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## Limitations on Testamentary Power in Missouri: Protection of the Spouse and Children of the Testator

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# MISSOURI SECTION

## NOTES

### LIMITATIONS ON TESTAMENTARY POWER IN MISSOURI: PROTECTION OF THE SPOUSE AND CHILDREN OF THE TESTATOR

The broad power given to a testator to dispose of his property in any manner he desires is generally considered a statutory power and not a natural one, and the legislature therefore has the authority to revoke this power, or at least limit it in certain ways.<sup>1</sup> These limitations may take various forms. A few of them are general provisions imposed by statutes requiring a will to be executed with certain formalities, necessitating testamentary capacity, and protecting the rights of creditors. The scope of this note is confined to those specific limitations in Missouri which are designed particularly to protect the spouse and children of a testator from disinheritance.

#### PROTECTION OF THE SPOUSE

##### *a. Intestate Succession*

A brief examination of the intestate law of Missouri is a necessary prerequisite to an understanding of the rights of the spouse with respect to a testator's property. Generally, the husband and wife are treated the same so far as their interest in intestate property is concerned. When a husband dies intestate, the basic right of the wife in his realty is dower, a one-third interest for life, free from debts, in all estates of inheritance of which the husband was seized during coverture.<sup>2</sup> The historical right of the husband to curtesy is abolished by statute, and in its stead he is given substantially the same rights in the realty of his wife that she has in his estate.<sup>3</sup> The wife, during coverture, has an inchoate right in her spouse's realty;<sup>4</sup> however, no such right is accorded the husband in his wife's property.<sup>5</sup> Thus, the wife can convey a fee simple absolute during coverture without

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1. *Barnett v. Bellows*, 315 Mo. 1100, 287 S.W. 604 (1926); *State ex rel. McClintock v. Guinotte*, 275 Mo. 298, 204 S.W. 806 (1918); 1 PAGE, WILLS § 25 (3d ed. 1941). For a discussion of the history of the law of wills, see 1 PAGE, WILLS §§7-24 (3d ed. 1941). For the history of Missouri probate law, see MAUS, *History and Introduction to Missouri Probate Law*, 25 MO. ANN. STAT. p. 327 (Vernon 1949).

2. MO. REV. STAT. § 469.010 (1949).

3. MO. REV. STAT. § 469.020 (1949). This statute also impliedly repeals MO. REV. STAT. § 469.130 (1949) as to realty. See *Garrett v. Damron*, 110 S.W.2d 1112, 1113 (Mo. 1937).

4. See *Bernays v. Major*, 344 Mo. 135, 144, 126 S.W.2d 209, 214 (1939). ATKINSON, WILLS 105 (2d ed. 1953).

5. *Travelers Ins. Co. v. Beagles*, 333 Mo. 568, 62 S.W.2d 800 (1933); *Scott v. Scott*, 324 Mo. 1055, 26 S.W.2d 598 (1930).

the consent of the husband,<sup>6</sup> but the husband can do so only if the wife joins in the conveyance.<sup>7</sup> In addition to this right to a share in the real estate, both the husband and wife have certain rights in the personal estate of the deceased spouse. The surviving spouse is entitled to a share in the personal estate equal to the share of a surviving child.<sup>8</sup> If, however, no lineal descendants survive a decedent, the surviving spouse is entitled to one-half of the personal estate.<sup>9</sup> Either right in the personal estate is subject to the debts of the decedent.<sup>10</sup>

Both husband and wife are also entitled to certain rights of election in the case of intestacy. If there are children alive at the death of the decedent, the spouse may reject dower<sup>11</sup> and elect to take a share in all realty equal to the share of a surviving child subject to debts;<sup>12</sup> he is also entitled to this same share in the personalty.<sup>13</sup> If there are no lineal descendants then alive, the spouse may reject dower and elect to take one-half of all realty, also subject to debts;<sup>14</sup> furthermore, he is automatically entitled to one-half of the personal estate.<sup>15</sup> If there are no children or their descendants, father, mother, brother or sister, or their descendants, the spouse is entitled to the whole estate, both realty and personalty, again subject to the debts of the decedent.<sup>16</sup> In all situations, the spouse may claim certain other minor benefits in the estate free from debts.<sup>17</sup>

6. *Travelers Ins. Co. v. Beagles*, 333 Mo. 568, 62 S.W.2d 800 (1933); *Scott v. Scott*, 324 Mo. 1055, 26 S.W.2d 598 (1930).

7. See *Bernays v. Major*, 344 Mo. 135, 144, 126 S.W.2d 209, 214 (1939). *ATKINSON, WILLS* 105 (2d ed. 1953). This difference in the interests of the husband and wife has led the court to call the interest of the husband a reciprocal right in the wife's realty rather than dower. See *Strock v. Eagle*, 330 Mo. 135, 144, 126 S.W.2d 209, 214 (1939).

8. *MO. REV. STAT. § 469.070* (1949). When only grandchildren survive the decedent, the share of the surviving spouse is determined by considering the grandchildren as taking *per stirpes*. In *re Messersmith's Estate*, 264 Mo. 610, 175 S.W. 914 (1915).

9. *MO. REV. STAT. § 469.090* (1949).

10. In *re Poe's Estate*, 356 Mo. 276, 201 S.W.2d 441 (1947) (child's share is subject to debts although *MO. REV. STAT. § 469.070* (1949) omits mention of debts); *MO. REV. STAT. § 469.090* (1949) (if there are no lineal descendants the spouse's share is subject to debts).

11. Hereafter, whenever the word "dower" is used, it refers to the husband's intestate share in his wife's realty, as well as the wife's intestate share in her husband's realty.

12. *MO. REV. STAT. § 469.080* (1949).

13. *MO. REV. STAT. § 469.070* (1949).

14. *MO. REV. STAT. § 469.110* (1949).

15. See note 9 *supra*.

16. *MO. REV. STAT. § 468.010* (1949).

17. *MO. REV. STAT. § 462.450* (1949) provides that the spouse is entitled to family books and household effects not to exceed the value of \$500. It also provides that he is entitled to a year's allowance for maintenance and support. *MO. REV. STAT. § 462.460* (1949) provides that the spouse is entitled to any other personal property not to exceed the value of \$400. *MO. REV. STAT. § 513.495* (1949) provides that the spouse is entitled to homestead rights. *MO. REV. STAT. § 513.505* (1949) provides that the spouse's dower interest is diminished by the size of the homestead. The spouse's share in realty if he rejects dower is not diminished by homestead. *Adams v. Adams*, 183 Mo. 396, 82 S.W. 66 (1904).

*b. Election between Will and Intestate Rights*

The spouse has the absolute power to renounce the testator's will and receive that share to which he would be entitled by the laws of intestacy;<sup>18</sup> thus, the testator cannot deprive the spouse of his right to this minimum share in the estate. The testator can, however, force the surviving spouse to elect between the share given by the terms of the will and that given by intestate law.<sup>19</sup> This election may be made by court action whenever the spouse is unable to elect because of incapacity.<sup>20</sup>

The intestate share which the spouse takes if he renounces the will is basically dower plus his share in the personal estate, and a further statutory election is required to enable the spouse to *reject* dower and take either a child's share or one-half of the realty.<sup>21</sup> The cases indicate the spouse may be confused between the right to renounce the will and the right to elect between dower and an intestate share once the will has been renounced,<sup>22</sup> but these rights are distinct and separate in legal effect.

A renunciation of the will does not render the will void. It is given effect so far as is possible, and the spouse receives his intestate interest in the estate out of the shares of the other beneficiaries.<sup>23</sup>

Whether the spouse must elect between his share under the will and his intestate rights in the estate depends upon the intent of the testator.<sup>24</sup> If the terms of the will show that the testator intended that the spouse should take under the will only, the spouse must elect; if the terms of the will do not show such an intent, he is entitled to take both under the will and under intestate law.<sup>25</sup>

The intent criterion is supplemented by certain statutory and common law presumptions. By statute a devise of realty is presumed to be in lieu of dower.<sup>26</sup> If the will does not express an intent to the contrary, this presumption forces an election between the devise under the will and the right to dower. There is no statutory presumption that a bequest of personalty is in lieu of the intestate right to a share

18. MO. REV. STAT. § 469.150 (1949). This statute applies to a devise of realty only. Renunciation of a will provision concerning personalty in order to take under statute is an equitable renunciation and is not covered by statute. *Andrews v. Brenizer*, 230 S.W.2d 787 (Mo. App. 1950).

19. *Ibid.*

20. *Manufacturers Bank & Trust Co. v. Kunda*, 353 Mo. 870, 185 S.W.2d 13 (1945).

21. *Colvin v. Hutchison*, 338 Mo. 576, 92 S.W.2d 667 (1936); *First National Bank of Kansas City v. Schaake*, 240 Mo. App. 217, 203 S.W.2d 611 (1947).

22. See note 21 *supra*.

23. *St. Louis Union Trust Co. v. Kern*, 346 Mo. 643, 142 S.W.2d 493 (1940); *Broadus v. Park College*, 238 Mo. App. 304, 180 S.W.2d 268 (1944). *But of* *Barksdale v. Morris*, 361 Mo. 432, 235 S.W.2d 238 (1950).

24. *In re Dean's Estate*, 350 Mo. 494, 166 S.W.2d 529 (1942).

25. *Ibid.*

26. MO. REV. STAT. § 469.140 (1949).

in personalty. To the contrary, the common law presumption is that the bequest is in addition to the intestate share.<sup>27</sup> This presumption, however, is easily rebutted. Thus, the mere presence of a specific bequest to the surviving spouse has been held sufficient to show an intent that the spouse should not take both under the will and by intestacy.<sup>28</sup> If, on the other hand, provision is made for the surviving spouse in the residuary clause only, he is entitled to take both as residuary legatee and by intestacy in the absence of some other manifestation of intent in the will to the contrary.<sup>29</sup>

Thus, in effect, the common law presumption as to personalty has been reversed in cases in which the spouse takes by way of a specific bequest. This result would seem desirable even if the spouse is a general legatee or takes by way of a residuary clause. The common law presumption probably is based, not on the actual intent of the testator, but on the desire to assure the spouse, particularly a wife, of as liberal a provision as possible. Realistically, the testator would not intend that the spouse should receive both the bequest and an intestate share. He obviously intends that each legatee, including his wife, should receive his full share under the will; this intent could not be carried out if the spouse had to be compensated out of bequests to other legatees in order to make up her intestate share in the estate. A presumption that the bequest is in lieu of an intestate share in personalty, therefore, would appear to be consistent with the testator's actual intent.

The spouse is presumed to accept a devise of realty, and it is provided by statute that he must act within twelve months after the will is proved if he desires to renounce a provision of this kind in the will.<sup>30</sup> A mere mistake of law will not operate to allow an election after this twelve month period.<sup>31</sup> The spouse is also presumed to accept a bequest of personalty, but there is no statutory limitation on the time he has to reject such a provision and take by intestacy. This election is an equitable one, and the spouse will be estopped to reject the bequest and take by intestacy if he has already accepted the benefits of the bequest.<sup>32</sup>

The Missouri statutes on intestacy and election between a will and intestate rights are extremely old and have been amended by the en-

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27. See Sparks v. Dorrell, 151 Mo. App. 173, 184, 131 S.W. 761, 764 (1910).

28. Trautz v. Lemp, 329 Mo. 580, 46 S.W.2d 135 (1932); Pemberton v. Pemberton, 29 Mo. 408 (1860). See also Sparks v. Dorrell, 151 Mo. App. 173, 131 S.W. 761 (1910), a partial intestacy case discussed in the text supported by note 45 *infra*, where the court did not allow the spouse to take an intestate share either in the personal estate disposed of or undisposed of by the testator.

29. *In re Dean's Estate*, 350 Mo. 494, 166 S.W.2d 529 (1942).

30. Mo. Rev. Stat. § 469.150 (1949).

31. First National Bank of Kansas City v. Schaafe, 240 Mo. App. 217, 203 S.W.2d 611 (1947).

32. Andrews v. Brenizer, 230 S.W.2d 787 (Mo. App. 1950).

actment of various additions to the basic statutes, primarily to the dower statute. The statutes, besides being outmoded, overlap and are dispersed throughout a great number of different sections. Considerable revision is necessary to clarify and modernize the present law.

Any such revision of the statutes should include three fundamental changes in the law. The first change should be the abolishment of dower, an incident of the feudal system which has outlived its usefulness.<sup>33</sup> The argument most often made against abolishing dower is the assertion that land is still very important in rural areas.<sup>34</sup> This argument, however, appears outweighed by the following factors:<sup>35</sup> (1) land is less important today than in former times since a smaller percentage of the population own realty today; (2) it is difficult to alienate land encumbered by a life estate; (3) there is a possibility that the dower right of a secret spouse may cloud the title of a bona fide purchaser; (4) dower can be replaced with provisions which would give the spouse a share at least equal to the share provided by dower; and (5) the spouse is already protected by additional statutory provisions which give him homestead, certain rights in personal property, and a family allowance, all free from the debts of the decedent.<sup>36</sup> These additional rights adequately protect the spouse where the debts would otherwise absorb the body of the estate.<sup>37</sup>

The second fundamental change necessary is a revision of the descent and distribution statute to increase the spouse's intestate share in the estate. This is a desirable corollary to the repeal of the dower statute. This revision would also include a diminution of the share which the collateral heirs would take. The collateral heirs very seldom are dependent upon the estate of the testator; the widow, however, is generally dependent for support upon the estate of the deceased spouse.<sup>38</sup>

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33. MODEL PROBATE CODE § 31 (1946) abolishes dower and replaces it with a liberal share to be taken by descent under § 22. See note 38 *infra*.

34. See Rheinstein, *The Model Probate Code: A Critique*, 48 COL. L. REV. 534 (1948).

35. For arguments favoring the abolishment of dower, see Sayre, *Husband and Wife As Statutory Heirs*, 42 HARV. L. REV. 330 (1929).

36. See note 17 *supra*.

37. Dower is free from the debts of the decedent while the share the surviving spouse would take by intestate succession would not be free from debts. If dower were abolished, this factor, practically speaking, would not hurt the spouse; his rights to homestead and a certain share in personal property free of debts amount to the same protection afforded by the dower statute. This is particularly true in the large number of cases in which the estate of the decedent is composed almost entirely of personalty.

38. The intestate succession statute proposed by the Model Probate Code appears to be desirable, at least in so far as the share of the surviving spouse is concerned. MODEL PROBATE CODE § 22 (1946) provides:

The net estate of a person dying intestate shall descend and be distributed as follows:

The third change necessary is the enactment of a single concise statute providing the share the spouse takes when he elects to renounce the will. The Missouri statutes are too susceptible to misinterpretation, and this inadequacy could easily be overcome by a statute similar to the provision in the Model Probate Code which specifies in detail what share the spouse is to receive.<sup>39</sup>

### c. *Partial Intestacy*

Since wills almost invariably contain a residuary clause and there is a strong presumption against partial intestacy,<sup>40</sup> cases seldom arise where the spouse claims under the will and also seeks a share of the intestate estate. The few cases which have arisen on this subject in the United States are in conflict and as a result there are no rules which are generally applicable.<sup>41</sup> The courts, however, usually base their decisions on the intent of the testator manifest from the terms of the will.<sup>42</sup> It is presumed that when a man makes a will, he has evidenced a desire to die completely testate.<sup>43</sup> If he does intend to die

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(a) The surviving spouse shall receive the following share:

- (1) One-half of the net estate if the intestate is survived by issue; or
- (2) The first five thousand dollars and one-half of the remainder of the net estate, if there is no surviving issue, but the intestate is survived by one or more of his parents, or of his brothers, sisters or their issue; or
- (3) All of the net estate, if there is no surviving issue nor parent nor issue of a parent.

39. MODEL PROBATE CODE § 32 (1946) provides:

When a married person dies testate as to any part of his estate, a right of election is given to the surviving husband or wife solely under the limitations and conditions hereinafter stated.

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

The comment to § 32 explains how this process works:

Suppose the net estate is \$12,000 and the decedent is survived by a wife and one or more children. Under § 22 (a) (1), if there were no will, the wife would receive one-half the net estate, or \$6,000. In electing to take against the will she receives that amount up to \$5,000, and half of the remainder of her intestate share under § 22 (a) (1). This remainder would be \$1,000 (the difference between \$5,000 and \$6,000), half of which would amount to \$500. Therefore, the total share which she may elect to take against the will is \$5,500.

MODEL PROBATE CODE alternate § 32 (1946) has a different election process for estates over \$20,000 than for estates of \$20,000 and less. Under either provision, the surviving spouse receives substantially more than he would receive under existing Missouri law.

40. *Smoot v. Harbur*, 357 Mo. 511, 209 S.W.2d 249 (1948); *Riesmeyer v. St. Louis Union Trust Co.*, 180 S.W.2d 60 (Mo. 1944); *Mercantile-Commerce Bank & Trust Co. v. Binowitz*, 238 S.W.2d 893 (Mo. App. 1951).

41. For a discussion of the problems which might arise, see; ATKINSON, WILLS 122-123 (2d ed. 1953); 4 PAGE, WILLS § 1388 (3d ed. 1941); Sayre, *Husband and Wife as Statutory Heirs*, 42 HARV. L. REV. 330 (1929).

42. 4 PAGE, WILLS § 1388 (3d ed. 1941).

43. See note 40 *supra*.

completely testate, it logically follows that he has no intent whatsoever as to intestate property. Therefore, no intent toward the disposition of that property should be presumed by the courts, and logically the spouse should be entitled to a share in the intestate estate.<sup>44</sup>

In the only Missouri case on this question, *Sparks v. Dorrell*,<sup>45</sup> the court barred the spouse from a share in the personal estate which was undisposed of by the will. In that case, the testator left his wife all of his realty and one-half of a personal estate of \$30,000. He bequeathed \$5,000 to other legatees and left an intestate estate of approximately \$10,000. Since the testator died without surviving issue, the widow sought one-half of this intestate property. The court held that she was precluded from taking both her share under the will and her statutory share in the intestate property. The court reasoned that the widow had to claim one-half of *all* the personal estate if she wanted to take by intestate law. This would amount to \$15,000, and she would then be claiming \$30,000, \$15,000 under the will and \$15,000 by intestate succession. Since this would deprive the other legatees of their bequests, the court concluded that such a claim was contrary to the intent of the testator, and the widow was denied a share of the intestate estate.

The reasoning in the case appears indefensible. Logically, the widow should have been entitled to one-half of the *intestate* property only, in addition to her share given by the will. This would give her \$20,000, \$15,000 under the will and \$5,000 under intestate law, and would not reduce the bequests to the other legatees in the slightest. A short statute providing that the spouse should receive a share in the intestate property in the absence of an express intent to the contrary would seem desirable.<sup>46</sup>

#### *d. Inter Vivos Gifts*

The spouse's absolute power to renounce the will and take an intestate share in the estate has led to attempts by the testator to limit the spouse's rights by disposing of his estate during his lifetime. There are no statutes specifically prohibiting such a disposition but the courts of equity have placed limitations upon the testator in an effort to prevent any such transfer. These attempts may conveniently be divided into those which occur before marriage and those which occur after marriage.

A conveyance of realty by a prospective husband in contemplation of marriage is considered to be in fraud of his betrothed's prospective

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44. *Ness v. Lunde*, 394 Ill. 286, 68 N.E.2d 458 (1946).

45. 151 Mo. App. 173, 131 S.W. 761 (1910).

46. See MODEL PROBATE CODE §§ 23, 40 (1946).



inchoate right in dower and will be ineffective to defeat this right.<sup>47</sup> The fiancée may convey her property before marriage without defeating any right of her prospective husband because he acquires no inchoate right to her property merely by marriage.<sup>48</sup> Either party may convey personalty before marriage.<sup>49</sup>

An inter vivos gift of personalty by either spouse after marriage will fail if it is in fraud of the other's statutory rights in the estate.<sup>50</sup> For an inter vivos gift to be fraudulent, it must be in contemplation of death and made with the intent to defraud the spouse.<sup>51</sup> Since the husband can convey a fee simple title in realty only if his wife joins in the conveyance, a conveyance of realty by the husband alone can be set aside even in the absence of fraud.<sup>52</sup> A conveyance of realty by the wife after marriage would apparently be set aside only if made in contemplation of death and with the intent to defraud the husband.<sup>53</sup>

The leading case in Missouri on fraudulent inter vivos gifts is *Merz v. Tower Grove Bank & Trust Company*.<sup>54</sup> In an effort to limit his wife's share in his estate, the husband conveyed a large amount of personalty in trust. The income was to be paid to him for life, and on his death his wife was to receive a specific monthly allotment of \$200 during her lifetime. By the instrument, the husband reserved the right to revoke the trust or change its provisions at any time. The husband was incurably ill at the time of the creation of the trust and for a year prior to his death he had been continually seeking some method of limiting his wife's income. The court held that the trust was void because the gift was made in contemplation of death and with the intent to defraud the wife.

In holding the trust void the court expressly rejected a theory accepted in some jurisdictions which emphasizes the illusory nature of the gift rather than the intent of the donor.<sup>55</sup> In order to apply that

47. *Breshears v. Breshears*, 360 Mo. 1057, 232 S.W.2d 460 (1950). The decision that the conveyance was invalid only to the extent of the wife's dower interest applies only where suit is brought after the husband is dead. Where suit is brought during the husband's life the entire conveyance will be held void. *Vordick v. Kirsch*, 216 S.W. 519 (Mo. 1919).

48. *Travelers Ins. Co. v. Beagles*, 333 Mo. 563, 62 S.W.2d 800 (1933); *Scott v. Scott*, 324 Mo. 1055, 26 S.W.2d 598 (1930).

49. This would appear to be the case in Missouri. See ATKINSON, WILLS 113 (2d ed. 1953).

50. *Wanstrath v. Kappel*, 356 Mo. 210, 201 S.W.2d 327 (1947); *Merz v. Tower Grove Bank & Trust Co.*, 344 Mo. 1150, 130 S.W.2d 611 (1939); *Rice v. Waddill*, 168 Mo. 99, 67 S.W. 605 (1902).

51. *Ibid.*

52. See *Bernays v. Major*, 344 Mo. 135, 144, 126 S.W.2d 209, 214 (1939). ATKINSON, WILLS 105 (2d ed. 1953).

53. See text supported by note 6 *supra*.

54. 344 Mo. 1150, 130 S.W.2d 611 (1939).

55. *Id.* at 1163, 130 S.W.2d at 618 (1939). The leading case on this theory is *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937). There, the facts were very similar to those in the *Merz* case. The court held that since the husband

theory, which is known as the illusory trust doctrine, the court must examine the gift to see if the donor retains the beneficial interest together with the unlimited right to revoke or amend the trust. The limitations on the gift are determinative, regardless of intent. It would seem, however, that these limitations are important only in that they evidence a fraudulent intent on the part of the deceased spouse. Thus, intent is apparently the real basis of any decision, and the Missouri position appears more realistic. The court in the *Merz* case, however, undoubtedly would have reached the same result under the illusory trust doctrine.<sup>56</sup>

In the *Merz* case, the trust was set aside in toto.<sup>57</sup> On similar facts in a later Missouri case, *Wanstrath v. Kappel*,<sup>58</sup> the court set a trust aside only to the extent of the spouse's interest.<sup>59</sup> As the court in the *Wanstrath* case points out, there are two basic reasons for the different result.<sup>60</sup> First, the pleadings in the *Wanstrath* case did not raise the question whether the trust should have been set aside in toto, while in the *Merz* case they did. Second, there was a suggestion in the *Merz* case of bad faith on the part of the trustee, a trust company which participated in drafting the trust instrument, in that the company did not inform the husband that the trust provision limiting the wife would fail although it knew, or should have known, that such would be the case. In the *Wanstrath* case, on the other hand, there was no evidence of bad faith on the part of the trustees. There is an increased possibility of fraud or unfair play where a trust company drafts a trust instrument and names itself trustee; in that case the court will examine the trust more carefully in determining its validity than in the case in which the trustee is not active in drawing the instrument.

## PROTECTION OF CHILDREN

### a. In General

In common law jurisdictions, the children of a testator are not given the absolute protection against disinheritance which is given to the spouse. Generally, an expression in the will of intent to exclude a child, together with a disposition of the testator's entire estate, is

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retained beneficial interest in the property for life, together with the right to revoke the trust, the conveyance was illusory and therefore should not be given effect. The doctrine is discussed in Comment, 44 MICH. L. REV. 151 (1945). A later decision in New York greatly restricts the effectiveness of the *Newman* decision. *Matter of Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951). MODEL PROBATE CODE § 33 (1946) rejects the illusory trust doctrine and substantially adopts the Missouri position. See Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321, 330 (1947).

56. See *Newman v. Dore*, *supra* note 55.

57. *Merz v. Tower Grove Bank & Trust Co.*, 344 Mo. 1150, 1167-1171, 130 S.W.2d 611, 620-623 (1939).

58. 356 Mo. 210, 201 S.W.2d 327 (1947).

59. *Id.* at 217-218, 201 S.W.2d at 330-331.

60. *Ibid.*

sufficient to bar the child from a share in the estate.<sup>61</sup> In Louisiana, however, the civil law principle of legitime gives the children of a testator considerably more protection than they are afforded in common law states.<sup>62</sup>

Although a child is given no absolute protection against disinheritance in any state other than Louisiana, the fact of disinheritance may aid him in contesting the will. An unnatural disposition is not alone a sufficient ground for setting aside a will,<sup>63</sup> but it does have probative value when used to supplement other substantial evidence indicating undue influence or incapacity.<sup>64</sup> In a will contest a child may also gain an intangible advantage with a sympathetic judge or jury if the testator fails to provide adequately for him in the will.<sup>65</sup>

### *b. Pretermitted Heir Statute*

In the United States the greatest protection afforded the children of a testator is found in the pretermitted heir statutes.<sup>66</sup> These statutes provide that in certain cases a child or grandchild omitted from a will shall receive his intestate share in the estate out of the shares of the other beneficiaries. There are basically two types of pretermitted heir statutes in the United States.<sup>67</sup> One type allows the child or grandchild to take when *unintentionally* omitted from the will. Extrinsic evidence is admissible to establish the intent of the testator.<sup>68</sup> Missouri has the second type of statute, which does not speak in terms of intention, but which says that if a child is not "named or provided for" in the will, he shall be deemed pretermitted.<sup>69</sup>

61. ATKINSON, WILLS 140 (2d ed. 1953). If there is partial intestacy, it would seem that the child can claim a share of the intestate property regardless of the terms of the will.

62. LA. CIV. CODE ANN. art. 1493 (West 1952) provides that a testator can dispose of two-thirds of his estate by will if he leaves only one child, one-half of his estate if he leaves two children, and one-third of his estate if he leaves three or more children.

63. *Gott v. Dennis*, 296 Mo. 66, 246 S.W. 218 (1922); *McFadin v. Catron*, 138 Mo. 197, 38 S.W. 932 (1897); *Jones v. Jones*, 260 S.W. 793 (Mo. App. 1924).

64. *Dunkeson v. Williams*, 242 S.W. 653 (Mo. 1922).

65. ATKINSON, WILLS 139-140 (2d ed. 1953).

66. For a complete analysis of the pretermitted heir statutes in the United States, see Mathews, *Pretermitted Heirs: An Analysis of Statutes*, 29 COL. L. REV. 748 (1929). See also 1 PAGE, WILLS §§ 526-532 (3d ed. 1941).

67. *Goff v. Goff*, 352 Mo. 809, 179 S.W.2d 707 (1944). ATKINSON, WILLS 141 (2d ed. 1953).

68. ATKINSON, WILLS 143 (2d ed. 1953).

69. MO. REV. STAT. § 468.290 (1949) provides:

If any person make his last will, and die, leaving a child or children, or descendants of such child or children in case of their death, not named or provided for in such will, although born after the making of such will, or the death of the testator, every such testator, so far as shall regard any such child or children, or their descendants, not provided for, shall be deemed to die intestate; and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part.

In determining whether a child is "named or provided for" in the will,<sup>70</sup> the court does not require that the child be specifically named; he may be named by implication. The court examines the will to see whether it is likely that in naming one person the testator was also thinking of another. The intent of the testator to include one not specifically named must be gathered solely from the terms of the will.<sup>71</sup> It has been held that naming a child of the testator also names the testator's grandchildren born of that child.<sup>72</sup> Furthermore, naming one's grandchildren impliedly names the testator's child who is the parent of the grandchildren.<sup>73</sup> Similarly, naming a son-in-law also names the testator's daughter who is the wife of the son-in-law,<sup>74</sup> but the naming of one child does not impliedly name any of the testator's other children.<sup>75</sup> A testator who names his wife in a will does not impliedly name his children,<sup>76</sup> unless the provision naming the wife also contains instructions to use the legacy or devise to care for the children.<sup>77</sup> The court must necessarily indulge in a large amount of guesswork in deciding whether the testator is thinking of one individual when he names another.

Another opportunity for judicial interpretation under the statute arises if the testator uses a word in its collective sense. For example, the word "grandchildren" in one clause of a will sufficiently names a grandchild not specifically mentioned, even where all other grandchildren are mentioned by name;<sup>78</sup> the words "heirs of my son John" sufficiently mention the children of that particular son so that they will not be pretermitted.<sup>79</sup>

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70. Originally the statute merely had the words "provided for" and not the words "named or provided for." In *Block v. Block*, 3 Mo. 594 (1834), the court held that where the testator named a child and expressed an intention that she should have nothing, she was "provided for" under the statute. The vigorous dissent of Tompkins, J., to this interpretation led the legislature to amend the statute so that it had the words "named or provided for." This eliminated the grounds of the dissent. See *McCourtney v. Mathes*, 47 Mo. 533 (1871), for a more detailed discussion of the history behind the statute.

71. *Goff v. Goff*, 352 Mo. 809, 179 S.W.2d 707 (1944); *Thomas v. Black*, 118 Mo. 66, 20 S.W. 657 (1892).

72. *Miller v. Aven*, 327 Mo. 20, 34 S.W.2d 116 (1930); *Lawnick v. Schultz*, 325 Mo. 294, 28 S.W.2d 658 (1930) (overruling *Meyers v. Watson*, 234 Mo. 286, 136 S.W. 236 (1911)); *Guitar v. Gordon*, 17 Mo. 408 (1853); *Fugate v. Allen*, 119 Mo. App. 183, 95 S.W. 980 (1906).

73. *Woods v. Drake*, 135 Mo. 393, 37 S.W. 109 (1896).

74. *Hockensmith v. Slusher*, 26 Mo. 237 (1858). The basis of the decision was that the husband generally is considered to be the one in charge of financial matters in a family. For this reason it is at least questionable whether, if a testator named his *daughter in-law*, the court would hold that this also named his son, the husband of the daughter-in-law.

75. *Pounds v. Dale*, 48 Mo. 270 (1871).

76. *Hargadine v. Pulte*, 27 Mo. 423 (1858).

77. *McCourtney v. Mathes*, 47 Mo. 533 (1871); *Beck v. Metz*, 25 Mo. 70 (1857).

78. *Ernshaw v. Smith*, 2 S.W.2d 803 (Mo. 1928).

79. *Bond v. Riley*, 317 Mo. 594, 296 S.W. 401 (1927).

An illegitimate child has been held pretermitted when not mentioned in the will of his mother.<sup>80</sup> The basis of this decision is a Missouri statute which entitles illegitimate children to take by intestacy from their mother.<sup>81</sup> Although an adopted child<sup>82</sup> or grandchild<sup>83</sup> can be pretermitted, a recent case has held that a natural child cannot be pretermitted if he has been legally adopted by other parents.<sup>84</sup> This latter view appears to be an entirely sound one, since by statute all legal relations between a child and his natural parents cease upon adoption.<sup>85</sup>

Two basic changes seem desirable in the Missouri pretermitted heir statute. The first change suggested in the statute is that provision should be made giving *minor* children of the testator absolute protection against disinheritance. When a testator disinherits his minor children and his wife predeceases him, the resulting lack of protection for the children appears unfair both to the children and to society or whomever must provide for them. Although pretermitted heir statutes are designed to carry out the probable intent of the testator rather than to force a moral obligation upon him, a statutory duty should be created binding the testator to provide for the maintenance of his minor children. The Model Probate Code does not include such a provision, but progressive English legislation does. In England, the Inheritance (Family Provision) Act of 1938 gives the probate court the power to grant a reasonable allowance for maintenance to unmarried or disabled daughters and minor or disabled sons.<sup>86</sup> A similar provision in Missouri, or even a statute similar to the Louisiana law but limited to minor children,<sup>87</sup> would certainly be a laudable example of progressive legislation.

The second change concerns *adult* children alive when the will was executed. The statute provides that a child or his issue is pretermitted if he is not "named or provided for" in the will. This statute is intended to protect from disinheritance those children and grandchildren who are unintentionally omitted from the will.<sup>88</sup> It is unlikely that a child or grandchild alive at the execution of the will was unintentionally omitted. Therefore, the statute should be changed to pro-

80. *Martin v. Claxton*, 308 Mo. 314, 274 S.W. 77 (1925) (apparently overruling *Baker v. Stucker*, 213 Mo. App. 245, 248 S.W. 1003 (1923)).

81. MO. REV. STAT. § 468.060 (1949).

82. *Remmers v. Remmers*, 239 S.W. 509 (Mo. 1922); *Thomas v. Maloney*, 142 Mo. App. 193, 126 S.W. 522 (1910).

83. *Robertson v. Cornett*, 359 Mo. 1156, 225 S.W.2d 780 (1949).

84. *Wailes v. Curators of Central College*, 254 S.W.2d 645 (Mo. 1953). See 19 MO. L. REV. 86 (1954).

85. MO. REV. STAT. § 453.090 (1949).

86. Inheritance (Family Provision) Act, 1938, 1 & 2 GEO. 6, c. 45, § 1.

87. See note 62 *supra*.

88. See *Goff v. Goff*, 352 Mo. 809, 815, 179 S.W.2d 707, 711 (1944).

vide that an adult child or grandchild alive at that time should not be held pretermitted unless it can be proved by affirmative evidence that he was unintentionally omitted.<sup>89</sup>

### *c. Revocation of a Will by Operation of Law*

There is only one statute in Missouri which provides for revocation of a will by operation of law. That statute provides that a will is revoked, if, subsequent to the execution of the will, the testator marries and leaves issue of that marriage alive at the time of his death.<sup>90</sup> Unlike the pretermitted heir statute, this statute completely revokes the will.<sup>91</sup> Litigation under the statute does not arise for two reasons: (1) the terms of the statute are explicit and not susceptible to varying interpretations; (2) the statute does not give any protection to children which is not already given by the pretermitted heir statutes.<sup>92</sup>

### CONCLUSION

The Missouri statutes which protect the spouse and children of a testator from disinheritance have been in effect long enough for the courts to interpret them and establish rules which govern a great many different factual situations. The result is a high degree of predictability in many situations and a consequent decrease in the amount of litigation concerning these statutes. This factor is, of course, entitled to careful consideration in determining the desirability of replacing these statutes with more modern legislation. Nevertheless, the following changes in and additions to the statutes would produce a liberal law in clear and concise form and thereby produce more desirable results.

1. Dower should be abolished and replaced by a scheme of statutory heirship which would provide liberally for the spouse.

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89. Judicial dissatisfaction with the law as it now stands on this point has been expressed in decision. See *Pounds v. Dale*, 48 Mo. 270, 272 (1871); *Batley v. Batley*, 239 Mo. App. 664, 669, 193 S.W.2d 707, 711 (1944). MODEL PROBATE CODE § 41 (1946) makes no provision for pretermitted children which the testator believes are alive at the time he executes the will.

90. Mo. REV. STAT. § 468.250 (1949) provides:

If, after making a will, disposing of the whole estate of the testator, such testator shall marry and die, leaving issue by such marriage living at the time of his death, or shall leave issue of such marriage, born to him after his death, such will shall be deemed revoked, unless provisions shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will; and no evidence shall be received to rebut the presumption of such revocation.

91. *Ibid.* This difference, however, would not give a child any reason to prefer the "revocation by operation of law" statute.

92. This writer was unable to find any case in which a child sought to have a will revoked under this statute. Since the spouse can always renounce the will (see text supported by note 18 *supra*), he also acquires no additional protection by the terms of the statute. If the testator "provides" that future issue should take nothing in his estate, there would be the same difficulty in this statute as was encountered in the former version of the pretermitted heir statute (see note 70 *supra*).

2. The statutes allowing the spouse to elect between his share under the will and his intestate share should be replaced by a single concise statute which would specify in detail what share the spouse shall take when he renounces the will.

3. A statute on partial intestacy should be enacted giving an heir his statutory share in intestate property in addition to any bequest in the will unless the testator by the terms of the will expressly limits the disposition of intestate property.

4. A statute should be enacted providing for the absolute protection of minor children against complete disinheritance by the testator.

5. The pretermitted heir statute should be changed to provide that an adult child or grandchild alive at the time of the execution of the will and not "named or provided for" therein should not be held pretermitted unless it can be proved by affirmative evidence that he was unintentionally omitted.

These changes in the statutes would modernize the Missouri law and produce more desirable results in a large percentage of cases.

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