court, which held that inchoate dower is not a vested right, and was abolished by the Probate Code of 1955. The court also held that this section does not create a new definition of fraud, but only affects the burden of proof, with respect to real estate conveyances.⁹¹ The court further observed that since the Probate Code is silent on whether the wife may sue during her husband's lifetime to protect her marital rights, and since under the former law the wife could sue during the husband's lifetime to protect her inchoate dower, it is to be assumed that there is no limitation as to the time to sue, so as to make an action brought during lifetime premature. The court found that there was consideration for the husband's deed and that its purpose was not to defraud the wife of her marital rights.

Paragraph 1 of section 474.150 confirms the right of one spouse to set aside a fraudulent transfer by the other, and spells out the type of relief to which the plaintiff spouse will be entitled. It is still necessary, under the cases, to show that the transfer was made either in immediate anticipation of a coming marriage or during the marriage, in contemplation of impending death, for the purpose of depriving and defrauding the other spouse of his or her marital rights. The transfer must include a substantial part of the transferor's property, and be made without adequate consideration.

In 1959, the 70th General Assembly passed a statute⁹² which provided for conveyance of real estate held by the entirety when one of the spouses is an incompetent or a minor. This new statute fills an important gap, in the third paragraph of section 474.150, because formerly there was no way by which the entirety property could be conveyed, when one spouse was incompetent, although, as a matter of practice, interests of incompetent spouses in entirety property have been passed on deeds by the guardian of such incompetent spouse (other than the other spouse), where the entire proceeds of the sale have been placed in the guardianship estate. If the incompetent spouse was the husband, this presented no particular hardship, because the wife could obtain support from the estate. If the incompetent spouse was the wife, however, this often created an undue hardship, particularly where the couple was elderly, because often the husband was dependent upon the proceeds of the sale to secure other living quarters, or for his own or his wife's support. The husband was not permitted to receive support from the guardianship estate of his

91. *Id.* at 828.

92. Mo. Rev. Stat. § 442.035 (Vernon's Supp. 1960).

incompetent wife, so long as he had funds of his own, and no authority existed whereby the funds could be used to purchase a new home by the entirety.

IV. MARITAL RIGHTS AND MISSOURI INHERITANCE TAX

Exempt property⁹³ and family allowance⁹⁴ are allowable as deductions in determining the net probate estate, but homestead allowance⁹⁵ is not.

Initially a question existed as to whether a spouse's distributive share, if she elected to take under the will,⁹⁶ was exempt from tax under the old statute.⁹⁷ The latter section, prior to the amendment, allowed the spouse an exemption of \$20,000, "in addition to an amount equal to the aggregate value of such marital rights to which . . . [the surviving spouse] would have been entitled if . . . [he or she] had renounced said will or if [the deceased] spouse had died intestate. . . ."⁹⁸

A spouse who elects to take against the will⁹⁹ takes by descent exactly as if her spouse had died intestate.¹⁰⁰ The supreme court has held that the legislature, by changing the basis of taking from statutory marital rights, under the old law, to descent, under the new Code, did not intend to do away with the exemption as to the marital rights distributive share.¹⁰¹

The amended statute¹⁰² removes all such question entirely, and also avoids a possible inequity between electing spouses, where there are children as opposed to cases where there are no children.

The other principal development having a practical bearing on marital rights is found in two recent cases dealing with taxability of joint tenancies. While this is not restricted to husband and wife situations, joint tenancies are more common in such cases, and the decisions, therefore, are significant, especially in estate planning.

It is completely settled that under the present inheritance tax statutes, joint tenancies are not subject to tax, regardless of when created, or the motive of creation.¹⁰³

93. Mo. Rev. Stat. § 474.250 (Supp. 1957).

94. Mo. Rev. Stat. § 474.260 (Supp. 1957).

95. Mo. Rev. Stat. § 474.290 (Supp. 1957).

96. Mo. Rev. Stat. § 474.160 (Supp. 1957).

97. Mo. Rev. Stat. § 145.090 (1949).

98. *Ibid.*

99. Mo. Rev. Stat. § 474.160 (Supp. 1957).

100. Mo. Rev. Stat. § 474.010 (Supp. 1957).

101. *In re Atkins' Estate*, 307 S.W.2d 420 (Mo. 1957).

102. Mo. Rev. Stat. § 145.090 (Supp. 1957).

103. *Osterloh's Estate v. Carpenter*, 327 S.W.2d 942 (Mo. 1960); *In re Gerling's Estate*, 303 S.W.2d 915 (Mo. 1957).

In summary, the state of the law dealing with marital rights is reasonably clear for the present-day practitioner. Many of the former uncertainties have been removed by the statutory provisions of our Probate Code, enacted in 1955, and by the clarifying amendments since adopted. The task of the lawyer thereby has been made a little less difficult.

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