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THE WIDOW'S ELECTION IN COMMUNITY PROPERTY STATES

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Every legal system has in some way sought to protect a widow against disinheritance. At the common law, dower was the principle vehicle for such protection. Dower, however, was applicable only to estates in freehold. For an estate in copyhold, the common law provided the institution of "free bench." For those of you who may be unaware of this type of property holding, I refer you to the following definition:

> Free-Bench (*Francus Bancus*, i.e., *Sedes Libera*) Is that Estate in Copyhold Lands which the Wife hath on the Death of her Husband for her Dower, according to the Custom of the Manor: But it is said the Wife ought to be espous'd a Virgin; and is to hold the Land only so long as she lives sole and continent. Kitch. 102. Of this Free-Bench, several Manors have several Customs; and Fitzherbert calls it a Custom whereby in certain Cities the Wife shall have the whole Lands of the Husband for her Dower, etc. F.N.B. 150. In the Manors of East and West Enborne in the County of Berks, and the Manor of Torre in Devonshire, and other Parts of the West of England, there is a Custom: that when a Copyhold Tenant dies, his Widow shall have her Free-Bench in all his Customary Lands, *Dum sola & casta fuerit*; but if she commits Incontinency, she forfeits her Estate; Yet nevertheless, on her coming into the Court of the Manor, riding backward on a Black Ram, with his Tail in her Hand, and saying the words following, the Steward is bound by the Custom to readmit her to her Free-Bench; the Words are these,
>
> Here I am,
> Riding upon a Black Ram,
> Like a Whore as I am,
> And for my Crincum Crancum,
> I have left my Binkum Bankum;
> And for my Tail's Game
> Have done this worldly Shame
> Therefore pray Mr. Steward let me have my land again.
>
> This is a Kind of Penance, among jocular Tenures and Customs, to purge the Offence.[1]

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[1] A NEW LAW DICTIONARY (published by Giles Jacob, Gent., in the Savoy, 1732).

While the law today does not require the widow to perform in the manner required of a widow of a copyholder, much complexity surrounds this area, particularly in the community property states. With regard to personalty, the common law protected the widow by means of the writ *de rationabili parte bonorum.* By this writ, the widow could claim her intestate share (normally, one-third of her husband's estate). This writ dropped out of use in the fifteenth century, but was restored in the nineteenth century by the separate women's property statutes, which recognized the privilege of the wife to renounce her husband's will, and claim her intestate share. Unlike dower, however, the widow had no claim on the property prior to H's[2] death. Hence, the statutory privilege of renunciation in the common law states is quite different from the election device which stems from common law cases involving dower. Dower was the right of W on the death of H to a life estate in one-third of the land of which H was seised. Since dower belonged to W, there was no way for H to devise it to her. Indeed, at the common law, prior to the Statute of Uses and the Statute of Wills, land was not devisable. It simply descended by right of primogeniture to the heir, usually the decedent's eldest son. W took dower as a matter of law. Unless an intention to exclude W from dower appeared by express words, or by manifest implication from the terms of H's will, W could claim both dower and what H had provided her by will. The burden was on the one who contested W's rights to show that the will put her to an election to take other property in lieu of dower.

Similarly in the community property states, with the exception of New Mexico, the wife is deemed to have an interest in property *prior* to the death of her husband. This is true even though the husband is the manager of the community. During his life, he may do with the property as he pleases, so long as he does not act in fraud of his wife. Upon his death, the community estate is divided, and the widow for the first time is entitled not only to her property interest in the community, but the right to manage it as well.[3] If the husband seeks to dispose of the entire community estate by will, he is attempting to dispose of property in which he has no interest, namely, her one-half of the community.

I. PUTTING W TO AN ELECTION

To resolve the problem of interpreting such a will, the community property jurisdictions have borrowed a concept from the

[2] Throughout this paper, we shall use "H" to refer to the husband and "W" to refer to the wife. We shall also assume that H predeceases W, although this would not always be the case.

[3] This is the traditional Texas view. In Arizona, W may have rights of management in realty, but not in personalty.

English Chancery, *viz.*, the device of *election.* As applied to the problem with which we are here concerned, this doctrine is known as the "widow's election."

In Arizona, the leading case on the widow's election, as well as community property generally, is, of course, *LaTourette v. LaTourette.*[4] In that case, H gave "all the property of which I may die possessed" to W for life, and then directed that "after her death all of said property of which she is then possessed shall go to our surviving children, and to the issue of those who may be dead, to the extent of the share which would have gone to the deceased parent, if alive, share and share alike."[5] The court held that this language affected only H's one-half of the community. As a result, W kept her one-half of the community free and clear, and, in addition, received a life estate in H's one-half, while the heirs of H (other than W) took a remainder interest in his one-half. In the course of its opinion, the Arizona court said much about community property and the widow's election. We may summarize this law as follows: The husband has no better right in the community than the wife. During coverture, he has power to dispose of *personalty* only. He may not exercise this power in such a manner as would defraud the wife. Community property is analogous to tenancy by the entirety, except that if one of the tenants should die leaving children, then the children take his one-half. In this regard, the community property system is analogous to a tenancy in common. A strong showing of intent on the part of the testator is required to put W to an election. The election theory is not applicable where H erroneously thinks that the entire community is his own.[6] The normal presumption is that H will not be presumed to have intended to devise property over which he had no power of testamentary disposition. W's claim to her one-half of the community is not necessarily inconsistent with the will provisions; she may take both what she receives under the will, and her share of the community.

Like the majority of the community property states, Arizona favors a strong presumption against the widow's election will. For H to put W to an election, he must carefully spell it out in his will. California, Texas, and Washington have all decided cases holding to this basic principle.[7]

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[4] 15 Ariz. 200, 137 Pac. 426 (1914).

[5] *Id.* at 202, 137 Pac. at 426.

[6] *Cf.*, California and Texas cases on this point, *infra* note 1.

[7] In the following cases, the courts have given effect to the ordinary rule that testamentary dispositions will be construed, where possible, as referring to the testator's own partial interest in the property, and have refused to require an election:
Arizona — LaTourette v. LaTourette, 15 Ariz. 200, 137 Pac. 426 (1914) ("all of the property of which I may die possessed").

The more interesting widow's election cases are those where the courts have found the necessary intention to put the widow to an election. Typical are the following:

1. Where H bequeathed to W one-half of all his estate, providing further that certain specifically described realty and personalty, including his residence, should be taken by her at a price of $10,000, and that she should be given $3,000 cash from the first property sold, and

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California — Estate of Wolfe, 48 Cal. 2d 570, 311 P.2d 476 (1957) ("all of my property"; dictum); *In re* Prager's Estate, 166 Cal. 450, 137 Pac. 37 (1913) ("all of the real property owned by me"); *In re* Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076 (1902), *modified*, 71 Pac. 437 (1902) ("remainder of my estate . . . to be divided equally between my wife and children"); *In re* Gilmore's Estate, 81 Cal. 240, 22 Pac. 655 (1889) ("all my property, both real and personal, of which I shall be possessed at the time of my death"); King v. Lagrange, 50 Cal. 328 (1875) ("all my estate, real, personal and mixed"); In the Matter of the Estate of Silvey, 42 Cal. 210 (1871) ("the entire residue of my property"); Beard v. Knox, 5 Cal. 252, 63 Am. Dec. 125 (1855) ("all the property, of whatever kind and species, and all my money"); *In re* Boyd's Estate, 95 Cal. App. 2d 44, 212 P.2d 17 (1949) (the residue of "my property, real, personal or mixed, of every kind and description"); Estate of Mumford, Myrick Prob. 133 (1877). See also Pratt v. Douglas, 38 N.J. Eq. 516 (1884) ("all my real and personal estate," stating California law).

Louisiana — Theall v. Theall, 7 La. 226, 26 Am. Dec. 501 (1834) ("the rest of my property, both real and personal").

New Mexico — See Colclazier v. Colclazier, 89 So. 2d 261 (Fla. 1956) ("the entire community property in which I and my wife . . . share").

Texas — Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955) ("all of the balance of my real estate which I now own and which I own at the time of my death"); Miller v. Miller, 149 Tex. 543, 235 S.W.2d 624 (1951) ("all of the property . . . I may die seised and possessed of"); Graser v. Graser, 147 Tex. 404, 215 S.W.2d 867 (1948); Schelb v. Sparenberg, 133 Tex. 17, 124 S.W.2d 322 (1939) ("all property . . . as well as interest in any and all property or estate . . . which I shall own or be entitled to"); Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935) ("all the balance and remainder of all my property, whether real estate or personal property, belonging to me or in which I may have an interest"); Haley v. Gatewood, 74 Tex. 281, 12 S.W. 25 (1889) ("all the estate I now own and possess"); Moss v. Helsley, 60 Tex. 426 (1883) ("my interest in"); Carroll v. Carroll, 20 Tex. 732 (1858) ("all my real and personal estate"); Sailer v. Furche, 22 S.W.2d 1065 (Tex. Comm. App. 1930) ("all property, real, personal and mixed, of which I may die seised and possessed"); Ward v. Gohlke, 279 S.W.2d 422 (Tex. Civ. App. 1955) error ref. ("my estate"); Church of Christ v. Wildfong, 265 S.W.2d 622 (Tex. Civ. App. 1954) ("property . . . which I own or may be entitled to at the time of my death"); Long v. Long, 252 S.W.2d 235 (Tex. Civ. App. 1952) error ref. n.r.e. ("my property"); Ottenhouse v. Paysinger, 244 S.W.2d 714 (Tex. Civ. App. 1951) error ref. n.r.e. ("my estate"); C. C. Young Memorial Home for Aged Women v. Nelms, 223 S.W.2d 302 (Tex. Civ. App. 1949) error ref. n.r.e. ("property . . . of which I may die seised"); Ford v. Bachman, 203 S.W.2d 630 (Tex. Civ. App. 1947) error ref. n.r.e. ("all my estate"); Pope v. Pope, 175 S.W.2d 289 (Tex. Civ. App. 1943) ("my property" or "my estate"); Wolf v. Hartmangruber, 162 S.W.2d 112 (Tex. Civ. App. 1942) ("all my property"); Whaley v. Quillin, 153 S.W.2d 969 (Tex. Civ. App. 1941) error ref. ("my property"); Logan v. Logan, 112 S.W.2d 515 (Tex. Civ. App. 1937) error dismissed ("all property, both real and personal, whether belonging to me separately or as my interest in partnership"); Broughton v. Millis, 67 S.W.2d 650 (Tex. Civ. App. 1933), followed in Broughton v. Settegast, 67 S.W.2d 656 (Tex. Civ. App. 1933); Rippy v. Rippy, 49 S.W.2d 494 (Tex. Civ. App. 1932) error ref. ("all the rest and residue of my property, real, personal or mixed of which I may die seised and possessed of, or to which I may be entitled"); Dial v. Martin, 37 S.W.2d 166 (Tex. Civ. App. 1931), *rev'd on other grounds*, 57 S.W.2d 75 (Tex. Comm. App. 1933), Annot., 89 A.L.R. 571 (1934) ("all the property of which I may die seised and possessed"); Kreis v. Kreis, 36 S.W.2d 821 (Tex. Civ. App. 1931) error dis-

also provided specific legacies for others, the court reasoned that if H had known that W was to receive $300,000 in stock and lands he would not have been so anxious to have sales of property to obtain the $3,000 on which W could live; further, that it was not likely that a husband who desired his wife to have *three-fourths* of his great estate would ask her to pay $10,000 for one-half of his interest in his residence, which was worth only about $14,000; and, finally, if W's contention (that she was entitled to both) were accepted, there would be nothing left for payment of the specific legacies to H's brothers and sisters.[8]

2. Where H described his land by section, township, and range, and gave W a life estate in such land and in all livestock, farming utensils, household furniture, and other personal property on the ranch, with a remainder over; the will stated that it was made with full knowledge of the property rights of husband and wife.[9]

3. Where H devised to W "one-half of all my land, the division line to be run in the same direction that the present field fence runs," stating that W was to have the northeast end of the land, including the homestead, also the largest span of mules, "my" wagon and hack, "my" farming implements, and eight cows to be selected out of "my stock of cattle."[10]

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missed ("all of my estate both real and personal of which I shall die seised and possessed"); Arrington v. McDaniel, 4 S.W.2d 262 (Tex. Civ. App. 1928), *modified on other grounds*, 14 S.W.2d 1009 (Tex. Comm. App. 1929), certified question answered, 119 Tex. 148, 25 S.W.2d 295 (1930) ("all my property both real and personal"); Hocker v. Piper, 2 S.W.2d 997 (Tex. Civ. App. 1928) ("any and all property of which I may die seised and possessed"); Edds v. Edds, 282 S.W.2d 638 (Tex. Civ. App. 1926) error ref. ("all other property, real and personal"); Waller v. Dickson, 229 S.W. 893 (Tex. Civ. App. 1921) ("all my estate of every kind whatsoever, real, personal, and mixed, separate and community"); Slavin v. Greever, 209 S.W. 479 (Tex. Civ. App. 1919) ("my estate"; "all of section 75"); Payne v. Farley, 178 S.W. 793 (Tex. Civ. App. 1915) ("my personal property"; "my money"); Swilley v. Phillips, 169 S.W. 1117 (Tex. Civ. App. 1914) error ref. ("the real and personal estate of which I may die possessed"); Gulf, C. & S. F. Ry. Co. v. Brandenburg, 167 S.W. 170 (Tex. Civ. App. 1914) error ref. ("all my estate"); Sauvage v. Wauhop, 143 S.W. 259 (Tex. Civ. App. 1912) error dismissed "my estate"; "all my furniture, my stock, and the farm upon which I now reside"; Autrey v. Stubenrauch, 63 Tex. Civ. App. 247, 133 S.W. 531 (1910) error ref. ("my estate"; "all my property"); Gibony v. Hutcheson, 20 Tex. Civ. App. 581, 50 S.W. 648 (1899) ("all the property which I may die possessed"); Crosson v. Dwyer, 9 Tex. Civ. App. 482, 30 S.W. 929 (1895) error ref. ("all my property"). See also Comm'r v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958) ("property . . . which I shall own or to which I may be entitled at the time of my death . . . my estate"); Davis v. East Texas Savings & Loan Ass'n, 163 Tex. 361, 354 S.W.2d 926 (1962) ("all the rest and residue of my estate"); Caddell v. Lufkin Land & Lumber Co., 255 S.W. 397 (Tex. Comm. App. 1923).

Washington — Collins v. Collins, 152 Wash. 499, 278 Pac. 186 (1929) ("all my property"); Herrick v. Miller, 69 Wash. 456, 125 Pac. 974 (1912) ("all my real estate . . . and all interests therein, community and otherwise . . . which I shall at my death have power to dispose of by will").

[8] Estate of Stewart, 74 Cal. 98, 15 Pac. 445 (1887).

[9] *In re* Smith's Estate, 4 Cal. Unrep. 919, 38 Pac. 950 (1894), *rev'd in part on rehearing*, 108 Cal. 115, 40 Pac. 1037 (1895).

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

4. Where H devised to W a life estate in a ranch which he owned as separate property, and then devised to others two leagues of another ranch which was community, providing further that the balance of that property, which he described as "my ranch," should be sold to satisfy his debts, with any balance of the proceeds to be distributed one-third to his children.[11]

5. Where H first devised to his wife a described lot which was admittedly his separate property, and then provided that the rest of "my estate" should go to W and four children in equal shares, adding that all of his estate was separate property, except a portion thereof worth $8,000.[12]

6. Where H first stated that all of the property which he possessed was community, and then gave W one-half of "all the property . . . of which I may die seised or possessed."[13]

7. Where H gave his sister "all" of a lot which was community, described by number, subdivision, and address.[14]

8. Where H gave W a one-half interest for life in "all of my property and estate," the other one-half to his son, with certain gifts over, and added that all of the property of which he was "now possessed" was separate property.[15]

9. Where H gave 108 acres to each of his five children from a tract of 640 acres, held as community property, and the remaining 100 acres, including the homestead, to his wife for life, with remainder over.[16]

10. Where H gave one tract, describing it, to his son in fee, and another to W for life, with remainder to his daughter and her children.[17]

11. Where H gave W specified tracts of land, and described personalty, all of which was community.[18]

12. Where W had an interest in the improvements on property owned by H, and H devised the lot, describing it, "together with all improvements thereon" to his children, providing that W should have the right to use the home place for life, free of all taxes, and receive a monthly payment from the rentals on the buildings bequeathed to

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[11] Morrison v. Bowman, 29 Cal. 337 (1865).

[12] *In re* Vogt's Estate, 154 Cal. 508, 98 Pac. 265 (1908).

[13] *In re* Dargie's Estate, 179 Cal. 418, 177 Pac. 165 (1918).

[14] *In re* Moore's Estate, 62 Cal. App. 265, 216 Pac. 981 (1923).

[15] *In re* Emerson's Estate, 82 Cal. App. 2d 510, 186 P.2d 734 (1947).

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

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

[18] Zinn v. Farmer, 243 S.W. 523 (Tex. Civ. App. 1922), *aff'd*, 276 S.W. 191 (Tex. Comm. App. 1925).

the children.[19]

13. Where H devised described lots, which were community property, to his daughter, leaving W all the rest and residue of his estate, consisting entirely of community property.[20]

14. Where H first set forth his separate and community property, and then gave an undivided one-fifth of "the remainder of my estate, real and personal" to W "which includes her share of the community property."[21]

15. Where H gave W one-half of all of his personalty "whether it be my individual and separate property or our community property," and also "my home place of 213 acres of land during her lifetime; this being my separate property," although one hundred acres of the home place was community property.[22]

16. Where the property, a group of tourist courts, apartment buildings, and the homestead, was specifically described.[23]

17. Where H first declared that all of the property "I now hold," was separate property, and then devised one-third of "all my property" to W, the balance to others.[24]

While the majority of decided cases have involved situations where *H* put *W* to an election, there is no reason why *W* may not put *H* to an election, should she wish to do so. Thus, in a Texas case,[25] W first announced her intent to dispose of all of "my estate," stating that the property mentioned had been purchased with her separate funds. She then devised certain specifically described land to others, subject to a life estate in H. It was held that H was put to an election. In a California case,[26] W first stated in her will that all the property which she possessed was her own, and then devised one-half to H, and one-half to her brother. The evidence established, however, that much of the property was community property, and accordingly, H was put to an election. In another Texas case, [27] W used the personal pronoun "our" in the comprehensive expression "all our remaining property." By so doing, she sought to dispose of the entire community. Accordingly, H was put to an election.

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

[20] Cheatham v. Mann, 133 S.W.2d 264 (Tex. Civ. App. 1939) error ref.

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

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

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

[24] Andrews v. Kelleher, 124 Wash. 517, 214 Pac. 1056 (1923).

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

[26] *In re* Johnson's Estate, 178 Cal. App. 2d 826, 3 Cal. Rptr. 408 (1960).

[27] Lancaster v. Burris, 352 S.W.2d 136 (Tex. Civ. App. 1961).

Is the fact that the testator is mistaken material in determining whether the will puts his widow to an election? For example, where the testator erroneously regards certain community property as his separate estate, California holds that H's mistake is immaterial. It is his intention, and not the ground on which his intention rests, that determines whether W is put to an election.[28]

The erroneous assertion by H that certain property is his own does not automatically put W to an election. His belief as to ownership is a *factor* in determining his intent with respect to whether he sought to put W to an election. For example, where H erroneously described certain realty as his separate property, and after his death, W sought to have the homestead set aside, W was not deemed to have elected to take under H's will. The court said: "[T]he doctrine of election can have no application because Mr. Cooper did not intend to devise away from his wife property in which she had any interest, as he believed he was devising his separate property over which he would have testamentary disposition."[29]

Obviously, the decided cases are concerned with situations where there was ambiguity with regard to the testator's intent.[30] In a few cases, testators have been more explicit, and have expressly provided that W should be put to an election. Thus, in one Texas case,[31] H inserted a clause requiring W to elect, and then devised "all my estate" to W for life, charged with the support of a daughter, and with a restriction of W's power of sale. The will was held to have put W to an election. In another,[32] H put W to an election by providing that her qualification as executrix should be considered as full approval of all the legacies made, and should bind her interest in the estate.

If the testator wishes to put the widow to an election, the draftsman must find the language that will best accomplish this result.

Typical of the type of clause used in Texas is the following:

> It is my intention to dispose of my entire interest in my separate property, and also to dispose of the entire interest of my wife and myself in all our community property.[33] It is my

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[28] *In re* Moore's Estate, 62 Cal. App. 265, 216 Pac. 981 (1923). See also Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900 (1955), where W thought that the property which she sought to devise was her separate, rather than community, property.

[29] *In re* Cooper's Estate, 32 Wash. 2d 444, 202 P.2d 439, 441 (1949).

[30] In California, where the inter vivos widow's election has been used, a number of the cases deal with situations where there is an express election.

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

[32] Baldwin v. Baldwin, 134 Tex. 428, 135 S.W.2d 92 (1940), answer conformed to in Baldwin v. Baldwin, 137 S.W.2d 1067 (Tex. Civ. App. 1940).

[33] There is no reason why H may not also dispose of W's separate property, should he choose to do so. In that event, W would elect between what H gives her under the will, and her one-half of the community plus her separate property. While such a testamentary plan is possible, it has not often been used.

> intention that my said wife shall be required to elect between accepting the benefits of this will [including the acceptance of appointment as executrix, trustee, or guardian], and renouncing all benefits and appointments under this will. [In all events, however, I direct that my wife shall not be deprived of her right to have set aside for her any rights which she may have with respect to the probate homestead, exempt personal property, or allowance therefor, or the family allowance.]

Other variations may be appropriate depending upon the nature of the property in the estate.

If the testator wishes to dispose only of his own property, and not put his wife to an election, it would be appropriate to insert the following:

> It is my intention hereunder to dispose of my entire interest in my separate property, but to dispose only of my community interest in the community property of my said wife and myself.

Where H's will establishes a testamentary trust, he may *request* that the wife place her one-half of the community estate in trust to obtain a uniform administration of all of the decedent's separate and community property. Such clause might read:

> I request that my wife place her one-half interest in our community estate in the said trust, created by Article _____ of this my will. If she does so, the said one-half interest shall be held by my trustee, in trust, and treated in the same fashion as the property which shall pass to my trustee under Article _____ of this my will. It is my hope and desire that my wife will allow her one-half interest in our community estate to pass into the said trust, as I believe it to be in her best interest, and in the best interest of the family, for her to do so. If, for any reason, my wife should refuse to place her one-half interest in our community estate in the said trust, she shall, nevertheless, be entitled to share in my estate to the same extent as if she had placed her one-half of our community estate in the said trust.

Precatory language of this sort accomplishes much the same thing as if H had put W to an election by placing the entire community and his separate property in a testamentary trust, and W had elected to take under the will.

II. Identifying the Property

Once the testator has decided to put the widow to an election, the draftsman should consider the desirability of identifying the property in the will as community or separate property. If the separate property is clearly identifiable, the better practice is to treat such property as wholly separate from the balance of the estate. For example, where the bulk of the testator's wealth consists of stock in a close corporation established prior to his marriage, the draftsman should make a specific bequest either to a testamentary trust or outright to

the beneficiary.

More often, the draftsman will have to use a residuary clause covering both separate and community property. Some of the modes of expression for such clauses are as follows:

1. The draftsman might treat the entire property of the testator as community, by providing:

> My estate consists entirely of community property of my wife and myself.[34]

He would then decide whether to dispose of the entire community, using the election device, or only the testator's one-half of the community.

2. If the draftsman believes that a portion of the testator's residuary estate will include his separate property:

a. He may attempt to identify the separate property:

> My estate consists of both community and separate property, all of the estate being community property, except [describing separate property] which is my separate property by virtue of the fact that I owned the same prior to my marriage to my wife, Mary Doe, (or that I acquired it after marriage by gift, devise or descent from my father, James Doe).

While such a self-serving recital would not necessarily rebut the presumption in favor of the community it might have value in affording information from which evidence can be obtained that will do so.

b. He may identify the separate property by reciting his marital history:

> To aid in identifying my community and separate property for other purposes, I state that I am the husband of Mary Doe, our marriage having occurred on November 1, 1960. Previously, on March 28, 1948, I was married to Jane Doe, but that marriage was terminated by divorce (or death) on June 12, 1959. I have two children by my present marriage, and three children by my former marriage, their names being, respectively . . . .

In addition to aiding in the determination of whether property is separate or community, such a recital of marital history often proves helpful in facilitating title examinations, assisting the executor in preparing the application for letters testamentary, and in otherwise generally revealing the nature of the testator's estate plan.

c. He may seek to identify the separate property by reciting facts with reference to his domicile. For example:

> My wife, Mary Doe, and I were married on March 28, 1948, in Salem, Massachusetts, where we were domiciled until we

[34] Such a clause is, of course, in accord with the normal presumption. See ARIZ. REV. STAT. ANN. § 25-211 (1956); Rundle v. Winters, 38 Ariz. 239, 298 Pac. 929 (1931); Horton v. Horton, 35 Ariz. 378, 278 Pac. 370 (1929). See also TEX. REV. CIV. STAT. art. 4619 (1960); Colden v. Alexander, 141 Tex. 134, 171 S.W.2d 328 (1943); Keller v. Keller, 135 Tex. 260, 141 S.W.2d 308 (1940); Strickland v. Wester, 131 Tex. 23, 112 S.W.2d 1047 (1938).

moved to Phoenix, Arizona, on November 1, 1960, where we have been domiciled ever since.

III. Providing W With Appropriate Benefits

To put W to an election, H's will must provide W with some benefit other than that to which she would be entitled at law. The benefit may be a fee simple, a life estate, a leasehold, or other property interest. It may consist of the testator's interest in the community property or his separate property. It may be given to W in lieu of homestead rights, exempt property, or statutory allowances. The will should be drafted so that W will accept it, and thereby preserve H's estate plan.

Suppose that the principal asset in the community estate is an interest in a small business. Much of the value of such a business will be lost if it is not held together after the testator's death. The planner may have reached the conclusion that to avoid a substantial decline in value, the entire business should be placed in a testamentary trust. But if H's will is concerned only with his one-half of the community, only this one-half goes into the testamentary trust, and the trustee will run the risk of a conflict with W. But if the trust contains the entire business interest, and the trust terms are so attractive that W will accept them, this risk is eliminated. How then can the draftsman draft an instrument that will appeal to the widow?

The following factors will enter W's mind in determining whether she will accept the will:

1. *Respect for her husband's wishes.* Faced with the choice of doing what H wanted and going her own way, a widow will usually prefer to follow her husband's wishes, if he has expressed them.

2. *Tax advantages.* The tax advantages of the election may be such that W would be foolish not to take under the will.

3. *Convenience of administration.* If the estate is well planned, and H has made proper provision for the method for making the election, W will want the convenience of a well administered trust, geared to her needs.

4. *Income from the entire community.* The most attractive feature of electing to take under the will is that W will normally receive income from the *entire* community, rather than from her one-half only.

If H's estate plan is to be effective upon his death, W must appreciate the advantages of accepting the provisions of his will. She should fully understand the objectives of H's will, before his death, and how her election will cause the plan to be fully successful.

While alternatives to the widow's election may promote a greater degree of certainty, this advantage is obtained usually at greater tax cost, and with less flexibility than is provided by the election.

A look at the decided cases discloses a variety of benefits with

which draftsmen have provided W so as to put her to an election:

1. A life estate in the entire community property.[35]

2. Rents and revenues from the entire community estate to W for life,[36] or until she remarries.[37]

3. Delay rentals on oil and gas leases.[38]

4. A one-half interest in the royalty due the community free of community debts.[39]

5. A devise of the homestead to W free of taxes.[40]

In determining whether the benefit given W is adequate to put her to an election, a comparison of what she would receive under the will with what she would have received on H's intestacy, is improper.[41] In an early California case.[42] where H gave W one-half of the whole community, W was put to an election. Since she had agreed to take under the will, she could not claim half of H's interest in the community under the will, and her own one-half, as well. A similar result was reached in a later case,[43] the court saying that the will was not susceptible to the construction that H was dealing only with his separate property and the one-half of the community over which he had testamentary control. The test of the propriety of the benefit is whether H's will seeks to do something with respect to an interest of which W cannot be deprived without her consent.[44]

IV. ELECTION AS TO THE WIDOW'S ALLOWANCE

Nearly every state has some statutory provision to relieve the immediate necessities of the widow at the expense of H's estate.[45] These

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[35] The will must give W "some free disposable property . . . which can become compensation for what the testator sought to take away." Smith v. Butler, 85 Tex. 126, 19 S.W. 1083 (1892). The benefit must be a material one. Delevan v. Thom, 244 S.W.2d 551 (Tex. Civ. App. 1951). The life estate in W will be a qualifying benefit though W's interest therein may be partially restricted. Dunn v. Vinyard, 251 S.W. 1043 (Tex. Comm. App. 1923).

[36] Dunn v. Vinyard, *supra* note 35; *cf.* Gilroy v. Richards, 63 S.W. 664 (Tex. Civ. App. 1901).

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

[38] Bradshaw v. Parkman, 254 S.W.2d 865 (Tex. Civ. App. 1953) error ref. n.r.e.

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

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

[41] Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955). If H died intestate leaving separate property, W might well receive more than H need provide her by will.

[42] Estate of Stewart, 74 Cal. 98, 15 Pac. 445 (1887).

[43] *In re* Dargie's Estate, 179 Cal. 418, 177 Pac. 165 (1918).

[44] Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900 (1955); Cunningham v. Townsend, 291 S.W.2d 438 (Tex. Civ. App. 1956) error ref. n.r.e.; Pope v. Pope, 175 S.W.2d 289 (Tex. Civ. App. 1943).

[45] See generally, Annot., 97 A.L.R.2d 1319 (1964).

provisions are of various kinds: some authorize an allowance fixed by the court during the settlement of the estate, or for a stated term; others provide for payment to W of a fixed sum, or for the setting apart for her use of household furniture and provisions of a stated value, or their equivalent in money.

Arizona's statutes[46] are similar to those of California[47] and Texas.[48] The widow or minor children may remain in possession of the homestead, wearing apparel, and household furniture of the decedent until the inventory is returned, and are entitled to a "reasonable provision for support to be allowed by the court."[49] Another section[50] provides for the setting apart of the homestead and exempt property for the surviving spouse or minor children. If the decedent has failed to select a homestead during his lifetime, the probate court selects the homestead from the community estate, or if there is none, from the decedent's separate property. The probate court may increase the family allowance to maintain the family during the settlement of the estate, and the allowance is paid in preference to all other claims against the estate other than funeral and administration expenses.[51]

No case in Arizona deals with the effect of H's will on W's rights to the allowance, homestead, or exempt property. A number of California and Texas cases indicate that H may put W to an election to choose between the will and her rights at law,[52] so long as such choice is clearly indicated either by express declaration,[53] or manifest implication.[54] H's will must be open to no other construction.[55]

Where W is not put to an election, she may claim both H's testamentary gift and her statutory allowance.[56]

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[46] ARIZ. REV. STAT. ANN. §§ 14-511 to -517 (1956).

[47] CAL. PROB. CODE §§ 680 - 684.

[48] TEX. PROB. CODE §§ 286 - 293 (1955).

[49] ARIZ. REV. STAT. ANN. § 14-513 (1956).

[50] ARIZ. REV. STAT. ANN. § 14-514 (1956).

[51] ARIZ. REV. STAT. ANN. § 14-515 (1956).

[52] *In re* Whitney, 171 Cal. 750, 154 Pac. 855 (1916); *In re* Cowell, 164 Cal. 636, 130 Pac. 209 (1913); *In re* Bump, 152 Cal. 274, 92 Pac. 643 (1907); *In re* Lufkin, 131 Cal. 291, 63 Pac. 469 (1901); *In re* Ettlinger's Estate, 56 Cal. App. 2d 603, 132 P.2d 895 (1943); Miller v. Miller, 149 Tex. 543, 235 S.W.2d 624 (1951); Lindsley v. Lindsley, 139 Tex. 512, 163 S.W.2d 633 (1942); Trousdale v. Trousdale, 35 Tex. 756 (1871); Little v. Birdwell, 27 Tex. 688 (1864); Nelson v. Lyster, 32 Tex. Civ. App. 356, 74 S.W. 54 (1903).

[53] See, *e.g.*, Lindsley v. Lindsley, *supra* note 52.

[54] See, *e.g.*, Miller v. Miller, 149 Tex. 543, 235 S.W.2d 624 (1951).

[55] See cases cited, note 52 *supra*, especially Miller v. Miller, *supra* note 54; Lindsley v. Lindsley, 139 Tex. 512, 163 S.W.2d 633 (1942).

[56] *In re* Cowell, 164 Cal. 636, 130 Pac. 209 (1913); *In re* Walkerley, 77 Cal. 642, 20 Pac. 150 (1888); *In re* Dow's Estate, 149 Cal. App. 2d 47, 308 P.2d 475 (1957); *In re* Dow's Estate, 91 Cal. App. 2d 420, 205 P.2d 698 (1949).

Typical of the cases where H has put W to an election are the following:

1. H gave W a stated sum, "on the payment of which . . . she [shall] relinquish all further claim to my estate."[57]

2. H gave W the homestead, with the household and kitchen furniture, a wagon and horses, twenty head of cattle, sheep, and hogs, $400 in cash, and "a sufficient amount of corn and meat to support her for one year." The court said that this provision was clearly in lieu of an appropriation by the court of a year's maintenance.[58]

3. H provided that W should "keep and have my property during her lifetime or widowhood, to raise and educate the children, and then to be divided equally among my children by her." W caused H's will to be probated, and held all of his property until her title failed by reason of her remarriage. The court held that she could not, more than a year after H's death, obtain an allowance for a year's support, since she had elected to abide by the will which contained a provision for that purpose.[59]

While no Arizona case has held that W was put to an election with regard to her allowance, one case held that she did not waive her allowance, although two years had elapsed after the will was admitted to probate.[60]

Different approaches to the problem of the widow's allowance are found in other community property jurisdictions. In New Mexico, a statute provides that the court shall make an allowance for the widow and children under fifteen, sufficient to maintain them for six months after H's death.[61] A second statute provides that as soon as the executors are possessed of sufficient means over and above administration expenses, they should pay off the charges for the decedent's last illness and funeral, and then pay any allowance fixed by the court for the maintenance of the family.[62] In *Andros v. Flournoy*,[63] H's will bequeathed W $20,000. $5,000 of this amount was to be paid her at H's death, and the balance at the convenience of the executrix within two years from the date of death. H expressly provided that this provision was

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[57] *In re* Lufkin, 131 Cal. 291, 63 Pac. 469 (1901). In this case there was no community property in H's estate, nor was there any real estate from which the homestead might be allotted.

[58] Trousdale v. Trousdale, 35 Tex. 756 (1871).

[59] Little v. Birdwell, 27 Tex. 688 (1864). The terms of the will appear in Little v. Birdwell, 21 Tex. 597 (1858).

[60] *In re* Nolan's Estate, 56 Ariz. 361, 108 P.2d 388 (1940).

[61] N.M. STAT. ANN. § 31-4-1 (1953).

[62] N.M. STAT. ANN. § 31-8-10 (1953).

[63] 22 N.M. 582, 166 Pac. 1173 (1917), 4 A.L.R. 387 (1919).

"to be in lieu of all other demands against my estate." Despite this language, it was held that W was entitled both to the bequest and to the allowance for six months. The court said that the allowance was independent of any provisions of H's will. H was powerless to deprive the court of the right to make the allowance or regulate it in any manner, the purpose of the statute being to provide for the support of the family until they received the provisions made for them under the will.

At the other extreme is Louisiana, where the Civil Code provides:

> When the wife has not brought any dowry, or when what she brought as a dowry is inconsiderable with respect to the condition of the husband, if either the husband or the wife die rich, leaving the survivor in necessitous circumstances, the latter has the right to take out of the succession of the deceased what is called the marital portion; that is, the fourth of the succession in full property, if there be no children.[64]

Under this provision of the Code, it has been held that a widow who claims her marital fourth is bound to deduct the amount of any legacy which H may have given her by his will.[65]

In summary, in Arizona, California, and Texas, if H puts W to an election to take what he has provided by will in lieu of her statutory allowance, the courts will require her to elect. If H does not require an election, W will be entitled to claim both what he has provided and her rights at law. In New Mexico and Louisiana, there is no election as between the allowance and H's will. In New Mexico, W may claim both, while in Louisiana, her legacy will be charged with what H has provided by will. Idaho and Washington both have statutes on the homestead and family allowance.[66] Idaho also has a statute on exempt property.[67] In neither jurisdiction has the effect of H's will on these statutory rights been considered.

V. Election With Regard to the Homestead

One of the more complex problems of the widow's election is in connection with the probate homestead, *i.e.*, the right of the widow to the use and occupancy of the homestead so long as she chooses to exercise it. The chances of this problem arising are lessened by the fact that the Arizona statute provides: "If the property set apart is a homestead selected from the separate property of decedent, the

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[64] La. Rev. Civ. Code art. 2382 (1926).

[65] Piffet's Succession, 39 La. Ann. 556, 2 So. 210 (1887); Melancon's Widow v. His Executor, 6 La. 105 (1833).

[66] Idaho Code §§ 15-501 to -514 (1948); Wash. Rev. Code ch. 11.52 (1951).

[67] Idaho Code § 15-502 (1948).

court may set it apart only for a limited period to be designated in the order, and the title vests in the heirs of decedent subject to such order."[68]

In Texas, the *extent* of the homestead right is not dependent upon whether the underlying property is community or separate. W has an interest in the property *during H's life,* if it is community. She has no such interest in H's separate property, except insofar as she has a homestead right. As a result, if H makes a disposition of his separate property which is subject to her homestead right, he will put W to an election. Where the underlying property is community, W's homestead right is often confused with her community rights. W may be put to an election between taking under the will or taking her one-half of the community, and the election as to the homestead right may be overlooked. But where the property underlying the homestead is H's separate property, in some cases, W may claim both her homestead right and what H has provided for her by will.[69] Other cases have held that H's intention, as revealed in the will, was that W should elect as between her homestead right and the will.[70]

The complexity of the widow's election in these cases is illustrated by *Miller v. Miller.*[71] H devised 233 acres which were his separate property and the family homestead, to his wife and seven children. The trial court held that W was not put to an election. She was entitled to what H provided for her by will (one-eighth of the 233 acres), plus her rights at law. These included: (1) one-half of the community (of little value); (2) exempt property; (3) the widow's allowance; (4) an allowance in lieu of exempt property; and (5) an allowance for homestead rights. The intermediate appellate court agreed that W was not put to an election, but reduced the benefits to W. It held: (1) setting apart of the exempt property to W absolutely was improper since she is entitled only to the *use* of such property; (2) the $1,000 widow's allowance was not payable only out of H's separate estate, but should have been made payable out of both the separate and community property; and (3) W was not entitled to an allowance for her homestead right since there was a homestead

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[68] ARIZ. REV. STAT. ANN. § 14-516 (1956).

[69] Haby v. Fuos, 25 S.W. 1121 (Tex. Civ. App. 1894).

[70] Lindsley v. Lindsley, 139 Tex. 512, 163 S.W.2d 633 (1942) (trustee's power over H's separate property held inconsistent with W's homestead rights); Oelkers v. Clemens, 260 S.W.2d 74 (Tex. Civ. App. 1953) error ref. n.r.e. (surviving spouse, H, held to have chosen homestead right, by conveying same and accepting other property in exchange, as against $5,000 bequest in W's will); Wicker v. Rowntree, 185 S.W.2d 150 (Tex. Civ. App. 1945) error ref. w.o.m. (surviving spouse, H, required to choose between homestead right in W's separate property or take one-third of the property in fee under W's will).

[71] 149 Tex. 543, 235 S.W.2d 624 (1951).

existing at the death of H.[72] On appeal by the executor to the Texas Supreme Court, it was held that W was required to elect either to take under the will or to claim her rights at law. The following inconsistencies between her statutory rights and the will required an election: (1) the homestead right of exclusive use and occupancy of 200 of the 233 acres, as against a one-eighth undivided interest in 233 acres, and (2) the use and power of disposition of the exempt property for W's maintenance, as against an undivided one-eighth interest in all property after the payment of debts. Justice Garwood wrote a concurring opinion in which he relied on a presumption (contrary to the usual presumption that one intends to dispose only of his own property) that the normal intention where the testator is dealing with his own property, is to negative benefits under the exemption laws. The effect of *Miller v. Miller*[73] is to force an election in every case in which the will does not expressly deal with the matter of exemption rights. The court might easily have reached the opposite result, since there was nothing inherently inconsistent between W's taking the underlying property which H may have given her by will, and claiming her homestead right.

The results have been less confusing where community property is the underlying property. In one case,[74] H's estate consisted of two tracts of land, all community. One tract was homestead, the other was not. H gave the homestead tract to W for life, remainder to his daughter and her children; he gave the other tract to his son. While W elected to abide by the will, and thereby gave up her one-half community interest in both tracts, she was nonetheless entitled to claim her homestead right, since there was nothing inconsistent in her doing this and taking a life interest in the homestead tract. Her election was between her community property rights and the will, not the homestead right and the will.

Similarly, in *Evans v. Jacobs*,[75] H made a testamentary disposition of his 213 acre homestead tract to W for life, remainder to his four children. The will recited that the entire tract was H's separate property, although one-half of the land was community and one-half was his separate property. W was put to an election to take her one-half of the community or the life estate which H had given her by will. She elected to take the life estate, but this was not inconsistent with her homestead rights.

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[72] 230 S.W.2d 237 (Tex. Civ. App. 1950).

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

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

[75] 249 S.W.2d 98 (Tex. Civ. App. 1952) error ref. n.r.e.

In *Delevan v. Thom*,[76] H placed the entire community in trust for W's support and maintenance because she was unable to care either for herself or her property. He gave his trustee specific powers over the property underlying the homestead, *e.g.*, to sell the property in certain instances. It was held that the trustee's powers were inconsistent with W's use and occupancy of the homestead; therefore, she was presented with an election.

In sum, the homestead right presents some unusual aspects to the election problem. W's assertion of her right in the homestead often does not require an election, since there is no necessary inconsistency between her asserting this right and claiming the underlying property, whether she may be given a fee, a life estate, or an interest in trust. If the underlying property is community, H may put W to an election to claim her community interest rather than what H has provided her, even though W may not be put to an election as to her homestead right. Where the underlying property is H's separate property, the Texas courts have found that W was put to an election by reason of the fact that inconsistencies arose between W's homestead right and what H had provided her by will. If these cases are taken seriously, the draftsman should make sure that the husband's will spells out his precise intention with regard to the homestead, and other rights at law. Several choices are available to the draftsman with respect to the language of such provisions:

1. H may give any property interest that he has in the homestead outright to his wife in fee, and provide:

> It is my intention that my wife shall have full enjoyment of her homestead rights, in addition to whatever I may provide her by this clause of my will.

Since the property underlying the homestead will often be community property, the interest which H has therein combines with W's one-half interest to give W the complete fee, and also recognize her homestead rights.

2. If H wants W to elect as between her homestead rights and a fee interest in the homestead, he may provide:

> I give W our homestead, Blackacre, in fee simple absolute. It is my intention that such gift shall be in lieu of her homestead rights at law. I specifically direct that W shall choose between such rights and the fee interest that I have provided her. If W shall elect to take her homestead rights at law, I direct that any interest that I may have in Blackacre at my death shall pass to X and his heirs.

3. Or H may incorporate the election as to the homestead in a

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[76] 244 S.W.2d 551 (Tex. Civ. App. 1951).

more detailed election clause:

> It is my intention to make adequate provisions for my wife, W, in this my will, and to put her to an election to choose between what I have provided for her, and what she would otherwise be entitled to by operation of law. I direct that my wife within six months after my will is offered for probate shall, by writing filed in the court where my will is probated, elect to take either under this my will or claim her rights by operation of law. Such rights shall include her one-half interest in our community property, her rights of homestead in Blackacre, her right to a family allowance, and her right to the use of exempt property, or an allowance therefor. If my wife elects to take under this will, then she will waive all of these rights.

VI. Election With Regard to Exempt Property and the Family Allowance

The law with respect to the election as applied to exempt property or the family allowance is much the same as that which affects the homestead. These are statutory rights normally unaffected by testamentary disposition or the withdrawal of the estate from administration.

If only H's separate property is involved, an election may be presented between the statutory exemptions and the will, since the allowances and exempt property must be charged against that estate alone. In one case,[77] where the wife had been unsuccessful in her contest of H's will, she had both the exempt property and the allowance for exempt property which was unavailable in kind, set apart for her benefit. The will directed that the executors prepare a suitable home for W. The court, assuming that the will disposed of only H's separate property, held that W could retain the statutory homestead, but before she could enjoy the other benefits of H's will, she would have to return the other allowances. There was no inconsistency as to the homestead, since by the will she could enjoy both what H had provided, and her homestead right. But as to the exemption, the statute did not contemplate that W would claim both the allowances and what H had provided. As to these, she was put to an election.

The case also illustrates the difficulty that W may sometimes make an election unwittingly. If W accepts the provisions made for her by her husband's will, she may not receive the family allowance, unless she is willing to disclaim all rights under the will to which she is not otherwise entitled.[78] Conversely, acceptance of allowances

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

[78] Trousdale v. Trousdale's Ex'rs, 55 Tex. 756 (1872).

may constitute an election to take her rights at law, which W might subsequently want to revoke, if she found that the terms of the will were more to her liking.

VII. WHO MAY MAKE THE ELECTION?

Most jurisdictions take the view that the election right is personal to the widow, and hence, no one can elect for her.[79] But California has held that where the interests of W are vested, it is not only the right, but the duty, of her personal representative to make an election. In *In re Kelley's Estate*,[80] H transferred all of his property to a trustee, in trust, to pay the income to W, and apply to her maintenance and support so much of the corpus as should be needed for those purposes, provided that if W should "elect to take under the law and not under the will," the trust provisions should be void. In that event, after W had received "the minimum allowed her by law," all the residue of the estate should go to H's sister and nieces. W died prior to the distribution of the husband's estate. In answering counsel's contention that the right of election was personal to W, the court said that the cases counsel relied on "do not apply to the vested interest here under consideration. The rule applies to expectancies; not to vested interests."[81]

Where W was incompetent, rather than deceased, Texas has held that only the district court has the power to exercise the election right for the benefit of W.[82] The guardian could not exercise the right in the absence of statutory authority. Nor could the probate court grant full relief by exercising the right, since testamentary trustees are not subject to its jurisdiction, although they would be adversely affected if the probate court chose to renounce the will, and have W take by operation of law.

The district court may also exercise the election on behalf of a minor.[83] Moreover, the district court could partition and close the estate as if W had elected under the will, since she is not permitted to prevent the closing of the estate by refraining from electing.[84]

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[79] See generally, Annot., 83 A.L.R.2d 1077 (1962).

[80] 122 Cal. App. 2d 42, 264 P.2d 210 (1953).

[81] *Id.* 264 P.2d at 212. The court relied on Estate of Field, 38 Cal. 2d 151, 238 P.2d 578 (1951), in which case the California Supreme Court first stated that the "only question" was "whether the widow's administratrix might file the petition to contest the will of the predeceased spouse," and then held that she might.

[82] Delevan v. Thom, 244 S.W.2d 551 (Tex. Civ. App. 1951). Cases involving election on behalf of an incompetent to take under or against the will are collected in Annots., 74 A.L.R. 452 (1931), 147 A.L.R. 336 (1943).

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

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

The common law jurisdictions have uniformly held that the election right is personal to the widow, and cannot be exercised by her personal representative, where W dies prior to exercising it.[85] These cases, however, may well be distinguishable since they typically involve situations where W's rights do not accrue until after H's death, and W elects to take *against*, rather than *under*, the will.

VIII. How Does W Make the Election?

Assuming that H's will puts W to an election, how does she exercise the right? H's will should provide an explicit method whereby W will elect to take under the will, with a further provision that if she should fail to do so, she will be deemed to have claimed her rights by operation of law.[86]

For W to make an effective election, she must intend to do so,[87] and be fully aware of her rights at law, the condition and extent of H's estate, and the requirement that she choose between his will and her statutory rights.[88] As the community property jurisdictions generally place no time limit on when W must make her election, equity implies that W may elect within a reasonable time.[89]

W may effect an election by making a declaration in writing, expressing a clear intent to elect.[90] If she executes a receipt for benefits received under the will and releases the executor from liability,[91] or files an agreement in court to take under the will,[92] she will be held to have elected. Where W insisted that her husband's will be carried out after she was informed of her right of election, and she joined in turning the property over to the probate court, she was

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[85] See cases collected in Annot., 83 A.L.R.2d 1077 (1962).

[86] If W does nothing, she will presumably take by operation of law. See Wichita Valley Ry. Co. v. Somerville, 179 S.W. 671 (Tex. Civ. App. 1915); Martin v. Moran, 32 S.W. 904 (Tex. Civ. App. 1895).

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

[88] Dunn v. Vinyard, *supra* note 87.

[89] *Compare* Smith v. Butler, 85 Tex. 126, 19 S.W. 1083 (1892) (W not too late in asserting rights at law six months after H's death and five months after probate of H's will) *with* Farmer v. Zinn, 261 S.W. 1073 (Tex. Civ. App. 1924), *aff'd*, 276 S.W. 191 (Tex. Comm. App. 1925) (W could not claim rights at law after accepting benefits of H's will for ten years).

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

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

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

held to have elected to take under the will.[93] Acceptance of the benefits of H's will[94] with full knowledge of the facts[95] will constitute an election, since W will subsequently be prevented from asserting inconsistent rights. If W offers H's will for probate, this fact alone would not necessarily constitute an election to take under the will,[96] but this when combined with other circumstances might be so treated.[97] Similarly, W's qualification as executrix,[98] or recognition of another as executor,[99] might be considered, along with other factors, as constituting an election.

IX. THE INTER VIVOS ELECTION

Before considering the tax consequences of the widow's election, mention should be made of the difference between California and Texas practice with respect to the inter vivos election.

The California courts have long recognized that the wife, during the husband's lifetime, may execute an instrument agreeing to take what H has provided for her by will. If W does not revoke her election, and H dies without changing his will, she is bound by the doctrine of estoppel.[100] No inter vivos transfer is made by the inter vivos election. W simply promises to permit the entire community to be controlled by H's will, on the condition that he make no changes in his will subsequent to the execution of the election agreement. The consideration for the wife's promise is the execution of the husband's will.

As Arizona recognizes a concept of equal *management,*[101] as well

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

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

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

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

[97] Bradshaw v. Parkman, 254 S.W.2d 865 (Tex. Civ. App. 1953) error ref. n.r.e.; Farmer v. Zinn, 276 S.W. 191 (Tex. Comm. App. 1925) (W received benefit to which she was not otherwise entitled, filed will for probate, disposed of property according to will, and filed an inventory).

[98] *Compare* Langston v. Robinson, 253 S.W. 654 (Tex. Civ. App. 1923) and White v. Hebberd, 89 S.W.2d 482 (Tex. Civ. App. 1936) *with* Dunn v. Vinyard, 251 S.W. 1043 (Tex. Comm. App. 1923) and Wurth v. Scher, 327 S.W.2d 72 (Tex. Civ. App. 1959).

[99] *Cf.* Pryor v. Pendleton, 92 Tex. 384, 47 S.W. 706 (1898), *rev'd on other grounds on rehearing,* 92 Tex. 387, 49 S.W. 212 (1899).

[100] *In re* Wyss' Estate, 112 Cal. App. 487, 297 Pac. 100 (1931).

[101] The requirement that only H shall have the power to deal with personalty in the community estate is for reasons of convenience.

as equal *property*, rights in W so far as the community estate is concerned,[102] her courts would presumably follow the California approach, and allow the inter vivos election.

Such an inter vivos election has been thought improper under Texas law because of the statute prohibiting contracts between husband and wife which "alter the legal orders of descent,"[103] and the reluctance of the Texas courts to enforce estoppel against a married woman.[104] Where a Texan desires an estate plan which the wife could not change after her husband's death, he will normally use a contract between H and W, followed by a joint and mutual will. Such a contract and will have been upheld and do not violate the prohibition against the alteration of the "legal orders of descent."[105]

Apart from the legality of the inter vivos election is the question of its desirability. One of the principal advantages of the post mortem widow's election is that it gives W an opportunity to take a "second look" at the estate plan, and make a decision in the light of the changed situation resulting from H's death. This desirable flexibility is one of the principal advantages of the widow's election will.

X. Tax Planning Using the Widow's Election

Assuming that the client has decided to use the election, that the draftsman has drafted both his will and an appropriate form to be executed by W either before or after H's death, what will be the tax consequences of W's electing to take under H's will? In the discussion that follows, we shall assume that the estate consists only of community property, and that H has devised the entire community in trust to pay the income to W for life, remainder to X and his heirs.

A. Income tax consequences

Three problems arise in connection with the income tax:

1. Does W's election to take under the will place the entire community estate in administration for tax purposes, as well as probate purposes?

2. Does W realize any taxable gain or deductible loss by reason of the exercise of the election?

3. May W treat the acquisition of her life interest like a "purchase," so as to be able to amortize the cost of her life estate, and thereby reduce the income tax due upon her receipt of the income?

In answer to the first of these three questions, the Ninth Circuit

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[102] Lyons, *Development of Community Property Law in Arizona*, in Charmatz & Daggett, Comparative Studies in Community Property (1955).

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

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

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

has ruled in the negative, on the theory that the income tax should be treated the same as the estate tax.[106] Since W, by electing to take under H's will, does not subject her one-half of the community to the estate tax on H's death, the court reasoned that W does not subject her one-half *to administration* for purposes of the income tax. The court conceded that the property placed in trust was subject to administration for purposes of probate.[107]

I submit that this does not follow. The problem of what is includible in the gross estate for estate tax purposes is not the same as the problem of determining who is to pay the income tax on the income realized by the estate. The court apparently assumed that W would not be taxed on the income from the testamentary trust to be established subsequent to the administration.[108] The issue under the Internal Revenue Code is simply whether the income sought to be taxed is "received by estates of deceased persons during the period of administration or settlement of the estate."[109] This language of the Internal Revenue Code is a clear reference to local law. If the property is subject to administration for purposes of probate, it is equally subject to administration for purposes of the income tax.[110] It is the responsibility of the personal representative to see that the tax is paid.

Assuming, however, that the court is right in its conclusion, it still sought to distinguish its holding from prior California cases on the basis of the facts of the case. H's will provided for a testamentary trust of the entire community, which was his whole estate. W executed an inter vivos election whereby she agreed to abide by H's will. But, in the *trust provisions* of his will, H provided: "My said wife

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[106] Wells Fargo Bank & Union Trust Co. v. United States, 245 F.2d 524 (9th Cir. 1957). The case is discussed in Brown, *The Income Tax Aspects of the Widow's Election*, 1964 So. CALIF. TAX INST. 519, 522-24.

[107] "Thus the testamentary trust in the present case came into existence at the time of the Decedent's death and was ready to receive a transfer of community property from Emily at that time. Of course, the trust property was subject to administration in the Decedent's estate. California Probate Code, Sec. 202. But this does not diminish the fact of control by Emily." Wells Fargo Bank & Union Trust Co. v. United States, *supra* note 106, at 534-35.

[108] The lack of harmony between the income and estate tax provisions affecting trusts is well known. The very sections with which the Ninth Circuit was here concerned have long been not entirely consistent with their counterparts in the estate tax law. While powers of revocation are treated somewhat similarly (*cf.* INT. REV. CODE OF 1954, §§ 676, 2038), the estate tax has no counterpart to a Mallinckrodt power (*cf.* INT. REV. CODE OF 1954, § 678), nor has the income tax a counterpart to powers of appointment (*cf.* INT. REV. CODE OF 1954, § 2041).

[109] INT. REV. CODE OF 1954, § 641(a)(3).

[110] This was the position taken by the lower court, the dissenting judge and the writer. See, respectively, 134 F. Supp. 340 (N.D. Cal. 1955); 245 F.2d 524, 536 (9th Cir. 1957) (Pope, J., dissenting); and Wren, *Estate Planning and the Widow's Election*, 34 ROCKY MT. L. REV. 281, 289 (1962).

shall also be entitled to withdraw such portions of the corpus of said Emily A. Gibson Trust Estate (not exceeding, however, *in all one-half* (½) of the amount of the corpus thereof) from time to time and for any purpose as she may desire."[111] (Emphasis the court's.)

In the court's mind, this power to withdraw was a significant factor:

> At this point it must be emphatically noted that in none of the foregoing California cases [*i.e.*, cases holding that W's election to take under H's will made her one-half subject to administration for purposes of probate] was the wife permitted by the terms of the will, the power and the right to render nugatory the effect of her waiver by the withdrawal of up to fifty percent of the corpus dealt with by the will. In other words, reinstate herself with the community property she owned immediately prior to the death. In the case at bar we have such a right and power vested in Emily in the instant of the death of Decedent. No equitable doctrine of estoppel or resulting trust against Emily can be developed when the Decedent during his lifetime provided the means.[112]

By the court's view it is the *retention of control* by Emily over one-half of the corpus which makes the one-half of the income attributable to her taxable to her rather than to the estate. Logically, Emily would likewise be taxed on this one-half of the income after the establishment of the testamentary trust.[113] This would be true whether or not she withdrew any portion of the corpus, or enjoyed any portion of the income.

For gift tax purposes, as we shall see, if W elects to take under H's will, she makes a gift of a remainder interest in her one-half of the community in exchange for a life interest in H's one-half. Or, the effect of W's election may be viewed as a transfer of her one-half of the community to the trust in exchange for a life estate in the whole community. In either event, what W receives is deemed to be an adequate and full consideration in money or money's worth for gift and estate tax purposes. Only the excess of what W gives up over the fair market value of what she receives in return is taxable as a gift or includible in W's gross estate.

Will W's exercise of the widow's election also be treated as a taxable *exchange* for *income tax* purposes? An analogy may be found in the income tax treatment of community property settlements. With the exception of the situation where H and W are given an undivided interest in one-half of each item of the community in a property settle-

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[111] Wells Fargo Bank & Union Trust Co. v. United States, 245 F.2d 524, 526 n. 1 (9th Cir. 1957).

[112] *Id.* at 531.

[113] INT. REV. CODE OF 1954, § 676.

ment, each spouse will realize gain to the extent that the fair market value of what the spouse receives exceeds the *basis* of what he gives up.[114] I doubt if this rationale will be applied to the widow's election for two reasons: first, the life estate which W receives is a "bequest or devise" excludable from gross income;[115] secondly, W is entitled to a stepped-up basis for her one-half of the community on the death of H. As a result, only the excess of the fair market value of what she receives over the *fair market value* of what she gives up would be taxable. Only if a widow was very young at the date of her husband's death would this difference be significant. Note, however, W does not acquire a stepped-up basis as to *her* separate property on the death of H. Hence, if she contributes this type of property to the trust by her election, the excess of the fair market value of what she receives over the (low) basis of what she gives up, may be much greater.

If the exercise of the widow's election is treated as a taxable exchange, it follows that W has "purchased" her life estate, and she should be able to deduct its cost over her lifetime. Mr. Leon Brown of the Los Angeles Bar has said:

> In Rev. Rul. 62-132[116] the Commissioner gave these cases [*i.e., Bell v. Harrison*[117] and *William N. Fry, Jr.*[118]] his approval, and during 1963, in Secretary Dillon's technical explanation of the President's tax proposals, it is conceded that when a life estate is sold, 'the purchaser may amortize his basis against the income received during the life tenancy.'
>
> The Secretary was referring, it is true, to sales of existing life estates, whereas the widow's election involves the original creation of a life estate; but the same principles should apply, for the widow is as surely a purchaser for value as would be one to whom she sold her life estate for cash.[119]

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[114] See United States v. Davis, 370 U.S. 65 (1962). See generally, Wren, *Tax Problems Incident to Divorce and Property Settlements*, 49 CALIF. L. REV. 665 (1961). If gain on the exercise of the widow's election were deemed taxable, it might be argued that any loss would be deductible. Such loss, however, would be unable to run the gauntlet of INT. REV. CODE OF 1954, § 274, which disallows losses between related taxpayers.

[115] INT. REV. CODE OF 1954, § 102. *Cf.* United States v. Merriam, 263 U.S. 179 (1923) (sums left to executors in lieu of compensation held to be bequests). See also Fidelity & Columbia Trust Co. v. Lucas, 11 F. Supp, 537 (W.D. Ky. 1935), *aff'd*, 89 F.2d 945 (6th Cir. 1937) (the Government's contention was that the election by W to receive benefits worth $80,000 less than her dower caused income to estate of H in this amount; this contention was abandoned on appeal).

[116] 1962-2 CUM. BULL. 73.

[117] 212 F.2d 253 (7th Cir. 1954).

[118] 31 T.C. 522 (1958).

[119] Brown, *supra* note 106 at 536.

In his conclusion, Mr. Brown points out that while *Butterworth v. Comm'r*[120] "forecloses any contention based on the 'return of capital' theory [of *Burnet v. Logan*[121]] . . . it does not preclude her from amortizing that cost by ratable deductions over the remaining period of life expectancy."[122] A widow who has elected to take a life estate might do well to seek a refund of income taxes paid during the past three years. Before opening this Pandora's box, however, it might be wise to make sure that the statute has run on any gift tax liability with respect to the widow's election, or estate tax liability with respect to the husband's estate.

B. Gift Tax Consequences

Turning to the gift tax, we are presented with a clearer picture of the tax consequences, thanks to a number of decided cases.

If W elects to take her one-half of the community, she will make no gift, but this property will be includible in her gross estate on her later death. The only tax consequence to her on H's death is the acquisition of a stepped-up basis in her one-half of the community.[123]

If H's will devises his separate property to her, a renunciation will cause a taxable gift in jurisdictions such as Texas where title vests in the devisee immediately upon death.[124] But if she must take affirmative action to accept or reject the benefits of the will, her renunciation will not cause a taxable gift.[125]

If W elects to take under the will, it is clear that she makes a taxable gift.[126] The question remaining is the extent of the gift.

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[120] 290 U.S. 365 (1933).

[121] 283 U.S. 404 (1931).

[122] Brown, *supra* note 106 at 545.

[123] INT. REV. CODE OF 1954, § 1014(b)(5).

[124] In Texas, title to both realty and personalty vests immediately on the death of the testator in the devisees and legatees of a will subject to a right of possession in the personal representative. TEX. PROB. CODE § 37 (1956). Hence, it has been held that an attempted renunciation of a testamentary disposition resulted in a taxable gift, even though the will was never admitted to probate. Rodgers v. United States, 218 F.2d 760 (5th Cir. 1955). See also Hardenbergh v. Comm'r, 198 F.2d 63 (8th Cir. 1952), *cert. denied*, 344 U.S. 836 (1952) (renunciation of property received by intestacy held a taxable gift, since an heir cannot prevent title from vesting); Frances Marcus, 22 T.C. 824 (1954), *acq.*, 1955-1 CUM. BULL. 5.

[125] *Cf.* William L. Maxwell, 17 T.C. 1589 (1952); but *cf.* Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933).

[126] Comm'r v. Siegel, 250 F.2d 339 (9th Cir. 1957); Chase National Bank, 25 T.C. 617 (1955), *rev'd on other grounds sub nom.* Comm'r v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959) (the Fifth Circuit held that W was not presented with an election by the terms of H's will); Zillah Mae Turman, 35 T.C. 1123 (1961), *nonacq.*, 1957-1 CUM. BULL. 3, *withdrawn; acq.*, 1964 P-H FED. TAX SERV. ¶ 54,946.

In *Mildred Irene Siegel*,[127] the Tax Court ruled that the value of the gift by W equaled the value of her *remainder* interest in her one-half of the community minus the life estate which she received in H's one-half of the community. But in *Zillah Mae Turman*,[128] it was held that W made no taxable gift because the value of her life estate in the whole community exceeded the value of her *entire* interest (not the remainder) in her one-half of the community.

Will these differences in approach make a difference in the amount of the gift by W? Assume that the value of the whole community is $200,000. If the approach of *Siegel*[129] is used, the following results will be obtained, depending on W's age at the date of H's death:

Age	*25*	*45*	*52*	*55*	*65*	*75*
Value of remainder in W's one-half of the community	$ 24,418	$ 42,336	$ 50,413	$ 54,074	$ 66,580	$ 78,248
Value of life interest in H's one-half of the community	75,582	57,664	49,587	45,926	33,420	21,752
Amount of gift	—0—	—0—	$ 826	$ 8,148	$ 33,160	$ 56,496

If the *Turman*[130] approach is used, the figures are different, but the result is the same:

Age	*25*	*45*	*52*	*55*	*65*	*75*
Value of W's one-half of the community	$100,000	$100,000	$100,000	$100,000	$100,000	$100,000
Value of W's life estate in the whole community	151,174	115,728	99,174	91,852	66,840	43,504
Amount of gift	—0—	—0—	$ 826	$ 8,148	$ 33,160	$ 56,496

While there is no difference in the gift tax results dependent upon the method of valuation used, there may well be a difference in the estate tax at W's death.

So long as W has not used her life-time exemption for gift tax purposes, the widow's election makes it possible for her to transfer a substantial amount of property for little or no gift tax cost.

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[127] 26 T.C. 743 (1956), *nonacq.*, 1957-1 CUM. BULL. 6, *withdrawn; acq.*, 1964 P-H FED. TAX SERV. ¶ 54,946. This case was affirmed in Comm'r v. Siegel, *supra* note 126.

[128] 35 T.C. 1123 (1961), *nonacq.*, 1957-1 CUM. BULL. 3, *withdrawn; acq.*, 1964 P-H FED. TAX SERV. ¶ 54,946.

[129] 26 T.C. 743 (1956).

[130] 35 T.C. 1123 (1961).

C. Estate Tax Consequences

1. At H's death:

We come at last to the question of the estate tax consequences of the widow's election. If H's estate consists solely of community property, nothing is includible in his estate with regard to W's one-half of the community, regardless of whether W elects to take under his will or to claim her one-half of the community.[131] Difficulty arises only if H seeks to put W to an election involving his separate property as well as community.

In *United States v. Stapf*,[132] H's will put W to an election to take under a will in which he disposed of the community property and his separate property. By electing, W gave up her one-half interest in the community, and received in exchange one-third of the total community and one-third of her husband's separate property. The husband's estate sought to obtain a marital deduction for the amount of property transferred to W, limited to one-half of the adjusted gross estate.[133] The Supreme Court held, however, that "the value of the property transferred [by H's will to W] ($106,268) must be reduced by the value of the community property [which W] was *required* to relinquish ($111,443). Since she received no net benefit, the estate is entitled to no marital deduction."[134] (Emphasis added.)

Stapf is a significant estate tax holding for all jurisdictions since the Supreme Court extended the philosophy of cases which had denied the marital deduction where W had been given property *on condition* that she transfer her own property, to the situation where W had an *option* to take what H had given her, or make a gift. Apart from the question of the widow's election, we can expect that in the future there will be additional situations where W is given an optional estate plan which will fall under the restrictions of *Stapf*.

2. At W's death:

The more difficult estate tax questions regarding the widow's election arise on the later death of W. Where W elects to take a life estate in the community and give up her one-half of the community,

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[131] While this precise issue has not been litigated, all widow's election cases have assumed this to be the law. Indeed, in Wells Fargo Bank & Union Trust Co. v. United States, 245 F.2d 524 (9th Cir. 1957), this proposition was relied on as a basis for holding (erroneously, in this writer's view) that an election by W did not cause the estate of H to be subject to income taxes with respect to W's one-half of the community.

[132] 375 U.S. 118 (1963).

[133] Leaving out the deductions allowed by INT. REV. CODE OF 1954, §§ 2053, 2054, the maximum deductible would normally equal one-half of H's separate property.

[134] United States v. Stapf, 375 U.S. 118, 129 (1963).

she makes a transfer with life estate retained includible in her gross estate.[135] Whatever she receives in return constitutes an adequate and full consideration in money or money's worth which will go to reduce the amount includible in her gross estate.[136]

The amount includible under § 2036[137] is the value of the assets with reference to which she made the transfer[138] in which she retained a life estate, valued as of the time of her death (or optional valuation date). What is not clear is how the consideration which W receives should be valued. The Tax Court has indicated that this should be the value of W's life estate as of the time of the election, or possibly, the amount actually received by W if this should be less than such amount:

> Petitioner errs in contending that the consideration for the transfer should be determined by looking back from Lillian's death and adding up the amount of income she actually received. The relevant value of her life estate in Silas' property was the value at the time of transfer. . . . The value of said life estate at transfer is a question of fact which must be determined by ascertaining what the interest would bring in the market. . . . We agree that life expectancy tables are merely evidentiary, but later arising facts are relevant only if they were anticipatable at the time of the creation of the relevant future interest. . . . Factors showing a smaller life expectancy are relevant, as a willing buyer would not pay the price stated in the mortality tables. But petitioner has not offered, and we have not found, any case which allowed a determination of life expectancy at the time of transfer greater than the computation which was stated in the applicable life expectancy tables.[139]

While none of the estate tax cases expressly decide the point, all seem to assume that the consideration received by W would be

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[135] INT. REV. CODE OF 1954, § 2036. Estate of Vardell v. Comm'r, 307 F.2d 688 (5th Cir. 1962); Whitely v. United States, 214 F. Supp. 489 (W.D. Wash. 1963); Estate of Lillian B. Gregory, 39 T.C. 1012 (1963).

[136] INT. REV. CODE OF 1954, § 2043.

[137] *Id.* § 2036.

[138] Only the one-half of the community transferred by W is includible. *Cf.* Estate of Vardell v. Comm'r, 307 F.2d 688 (5th Cir. 1962), where the Commissioner contended on appeal that under INT. REV. CODE OF 1954, § 2033, the entire trust assets were includible in W's gross estate since W had a life estate plus a power of disposition over the entire trust assets. The court rejected this contention but indicated that the existence of such a power (at least if created after October 21, 1942) would cause the assets to be includible in W's gross estate under INT. REV. CODE OF 1954, § 2041. It is equally clear that the income derived from the *entire* trust would not be the measure of the actual consideration received by W, since her life estate in her own property could not be consideration under INT. REV. CODE OF 1954, § 2043. See Estate of Lillian B. Gregory, 39 T.C. 1012, 1020 n. 10 (1963).

[139] Estate of Lillian B. Gregory, *supra* note 138, at 1021.

measured by her life estate in the *entire* community rather than by a life estate in H's one-half only. Accordingly, if we assume that the $200,000 placed in trust on H's death appreciates to a value, let us say, of $250,000 between such time and W's death, the amount includible in W's gross estate by virtue of her exercise of the election would be as follows:

Age	*25*	*45*	*52*	*55*	*65*	*75*
Includible under §2036	$125,000	$125,000	$125,000	$125,000	$125,000	$125,000
Less amount excluded under §2043	151,174	115,728	99,174	91,852	66,840	43,504
Includible in W's gross estate	—0—	$ 9,272	$ 25,826	$ 33,148	$ 58,160	$ 81,496

Since W's estate exemption will be $60,000, she would have to be over 65 at the time she makes her election before her estate would be subject to tax.

In sum, remember the following in connection with the widow's election and the estate tax:

1. *Don't use the election in connection with H's separate property.* If H desires to give W an interest in his separate property, make a special bequest or devise of such property which W will take, whether or not she claims her one-half of the community. A more conservative approach would be to avoid the widow's election if a substantial portion of H's estate consists of his separate property. This approach will be necessary where there is difficulty in identifying the items of separate property.

2. *Don't give W any more power over the corpus than she needs or is likely to use.* If a life income in the entire community is adequate for her needs, giving her a power of disposition over any portion of the corpus will cause unnecessary and undesirable estate tax consequences at W's later death.[140]

3. *File a gift tax return on her exercise of the election showing the value of her one-half of the community less the value of her life interest in the whole community.*[141] This will establish the value of

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[140] Phinney v. Kay, 275 F.2d 776 (5th Cir. 1960); *but see* Estate of Vardell v. Comm'r, 307 F.2d 688 (5th Cir. 1962) and Townsend v. United States, 232 F. Supp. 219 (E.D. Tex. 1964) (no power of appointment exercisable by W at her death where W dies after H, but before H's will was offered for probate; Rodgers v. United States, 218 F.2d 760 (5th Cir. 1955) is distinguishable on the ground that a power of appointment is "not either property or a property right or interest in property," and hence "not an estate or an interest in an estate" which would vest in W immediately on the death of H).

[141] This method of valuation was used in all cases that considered the problem, with the exception of Mildred Irene Siegel, 26 T.C. 743 (1956). On appeal, the Ninth Circuit interpreted the Tax Court's findings of fact as follows: "on the

the consideration which can later be set off against the amount includible in W's gross estate by virtue of her exercise of the election.

XI. ESTATE PLANNING AND THE WIDOW'S ELECTION

The principal concern of every estate planner is the satisfaction of his client's desires and needs. He fulfills his professional responsibility by achieving this objective at the lowest possible tax cost. Obviously, clients' desires will vary greatly. One will want his wife to have complete control over all of the community, as well as his and her separate property. Another will want his widow to be bound by a fixed plan not subject to change after his death. The first of these two approaches is costly tax-wise; the second is poor tax-wise, and often presents local law problems.

The inflexible estate plan that California developed by way of the inter vivos election has been accomplished in Texas by the joint and mutual will. In the joint and mutual will, H and W execute one or two documents as their joint will or their mutual wills. In either event, the arrangement is pursuant to an agreement that the dispositions shall be mutual or contractual in nature. If neither spouse revokes his will, on the death of the first spouse, the survivor is bound by his dispositions, and is thereafter precluded from changing them.[142] If he seeks to revoke, the contract whereby he agreed to these dispositions will be binding on him, and the property will pass in accordance therewith.

The alleged virtue of the joint and mutual will is that husband and wife are bound by their agreement the moment one of them dies. In my view, this is its principal fault. Should not the surviving spouse be able to make a decision with respect to disposition of the family's property in the light of changed circumstances? Like the power of appointment, the widow's election provides an opportunity for a second look at the whole estate plan.

The estate plan using the joint and mutual will in Texas is as follows: H transfers his one-half of the community to W for life, with a power to dispose of the principal during her lifetime; to the extent that W does not dispose of the property, any balance remaining at her death to go to X and his heirs. W makes a similar disposition of her one-half of the community, giving H a life estate with a power of consumption.

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basis of these findings, [the Tax Court] concluded that the surrender by the taxpayer of her community property rights was a gift to the estate to the extent that *the value of the interest thus surrendered* exceeded *the value of the interest she acquired* under the terms of the will." Comm'r v. Siegel, 250 F.2d 339, 343 (9th Cir. 1957).

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

Problems of interpretation include the following:

1. Does the property which passes at the survivor's death under the will include *all* of the property owned by W or only that which she acquired from H?[143]

2. What property interests are created by the will? Are they a life estate in W; a power to consume in W, and a remainder in X; or a defeasible fee in W, with a limitation over?[144]

3. If the former, what is the nature of the power to consume?[145] Does the remainder interest attach to the proceeds of sale made under the powers granted in the will? Is the power of invasion limited by any standard of needs or circumstances?[146]

In addition to problems of interpretation, the joint and mutual will usually creates an undesirable estate tax result on W's later death. Since the survivor is usually given an unlimited power to manage, control, and dispose of the whole estate, the full amount is includible in W's gross estate for tax purposes.[147] Moreover, if a portion of the property which W received from H on his prior death was his separate property, it will not qualify for the marital deduction, since W will not have a power of testation in assets which she does not consume.[148]

Under the circumstances, the widow's election will is far superior to the joint and mutual will, from the point of view of the saving of taxes and the satisfying of the client's needs.

Indeed, as an estate planning solution, the widow's election combines a high degree of flexibility with a minimal tax cost. Where combined with a well drafted testamentary trust to meet the needs of the family, it may come close to achieving the optimum in many estate plans.

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[143] Murphy v. Slaton, 154 Tex. 35, 273 S.W.2d 588 (1954) (joint and mutual will controlled disposition of property owned by H and W; codicils executed by W after H's death controlled dispositions of property acquired by W after H's death).

[144] For the latter, see Scales v. Scales, 297 F.2d 219 (5th Cir. 1961); Harrell v. Hickman, 147 Tex. 396, 215 S.W.2d 876 (1948); C. C. Young Memorial Home for Aged Women v. Nelms, 223 S.W.2d 302 (Tex. Civ. App. 1949) writ ref. n.r.e.

[145] See Edds v. Mitchell, 143 Tex. 307, 184 S.W.2d 823 (1945).

[146] Guest v. Bizzell, 271 S.W.2d 472 (Tex. Civ. App. 1954) writ ref.

[147] Phinney v. Kay, 275 F.2d 776 (5th Cir. 1960); *but see* Townsend v. United States, 232 F. Supp. 219 (E.D. Tex. 1964).

[148] Estate of Pipe v. Comm'r, 241 F.2d 210 (2d Cir. 1957).