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Rights of the Surviving Spouse under the Pennsylvania Wills and Estates Statutes

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Comments

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INTRODUCTION

The rights of the surviving spouse in the estate of his deceased mate are governed by three statutes in Pennsylvania. The first of these is section 2 of the Intestate Act[1] which sets forth the intestate share. Then there is section 11 of the Estates Act[2] which allows a surviving spouse to treat as testamentary certain inter vivos conveyances. Finally, section 8 of the Wills Act[3] provides the right to take against the will. It is the purpose of this paper to examine the latter two sections in light of how the Pennsylvania courts have applied them.[4]

Before dealing with specific applications of these two statutes, a brief explanation of their general effect would be helpful. Essentially section 8 assures the surviving spouse that the decedent may not exclude him from sharing in decedent's estate by devising or bequeathing it to others. If the surviving spouse does not agree with the testamentary scheme, he may take against the will and receive a statutory share of the property which his spouse owned at death. Section 11 allows a surviving spouse to treat as testamentary certain inter vivos conveyances where the donor, the decedent, had retained certain controls.

Under both of these sections the surviving spouse must elect to take against all transfers of which he is a beneficiary if he elects to take against any.[5] He may not take under a will that treats him favorably and at the same time take against an inter vivos conveyance. Nor, on the other

1. Act of April 24, 1947, P.L. 80, § 2, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 1.2 (Supp. 1970).
2. Act of April 24, 1947, P.L. 100, § 11, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1970).
3. Act of April 24, 1947, P.L. 89 § 8, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 180.8 (Supp. 1970).
4. For the tax and fiduciary considerations in this area see Shaiman, *The Widow's Election—Tax and Fiduciary Considerations*, 40 TEMP. L.Q. 1 (1966)
5. See Act of April 24, 1947, P.L. 89, § 8, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 180.8 (Supp. 1970), and Act of April 24, 1947 P.L. 100, § 11, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1970).

hand, may he take against an unfavorable will and not take against an inter vivos conveyance falling within the purview of section 11.[6]

SECTION 11

In Pennsylvania, before the enactment of section 11, when legal title had passed prior to death, the surviving spouse could not share in this property.[7] The only exception to this rule was made in the case of fraud.[8] It had been decided that the intent to deprive one's spouse of his distributive share did not constitute a fraudulent intent.[9] The court in *Rynier Estate* set forth an accurate statement of these propositions.

> Decedent had a perfect right to give away all or any of her property, and if she actually divested herself of ownership and there was no fraud . . . , it is immaterial that her husband was thereby deprived at her death of his distributive share in her estate.[10]

It was in this setting that section 11 was enacted.[11] It provides that, where certain incidents of ownership are retained, the surviving spouse may treat the conveyance as testamentary. A statutory share is provided the surviving spouse in the event that he makes that election. The incidents of ownership that must be retained are " a power of appointment by will, or a power of revocation or consumption over the principal . . . ."[12] This provision is consistent with the philosophy exhibited by the law in other states.[13] It also reflects the policy of our own state, Pennsylvania, toward the surviving spouse.[14] Incidentally, while the

6. This was not so before the addition of this limitation in the statute. Shaiman, *supra* note 4, at 7. "This requirement is to prevent the electing spouse from picking and choosing the conveyance against which she will take."

7. Some historical background in this area may be found in Woods, *Wills and Administration*, 1955-1956 *Survey of Pennsylvania Law*, 18 U. PITT. L. REV. 344 (1957).

8. Windolph v. Girard Trust Company, 245 Pa. 349, 91 A. 634 (1914).

9. *Id.* at 364, 91 A. at 638; Beirne v. Continental-Equitable Title & Trust Co., 307 Pa. 570, 578, 161 A. 721, 723 (1932). Brégy states the rule as follows: "Hence, a practical working rule under the case law as it stood prior to this act was that the motive of the donor was irrelevant in determining whether an inter vivos gift of personalty was in fraud of marital rights." BRÉGY, PENNSYLVANIA INTESTATE, WILLS AND ESTATES ACTS OF 1947 5855 (1949); Bookstaves, *Estates and Trusts*, 1960-1961 *Survey of Pennsylvania Law*, 23 U. PITT. L. REV. 409, 428-29 (1961).

10. 347 Pa. 471, 474, 32 A.2d 736, 738 (1943).

11. Act of April 24, 1947, P.L. 100, § 11, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1970).

12. *Id.* "This section preserves for the surviving spouse the right to share the decedent's assets were the decedent has retained important rights of ownership at death." Commission's Comment to section 11.

13. Newman v. Dore, 275 N.Y. 371, 9 N.E. 2d 966 (1937); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E. 2d 75 (1944).

14. Behan Estate, 399 Pa. 314, 160 A. 2d 209 (1960). See Woods, *Wills and Administra-*

statements of policy usually speak in terms of preserving widows' rights,[15] it is clear both from the rules of statutory construction[16] and from decisions that the statute also applies to the rights of widowers.[17]

The act has been held not to be retroactive in effect.[18] The rationale for this result is that vested rights should not be destroyed. The vested rights in those cases were the rights of the donees to whom the decedent gave property subject to the decedent's power.[19]

Since the act is not applied retroactively, the time of the conveyance must always be considered in determining the rights of a surviving spouse. In analyzing a particular situation, several determinations must be made in order to resolve the general question of whether section 11 applies. First, there must be a "conveyance of assets."[20] Secondly, the conveyance must have occurred after January 1, 1948, the effective date of the statute.[21] Finally, it must be determined whether the decedent retained a power that would fall within the act. It is within this framework that the courts have dealt with section 11 problems.

One major area, in which it was predictable that section 11 would have great effect, was the revocable trust.[22] Prior to 1948, a conveyance that vested a present interest was not rendered testamentary merely because the settlor reserved a beneficial life estate and a power to revoke.[23] This was true both as to its general testamentary character as well as to its testamentary character in relation to a surviving spouse. However, the reservation of the additional power to control the administration of the trust was held to render the conveyance generally testamentary as to those dispositions intended to take effect after death.[24]

tion, 1959-1960 *Survey of Pennsylvania Law*, 22 U. PITT. L. REV. 297 (1960) for a discussion of *Behan*.

15. Pengelly Estate, 374 Pa. 358, 97 A. 2d 844 (1953).

16. Act of May 28, 1937, P.L. 1019, Art. III. § 33, PURDON'S PA. STAT. ANN. tit. 46, § 533 (1969).

17. Graham Estate, 3 D. & C. 2d 218 (1954).

18. McKean Estate, 366 Pa. 192, 77 A. 2d 447 (1951).

19. *Id.*

20. The Estates Act defines a conveyance. " 'Conveyance' means an act by which it is intended to create an interest in real or personal property whether the act is intended to have inter vivos or testamentary operation. Except as used in section 11, it shall include an act by which a power of appointment, whenever given, is exercised." Act of April 24, 1947, P.L. 100 § 1, as amended, PURDON'S PA. STAT. ANN. tit. 20, § 301.1 (Supp. 1970).

21. The effective date was January 1, 1948. Act of April 24, 1947, P.L. 100, § 21, PURDON'S PA. STAT. ANN. tit. 20, § 301.21 (1950).

22. The nature and uses of the revocable trust are dealt with in Williams, *Revocable Trusts in Estate Planning*, 44 CORNELL L.Q. 524 (1959); SCOTT, TRUSTS §§ 57-58.6 (1967).

23. Shapley Trust, 353 Pa. 499, 46 A.2d 227 (1946); *see* RESTATEMENT (SECOND) OF TRUSTS § 57 (1959); SCOTT, TRUSTS § 57.1 (1967).

24. Shapley Trust, 353 Pa. 499, 46 A. 2d 227 (1946); Tunnell's Estate, 325 Pa. 544, 190 A. 906 (1937); Pengelly Estate, 374 Pa. 358, 97 A. 2d 844 (1953); see SCOTT, TRUSTS § 57.1 (1967); *But see* RESTATEMENT (SECOND) OF TRUSTS § 57 (1957).

This was on the theory that the trustee merely became the agent of the settlor.[25] Prior to the enactment of section 11, it appears that no situation existed in which a conveyance would have been considered testamentary as to the spouse, and inter vivos as to all others merely on the basis of retained powers as under the present statute.

After January 1, 1948,[26] the courts recognized the consistency between the new statute and state policy.[27] In allowing a revocable trust to be treated as testamentary relative to the wife the court stated the reason for the law.

> Wives were being very unfairly deprived of a share in their husband's personal property by a transparent trust device which permitted a husband to retain control of his property, and at the same time legally deprive his wife of her just marital rights therein.[28]

Retention of control has been maintained through use of the power to withdraw principal.[29] It was pointed out in *Shapley Trust* that a "power to consume" is probably equivalent to a "power to revoke."[30]

A surviving spouse may or may not be able to treat as testamentary a conveyance meeting section 11 requirements as to retained powers, depending upon whether the conveyance was made before or after the effective date. If a conveyance is made after the act's effective date the law applies.[31] If it occurs before this time and vested rights are created the conveyance is not affected by the statute. Of course, a particular conveyance could still be treated as generally testamentary. In that case the effective date of section 11 would be immaterial.

The statute specifically designates "a power of appointment by will"[32] as one of the indicia of ownership that if retained will allow a surviving spouse to elect to treat a conveyance as testamentary. It is to be noted that no distinction is made between general powers[33] and special powers.[34] A prominent commentator suggests that an inequitable result

25. *Id. Some Current Problems in Pennsylvania Law*, 99 U.PA.REV. 814, 881 (1951) the author states "that the agency test fails to meet the real issues created by these trusts."
26. Act of April 24, 1947, P.L. 100, § 21, PURDON'S PA. STAT. ANN. tit. 20, § 301.21 (1950).
27. Behan Estate, 399 P. 314, 160 A. 2d 209 (1960).
28. *Id.* at 318, 160 A. 2d at 213.
29. Shapley Trust, 353 Pa. 499, 46 A. 2d 227 (1946).
30. *Id.*
31. McKean Estate, 366, Pa. 192, 77 A. 2d 447 (1951).
32. Act of April 24, 1947, P.L. 100, § 11, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1970).
33. SCOTT, TRUSTS § 17.2 (1967) defines a general power as "a power to appoint to anyone whom the donee may select, whether the power is to appoint either by deed or by will, or by deed alone or by will alone."
34. *Id.* A special power is defined as "a power to appoint only to or among the members

would be obtained by not utilizing the distinctions that exist between general powers and special powers.[35] He states that "where there is a life estate to settlor and remainder to issue the spouse is barred."[36] He compares that situation to one in which an "imperative" power[37] exists and the beneficiaries are a small class. He concludes that the two conveyances, in practical effect, are so similar that perhaps not to treat them similarly would be inequitable. In a later supplement he cited *Behan Estate* to illustrate that "the court did not balk at applying the act to a case involving a very limited special power."[38]

The tentative trust,[39] otherwise known as the Totten Trust,[40] also falls within the purview of this section, because of its revocable nature.

> In the absence of evidence of a different intention of the depositor, the mere fact that a deposit is made in a savings bank in the name of the depositor "as trustee" for another person is sufficient to show an intention to create a revocable trust.[41]

Pennsylvania adopted the doctrine in *Scanlon's Estate*.[42] By definition the Totten Trust may be revoked at will until the depositor dies or completes the gift. Also, it may be revoked by a contrary provision in a will.[43] The applicability of section 11 to this type of conveyance seems obvious.

Certain problems regarding the effective date of the statute occurred with the Totten Trust. Regarding the revocable trust, it has been argued successfully that the beneficiaries had vested interests that could not be destroyed.[44] As to the tentative trust the vested rights argument does not apply. The court in *Graham Estate*[45]states the rule as follows:

> In a tentative trust, however, the beneficiary has no vested rights

of a limited class of persons." RESTATEMENT OF PROPERTY § 320 (1940) also provides a definition.

35. BRÉGY, *supra* note 9, at 5862.
36. *Id.* at 5863.
37. *Id.* at 5213; RESTATEMENT (SECOND) OF TRUSTS § 27 (1959).
38. BRÉGY, *supra* note 9, at 8142.
39. RESTATEMENT (SECOND) OF TRUSTS § 58 (1959).
40. *In re* Totten, 179 N.Y. 112, 71 N.E. 748 (1904).
41. RESTATEMENT (SECOND) OF TRUSTS § 58, comment *a* at 156 (1959).
42. 313 Pa. 424, 169 A. 106 (1933); See Haskell, *Testamentary Trustee as Insurance Beneficiary; An Estate Planning Gimmick*, 41 N.Y.U.L.REV. 566, 570 (1966). "They are effective with respect to deposits made in savings banks, and in savings and loan institutions, but whether they can be created in the form of an ordinary checking account is not clear. "Bookstaver, *Estates & Trusts*, 1956-1965 *Survey of Pennsylvania Law*, 27 U.PITT. L.REV. 373, 389 (1966).
43. Scanlon's Estate, 313 Pa. 424, 169 A. 106 (1933).
44. McKean Estate, 366 Pa. 192, 77 A. 2d 447 (1951); *Some Current Problems in Pennsylvania Law*, *supra* note 25, at 864 treats problems of retroactivity.
45. Graham Estate, 3 D. & C. 2d 218 (1954).

> prior to the death of the depositor, and the reserved power of control by the depositor is complete and he likewise retains full power follows that the arrangement is testamelntary in character . . . .[46]

The court occasionally seems to have spoken in terms of common law testamentary character.[47] Dictum in *Iafolla Estate*[48] agreed with the result in *Graham Estate*.[49] Whenever the exact issue arises it seems certain that the Supreme Court of Pennsylvania will deal with the problem similarly.

In *Longacre v. Hornblower*[50] a lower court held that the incident of a joint tenancy[51] that allows either tenant to sever the tenancy is in effect a power of revocation over one half of the property involved and that this conveyance comes under section 11.[52]

There are a number of other instances in which this section has been applied. The number is limited only by the variety of conveyances in which a donor may retain certain powers designated in the statute. The section has been applied to a pension plan[53] in which the power to revoke the beneficiary, as well as other powers, including the power to withdraw all funds upon termination of employment, were retained. The court held:

> The statute clearly states that this section comes into play whenever the decedent had the power to consume the assets in the fund. In this case it is definite that the decedent had such power. It therefore appears that these contributions made by the decedent into this pension fund comes under the terminology of this section of the Estates Act.[54]

Section 11 also has been applied to an annuity contract.[55] There the decedent had retained the power to appoint by will, the power to revoke,

46. *Id.* at 223.
47. Black Estate, 73 D. & C. 86 (1950).
48. 380 Pa. 391, 110 A. 2d 380 (1955).
49. 3 D. & C. 2d 218 (1954).
50. Longacre v. Hornblower & Weeks, 83 D. & C. 259 (1952).
51. Leach's Estate, 282 Pa. 545, 128 A. 497 (1925) held that a joint tenancy existed where a single estate in property was created with two or more persons as owners under an express agreement.
52. Orth Estate, 18 Fid. Rep. 26, 30 (1967) held: "Since a tenancy by the entireties cannot be severed unilaterally during life, it follows that the present account is not within Sec. 11."
53. Blair Estate, 17 Fid. Rep. 231 (1967).
54. *Id.* at 237.
55. "An annuity is usually defined as being an obligation to pay a stated sum, usually annually, to a stated recipient, such payments to terminate upon the death of the designated beneficiary. However, in a refund annuity contract if the annuitant dies before the principal and interest has been paid out in income to him, the unused principal is refunded to the designated beneficiary or to the estate of the annuitant. 1 J. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 81 (1965).

and the power to consume.[56] The unpaid balance was to be paid at his death to the named beneficiaries. The argument was made that the contracts were exempt under the insurance clause of section 11.[57] The court listed the many instances in which annuity contracts and insurance contracts had been treated differently in this state. After comparing the agreements involved the court merely stated that the contracts were not insurance contracts so as to be excepted under section 11.[58] The court reasoned that if the legislature had intended to except annuity contracts from the ambit of section 11 it would have provided a specific exemption.

Exemptions

There are several conveyances of assets that are excluded from section 11 effect notwithstanding the retention by decedent of one or more indicia of ownership specified in the statute. One such exclusion is the life insurance contract. While it is now clear that insurance contracts are exempt it was not always so. It took two amendments to the 1947 statute to accomplish this clarification.[59]

Before any amendment was made regarding life insurance the law was set forth in *Brown Estate*.[60] The *Brown* court stated that an insurance trust in which the settlor retained the powers to amend and revoke, among other powers, was generally testamentary. It should be noted that this court did not decide how "insurance held outright by the insured would be treated."[61]

Two amendments changed the law as stated in the *Brown* decision. Section 8 of the Estates Act[62] states that the designation of insurance

56. Fitzgerald Estate, 42 D. & C. 2d 676 (1967).

57. Section 11 was amended in 1956. The following language exempts life insurance contracts. "The provisions of this subsection shall not apply to any contract of life insurance purchased by a decedent, whether payable in trust or otherwise." Act of April 24, 1947. P.L. 100, § 11, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1970).

58. Fitzgerald Estate 42, D. & C. 2d 676, 682 (1967).

59. Act of July 11, 1957, P.L. 792, § 1, PURDON'S PA. STAT. ANN. tit. 20, § 301.7a (Supp. 1970) made it certain that the designation of beneficiaries of life insurance was not to be considered testamentary. Act of April 24, 1947, P.L. 100, § 11, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1970). Haskell, *supra* note 42, at 574 states an unfavorable opinion of the legislation. "Recent legislation validating the designation of the trustee under the insured's will as a life insurance policy beneficiary, and thereby excluding the proceeds from the probate estate may be another step in the wrong direction." Atkinson, *Succession*, 35 N.Y.U.L.REV. 470, 474 (1960), "Ordinary life insurance is part of the estate for estate tax purposes; why should it not be made so for purposes of the spouse's elective share?"

60. Brown Estate, 4 D. & C. 2d 722 (1955), *aff'd mem.*, 384 Pa. 99 (1956).

61. *Id.* at 726.

62. Act of July 11, 1957, P.L. 792, § 1, PURDON'S PA. STAT. ANN. tit. 20, § 301.7a (Supp. 1970).

beneficiaries is not testamentary. The surviving spouse was precluded from treating insurance contracts as testamentary by the addition to section 11 of the following sentence: "The provisions of this subsection shall not apply to any contract of life insurance purchased by a decedent, whether payable in trust or otherwise."[63] These two additions to the Estates Act were construed in *Henderson Estate.*[64] The court ruled, after interpreting the new amendments, that neither insurance paid directly, nor in trust, was testamentary as to anyone.[65]

It has been held that a surviving spouse is not entitled to any interest in United States Savings bonds series "E" when the registered owner, the the decedent, designated beneficiaries, but retained the power to revoke.[66] This was a holding of *Graham Estate.* The decision was based upon the federal pre-emption doctrine.[67]

The Treasury Regulations provided that bonds may be registered in the name of one person payable to another at the owner's death.[68] In the event that the owner did not cash the bond the regulations stated who was to be the owner. The regulations declared that "the beneficiary will be recognized as the sole and absolute owner of the bond."[69] In addition, another regulation provided that judicial proceedings defeating the survivorship rights of such a beneficiary would not be recognized.[70] The court held the Pennsylvania law subservient to the federal law. One court stated the principle as follows:

> Whenever the constitutional powers of the United States Government and those of a state conflict, the latter must yield and such cession takes place when the Federal Government, acting within its constitutional authority, promulgates a rule as to the ownership of evidences of the Government's indebtedness.[71]

Inter vivos gifts[72] by their very nature are excluded from the operation of section 11. Since an inter vivos gift to be valid must vest present title irrevocably in the donee, section 11 cannot apply; the

63. Act of April 24, 1947, P.L. 100, § 11, *as amended,* PURDON'S PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1970).
64. 395 Pa. 215, 149 A. 2d 892 (1959).
65. See Woods, *Will and Administration,* 1958-1959 *Survey of Pennsylvania Law,* 21 U.PITT. L.REV. 299, 302 (1959) where the state of the law is capsulized.
66. Graham Estate, 3 D. &. C. 2d 218 (1954).
67. *Id.* at 221.
68. 31 C.F.R. § 315.7 (1970).
69. *Id.* § 315.67.
70. *Id.* § 315.20.
71. Horstman Estate, 398 Pa. 506, 514, 159 A. 2d 514, 518 (1960).
72. Yeager's Estate, 273 Pa. 359, 362, 117 A. 67, 68 (1922) held: "To establish a gift inter vivos . . . two essential elements must be made to appear: an intention to make the donation then and there, and an actual or constructive delivery at the same time, of a nature sufficient to divest the giver of all dominion, and invest the recipient therewith."

donor retains no "strings." However, this is not so with a gift causa mortis.

Unlike the inter vivos gift, the gift causa mortis[73] is revocable. It is revoked upon the recovery of the donor. He may also revoke it before death if he so desires. Although no case law has dealt specifically with this issue in Pennsylvania, it seems that it should fall within the scope of section 11.

A fourth method of avoiding section 11 has been noted and analyzed by Brégy.[74] He suggests that a note payable at death could be used for this purpose. If such an approach is successful the surviving spouse may be excluded. He notes that the court in *Rynier Estate*[75] held that such a note must be paid. Nevertheless, another court ruling was offered as a possible vehicle for at least softening the blow. *Hummel's Estate*,[76] which asserted that the spouse's share in the estate must be measured before the note was paid was offered to serve that end. No appellate court has yet ruled on the specific question.

An antenuptial[77] or post nuptial agreement[78] can provide a means of avoiding section 11 for those who have no other means. The statute and related case law offer a number of exceptions, but if the individuals involved agree to a particular scheme the effect of the statute is nullified.

Finally, regardless of what transpires, the rights of the surviving spouse are subject to those of any income beneficiary whose interest in income becomes vested in enjoyment prior to death.[79]

SECTION 8

It is in section 8 that the power to take against the testator's will[80] is given and a statutory share provided.[81] Of course, here an agreement

73. Elliott's Estate, 312, Pa. 493, 498, 167 A. 289, 291 (1933) stated: "A gift causa mortis differs from other gifts only in that it is made when the donor believes he is about to die, and is revocable should he survive."

74. BRÉGY, *supra* note 9, at 5857.

75. Rynier Estate, 347 Pa. 471, 32 A. 2d 736 (1943).

76. Hummel's Estate, 161 Pa. 215, 28 A. 1113 (1894).

77. Flannery's Estate, 315 Pa. 576, 580, 173 A. 303, 304 (1934) stated the determinative factors of an antenuptial agreement. "For their validity antenuptial contracts depend upon the presence of one of two factors: A reasonable provision for the wife, or, in the absence of such provision, a full and fair disclosure to the wife of the husband's worth."

78. Fennell's Estate, 207 Pa. 309, 56 A. 875 (1904). This court held that where a post nuptial agreement is reasonable and entered into with full knowledge of the facts and for an adequate consideration it will be upheld.

79. Act of April 24, 1947, P.L. 100, § 11, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1970).

80. Act of April 24, 1947, P.L. 89 § 8, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 180.8(a) (Supp. 1970).

81. Act of April 24, 1947, P.L. 89, § 8, as amended, PURDON'S PA. STAT. ANN. tit. 20, § 180.8(b) (Supp. 1970).

between the husband and wife may provide for some other disposition of the estate.[82] These agreements are construed strictly because the basic policy behind this statute is the protection of the spouse.[83]

One of the first problems arises with partial intestacy. The question presented may be stated as follows: Does the surviving spouse by accepting the will acquiese in the testamentary scheme and thereby preclude himself from taking intestate property?[84] The answer is it will only where "a fractional part of the whole estate is bequeathed in lieu of dower . . . ."[85] Where a partial intestacy exists, a surviving spouse who elects to take against the will is not entitled to the $20,000 allowance under the Intestate Act.[86] When a spouse takes against the will his share is set forth by section 8 of the Wills Act. However, in a situation where decedent dies intestate the election by the surviving spouse to treat section 11 conveyances as testamentary does not prohibit the spouse from taking the allowance.[87]

By taking against the will the surviving spouse loses the benefit of provisions to pay funeral expenses[88] if they are included in the will. This is consistent with the general principle that where a spouse elects to take against a will it is destroyed as to him.[89]

The next problem is the surviving spouse's rights in property aliened without his joinder.[90] It has been held that the wife can take under the will and retain her dower in land conveyed without her joinder.[91] This has been described as the hardest case.

> In such a case she is not permitted to claim a share of real estate devised by the will to others. But if she is permitted to take both her gift under the will and also an intestate share in real estate

82. Mahoney's Estate, 56 D. & C. 286 (1945).
83. Zeigler Estate, 381 Pa. 436, 113 A. 2d 271 (1955).
84. Act of April 24, 1947, P.L. 80, § 2, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 1.2 (Supp. 1970).
85. Thompson's Estate, 229 Pa. 542, 550, 79 A. 173, 176 (1911); Biddle Estate, 375, Pa. 189, 100 A. 2d 65 (1953); Forrestal's Estate, 10 D. & C. 152, 153 (1928) states: "The general rule is that an election to take under a will is in lieu of the part of the estate as to which there is a testacy, but not as to the part of the estate as to which there is an intestacy."
86. Martin Estate, 365 Pa. 280, 74 A. 2d 120 (1950); *see also* Act of April 24, 1947, P.L. 80, § 2, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 1.2(3) (Supp. 1970) which provides: "In case of partial intestacy, any amount received by the surviving spouse under the will shall satisfy pro tanto the twenty thousand dollar allowance. . . ."
87. Hershey Estate (No. 2), 11 Fid. Rep. 122 (1960).
88. Mitchell's Estate, 79 Pa. Super, 208 (1922).
89. Kate's Estate, 282 Pa. 417, 128 A. 97 (1925). Shaiman *supra* note 4, at 8. "However, the electing spouse is permitted to accept an appointment as executrix, trustee, or guardian of a minor's estate."
90. Act of April 24, 1947, P.L. 80, § 5, *as amended*, PURDON'S PA. STAT. ANN. tit. 20, § 1.5 (Supp. 1970).
91. Borland v. Nichols, 12 Pa. 38 (1849).

> conveyed inter vivos, her rights against the transferee (who might be an innocent purchaser for value) are greater than her rights against devisees.[92]

When the spouse takes against the will the argument set forth above is not applicable because all are treated the same regardless of whether they are devisees or transferees. Therefore, the result of allowing the surviving spouse rights in property aliened without his joinder is easier to justify.

When the spouse takes against the will the testamentary scheme may be destroyed. The treatment of remainders becomes an immediate problem. The rule has been stated many times; generally remainders are accelerated[93] unless there is an evident contrary intent.[94] However, where "by inevitable implication, as, for instance where the will by itself fixes a definite time for distribution independent of the widow's death,"[95] this rule will not be followed.

Whenever remainders are accelerated oftentimes a hardship may be imposed on other beneficiaries.[96] When this is the case "parts of the estate may be sequestered,[97] in accordance with equitable principles, for the benefit of disappointed legatees and devisees."[98] Of course, "varying testamentary provisions render it impossible to promulgate rules of sequestration which will apply in every case."[99]

CONCLUSION

Viewing these sections as complementary it is evident that the position of the surviving spouse has been made more secure. The spouse is

92. BREGY, *supra* note 9, at 609.

93. "When the renounced interest is the only hindrance to the succeeding interest becoming forthwith a present interest, then acceleration. . . . causes such succeeding interest to become forthwith a present interest." RESTATEMENT OF PROPERTY § 231, comment *e* at 964 (1936).

94. *Id.* Schmick Estate, 349 Pa. 65, 36 A. 2d 305 (1944).

95. Disston's Estate, 257 Pa. 537, 543, 101 A. 804, 806 (1917).

96. An example of such a situation is found in Lonergan's Estate, 303 Pa. 142, 144, 154 A. 387, 388 (1931). "Testator died leaving a widow and collateral heirs. His estate amounted to nearly $1,500,000, of which, under the terms of the will, the residuary legatee would have received about $900,000. The widow elected to take against the will, the effect of which that the residuary legatee's share was reduced about $500,000, but none of the other legatees was affected thereby." Testator's wife had a life estate in a $200,000 trust. On her death $150,000 of the corpus was payable to the residue while $50,000 was to go to appointees. In this case the $50,000 was sequestered until the wife's death.

97. "The renounced interest is treated as if it were the subject matter of a trust to be judicially administered to effectuate as nearly as may be possible, the testator's manifested plan of disposition." RESTATEMENT OF PROPERTY § 234, comment *a* at 985 (1936).

98. Schmick Estate, 349, Pa. 65, 68, 36 A.2d 305, 307 (1944).

99. *Id.* at 69, 36 A. 2d at 307.

protected by section 8 from exclusion by the will. The surviving spouse may not be prevented from sharing in the estate of his spouse when she retains certain controls over the property until death. While there are devices available that permit a spouse to effectuate a desire to exclude her spouse they are limited in number. That, "it is only the stupid husband, who, against his wishes, would be forced to allow his wife to share in his personalty,"[100] is no longer necessarily accurate.

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100. Comment, *Gifts of Personal Property as Limited by the Rights of the Wife*, 5 U. PITT. L. REV. 78, 87 (1939).