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## OKLAHOMA'S TROUBLESOME COVERTURE PROPERTY CONCEPT

Orley R. Lilly, Jr.\*

Lawyers generally—Oklahoma lawyers more particularly—use the term “community property” to refer to a system of spousal ownership of property which prevails in civil code countries and currently in eight American states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

No one today lists Oklahoma among the community property states; she clearly is considered to be a “common law property” state.

For a decade Oklahoma properly was included in a community property list. The legislature in 1939 authorized spouses voluntarily to elect to come under a community property system.<sup>1</sup> Following a decision of the United States Supreme Court that the voluntary system did not qualify to permit spouses to divide income between them for federal income tax purposes,<sup>2</sup> the community property system in 1945 was made mandatory.<sup>3</sup> In 1949, after the joint federal income tax return had become available to spouses everywhere,<sup>4</sup> the legislature repealed the

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1. Law of May 10, 1939, ch. 62, art. 2, §§ 1-15, [1939] Okla. Sess. Laws 356-60 (repealed 1945).

2. *Commissioner v. Harmon*, 323 U.S. 44 (1944).

3. Law of April 28, 1945, tit. 32, ch. 1, §§ 1-18, [1945] Okla. Sess. Laws 118-21 (repealed 1949).

4. Act of April 2, 1948, ch. 168, § 303, 62 Stat. 115 (now INT. REV. CODE OF 1954, § 6013).

community property law<sup>5</sup> and returned Oklahoma to the list of "common law property" states.

In fact, the term "community property" currently appears in only a few Oklahoma statutes. One section provided for the dismantling of the system.<sup>6</sup> Another, probably as a result of legislative oversight, continues to subject the "separate" and "community" property of spouses to their reciprocal support obligations.<sup>7</sup>

Nonetheless, as marriage and spousal ownership of property continue to exist so has governmental regulation of property rights of spouses *inter sese* continued. Oklahoma certainly is no exception. Perhaps the most familiar areas in which spousal property rights are regulated are the duty to support,<sup>8</sup> the homestead<sup>9</sup> and in divorce or separation.<sup>10</sup>

This discussion focuses on a less familiar right which has its genesis in Oklahoma's intestate succession<sup>11</sup> and forced share<sup>12</sup> statutes. It is the right to "property . . . acquired by the joint industry of husband and wife during coverture,"<sup>13</sup> or, more commonly, "coverture property." The right is a troublesome one because in concept it is judicially equated with community property; it is doubly troublesome because it is also only a contingent right. The combination may give rise to very difficult problems in spousal succession, postnuptial estate planning and inter vivos gifts.

#### BASIC COMMUNITY PROPERTY LAW REVISITED

Lawyers and laymen alike generally think of "community property" in terms of the financial protection it provides the survivor on the spouse's death. So used, "community property" has an iceberg quality, for in the term lurk features at least as valuable as the survivorship right.

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5. Law of June 2, 1949, tit. 32, ch. 1, § 1, [1949] Okla. Sess. Laws 229.

6. OKLA. STAT. tit. 32, § 83 (1971) (The term appears only in the section's title.).

7. OKLA. STAT. tit. 32, § 3 (1971). The term also appears in the gift tax law, OKLA. STAT. tit. 68, § 901(e) (1971), and in the Uniform Simultaneous Death Act, OKLA. STAT. tit. 58, § 1004 (1971).

8. OKLA. STAT. tit. 32, § 3 (1971).

9. *E.g.*, OKLA. STAT. tit. 58, § 311 (1971).

10. OKLA. STAT. tit. 12, §§ 1275-76, 1278 (1971).

11. OKLA. STAT. tit. 84, § 213 (1971).

12. OKLA. STAT. tit. 84, § 44 (1971).

13. OKLA. STAT. tit. 84, § 213, Second (1971).

At the present time in all of our American community property states it is recognized . . . that the interests of the husband and the wife in the community property are present, equal and existing interests during the marriage itself, that the wife, in other words, has an ownership of half of the community property, equal to that of the husband, from the moment of the acquisition of, or from the inception of the right to, such property.<sup>14</sup>

In simpler words, the rights of each spouse in the community property are *vested*.

Where a community property system prevails, three "estates" typically exist for a married couple—the husband's "separate" property, the wife's "separate" property, and their "community" property. "In general, all property acquired during marriage, other than that received by gift, bequest, devise or intestate succession (generally including the proceeds and income therefrom), is community property."<sup>15</sup> A spouse's "separate" property thus consists only of property accumulated up to the time of marriage and that acquired after marriage as the result of a donative-type transaction.

What reasons caused the marital community form of property ownership to develop?

The most logical explanation, that most largely borne out by the facts, is that the causes which make the wife the partner of the husband are economic in nature. It is among those races or among those classes of society in which the wife works shoulder to shoulder with the husband to maintain and preserve the common home and possessions, in which she contributes labor rather than the mere "adornment" of her presence, that she is found to be the partner of her husband with an ownership in the acquests and gains of their common labor and struggle.<sup>16</sup>

Translated and updated, the explanation philosophically supports as a principle which merits legal recognition that even a stay-at-home "partner" at least "works" toward the maintenance and preservation of the home and possessions and indirectly "contributes" to spousal wealth accumulation. Oklahoma has always recognized that principle, and one way she has done so is by use of the coverture property concept. Her

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14. 1 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY LAW 302 (1943) (footnote omitted) [hereinafter cited as DE FUNIAK].

15. E. SCOLES & E. HALBACH, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 75 (2d ed. 1973).

16. 1 DE FUNIAK 27 (footnote omitted).

dalliance with true community property was motivated solely by federal tax law.

#### COVERTURE AND COMMUNITY PROPERTY COMPARED

Coverture property, in reality, is community property. Oklahoma decisions make that clear.

As early as 1914 the Supreme Court of Oklahoma, in *Black v. Haynes*,<sup>17</sup> announced a legal principle to which it adheres today, that property acquired during coverture is "an estate in the manner of community property."

The community nature of coverture property is clearly established in the more recent case of *In re Keith's Estate*.<sup>18</sup> A serviceman and his wife were married and resided together less than three days in a military guest house where the wife "did not even prepare a meal or make a bed."<sup>19</sup> The husband left the United States for duty overseas; the wife returned to her parents' home and resumed her premarital occupation as a theater cashier. Six months after the marriage the husband was reported missing; eleven months later he was officially reported as dead. He was survived by his widow and parents. The issue confronting the court was whether his military pay was property acquired during coverture.

The opinion in *Keith* draws no distinction between coverture property and community property. *Black v. Haynes* is the sole authority cited by the court in which only coverture property under Oklahoma law was involved. Far heavier reliance was placed on "pure" community property authority. The court quoted extensively from *Turner v. First National Bank & Trust Co.*,<sup>20</sup> a case concerning marital property acquired during Oklahoma's mandatory community years; from *Lake v. Lake*,<sup>21</sup> a Nevada divorce case; and from *Cole's Widow v. His Executors*,<sup>22</sup> an early Louisiana succession case. Concluding in *Keith* that the military pay was coverture property, the court said:

Once it is recognized that the statutory proviso . . . pertains to an estate in the nature of common, or community,

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17. 45 Okla. 363, 145 P. 362 (1914).

18. 298 P.2d 423 (Okla. 1956).

19. *Id.* at 425.

20. 292 P.2d 1012 (Okla. 1955).

21. 18 Nev. 361, 4 P. 711 (1884).

22. 7 Mart. (n.s.) 41, 18 Am. Dec. 241 (La. 1828).

property and that, because of this nature, it makes no difference whether the wife has contributed any particular effort or industry, mental or physical, to its acquisition, and that a *valid marriage is the only requisite to the existence of such an estate*, it will be seen that the proviso applies to an estate . . . where the widow, as the wife, contributed nothing tangible to the estate's accumulation through "industry" in the strict sense of the word.<sup>23</sup>

The identity of coverture and community property also extends to the definitions of the estates within the concepts and to the manner of determining what property is included in the estates. Relying on the *Keith* case in *Heirs, Etc., of Payne v. Seay*,<sup>24</sup> the court said:

[A]ll property, not falling within the definition of separate property, acquired after marriage by the labor of either spouse, is nevertheless *deemed* to be acquired by the labor of both spouses. Separate property is defined . . . as that acquired [after marriage] by gift, devise or descent, or by exchange of the spouse's individual property.<sup>25</sup>

And, of course, property accumulated prior to marriage is the spouse's separate property.<sup>26</sup> Property conveyed from one spouse to the other falls within the category of coverture property.<sup>27</sup> Finally, "[w]here separate and community property have become confused, blended, or commingled, the whole will be presumed to be community property unless the community component is comparatively small."<sup>28</sup>

In spite of the conceptual identity of Oklahoma's coverture property and community property, an important difference exists in the quality of protection each affords the surviving spouse. In community property, each spouse has a vested and equal interest from the time of its acquisition.<sup>29</sup> That is not the case with coverture property:

The interest of a wife in property acquired during coverture depends upon the occurrence of a statutorily enacted contingency such as divorce, separation, inability to support, homestead and death, all of which emanate from the marriage relationship. A wife then has no vested interest in

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23. 298 P.2d at 426 (emphasis added).

24. 478 P.2d 889 (Okla. 1970).

25. *Id.* at 896 (emphasis added). See text accompanying note 15 *supra*.

26. See *Irvin v. Thompson*, 500 P.2d 283 (Okla. 1972).

27. *Heirs, Etc., of Payne v. Seay*, 478 P.2d 889 (Okla. 1970); *Smith v. Ridpath*, 207 Okla. 638, 251 P.2d 1036 (1952).

28. *Catron v. First Nat'l Bank & Trust Co.*, 434 P.2d 263, 271 (Okla. 1967) (decided under Oklahoma's mandatory community property law) quoting 41 C.J.S. *Husband and Wife* § 490 (1944).

29. See text accompanying note 14 *supra*.

property acquired during coverture, but a *contingent* interest which the law protects.<sup>30</sup>

Oklahoma law provides some form of survivorship protection to every spouse, but the court more aptly might have said that protection by the coverture property concept is contingent.

#### SURVIVORSHIP RIGHTS

Only one-half of community property is subject to distribution on a spouse's death; the survivor already "owned" the other half.<sup>31</sup> That one-half ownership is the minimum protection a community property system affords the surviving spouse. In cases of intestacy, the survivor may<sup>32</sup> or may not<sup>33</sup> take the decedent spouse's separate or community property. A testate spouse may by will devise or bequeath separate or community property to the survivor,<sup>34</sup> although the latter has no forced share rights.

One might naturally assume that the community/coverture property concept is alien to spousal succession rights under Oklahoma law. Nonetheless, before, during and since her community property years the concept has been imbedded in Oklahoma's intestate succession and forced share statutes. The real "contingency" in Oklahoma, however, is whether the property of a spouse will ever have to be identified as separate or acquired during coverture. The coverture property concept does not, as in community property states, provide the principal survivorship protection. That protection in intestacy is a variable moiety of the decedent spouse's estate, to which the forced share in testate cases basically is equated.<sup>35</sup> The moiety in any case is dependent upon what kindred, in addition to the spouse, survive a decedent. Where applicable, the coverture property concept and its antithesis, the separate property concept, serve only as additional variables: the former increases, and the latter limits, the interest of the survivor in a component of the estate of the spouse.

In intestacy, the coverture property concept is applicable in two commonly encountered survivorship patterns.

First, assume that an intestate is survived by a spouse and issue

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30. *Sanditen v. Sanditen*, 496 P.2d 365, 367 (Okla. 1972) (emphasis added).

31. 1 DE FUNIAK § 203. See text accompanying note 14 *supra*.

32. *E.g.*, CAL. PROB. CODE § 201 (West 1956).

33. *E.g.*, TEX. PROB. CODE § 45 (1956).

34. 1 DE FUNIAK § 198.

35. See OKLA. STAT. tit. 84, §§ 44, 213 (1971).

of their marriage only. If there is one child or the issue of only one child surviving, the spouse's moiety is one-half of the entire estate. If there are two or more children or their issue surviving, the spouse's moiety is one-third of the entire estate.<sup>36</sup> In these "single family" situations, one-third of the decedent's entire estate is the minimum spousal protection whether in intestacy or by forced share,<sup>37</sup> and the coverture property concept is totally irrelevant in the disposition of the estate.

It is not uncommon, however, to adjust the share in intestacy of a surviving spouse in case issue of the decedent's former marriage survive.<sup>38</sup> Oklahoma does so by use of the separate property concept:

Provided, that if the decedent shall have been married more than once, the spouse at the time of death shall inherit of the *property not acquired during coverture* with such spouse only an equal part with each of the living children of decedent, and the lawful issue of any deceased child by right of representation.<sup>39</sup>

Unless the intestate is survived, in addition to the spouse, only by one child of a former marriage or by that child's issue, it will be necessary to divide the estate into two components. Of the coverture property component, the surviving spouse is entitled to one-third; of the separate property component, however, the spouse is entitled only to a child's share, the fraction being dependent upon the number taking as, and as representative of, the intestate's children plus the spouse.

Second, assume that an intestate is survived by a spouse and at least one parent or one sibling, but no issue. In this situation it is not uncommon that the spouse receives preferential treatment.<sup>40</sup> Although under Oklahoma law the spouse is assured of at least one-half of the decedent's entire estate,<sup>41</sup> there may be more:

Provided, that in all cases where the *property is acquired* by the joint industry of husband and wife *during coverture*, and there is no issue, the whole estate shall go to the survivor, at whose death, if any of the said property remain, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation.<sup>42</sup>

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36. OKLA. STAT. tit. 84, § 213, First (1971).

37. See OKLA. STAT. tit. 84, §§ 44, 213 (1971).

38. E.g., UNIFORM PROBATE CODE § 2-102.

39. OKLA. STAT. tit. 84, § 213, First (1971) (emphasis added).

40. Compare, e.g., UNIFORM PROBATE CODE § 2-102 (1) *with id.* (2).

41. See OKLA. STAT. tit. 84, § 213, Second (1971).

42. *Id.* (emphasis added).



Since the coverture property concept is the preference factor, it will be necessary to divide the estate into two components. The surviving spouse is entitled to one-half of the separate and all of the coverture property. Furthermore, the surviving spouse's estate at death may have to be divided into components, although the "heirs" of each spouse in reality have little more than an expectancy in the coverture property.<sup>43</sup>

Oklahoma's forced share statute is keyed to the intestate succession statute:

[B]ut no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law . . . .<sup>44</sup>

It is not uncommon that a surviving spouse's intestate and forced shares are different.<sup>45</sup> Here again Oklahoma uses the separate property concept as a limiting factor. If an intestate is survived by a spouse, but no issue, parent or sibling, the spouse is entitled to the entire estate of the decedent.<sup>46</sup> In this survivorship pattern, a testator must leave the surviving spouse all of the coverture property, but in no case is more than one-half of the testator's separate property required to be left to a surviving spouse:

[P]rovided, however, that of the *property not acquired* by joint industry *during coverture* the testator be not required to devise or bequeath more than one-half thereof in value to the surviving spouse . . . .<sup>47</sup>

To ascertain the spouse's forced share interest, or to insure the integrity of the decree of distribution,<sup>48</sup> it may be necessary to determine the extent to which a decedent's estate is separate or coverture property.

43. The surviving spouse may freely dispose of the coverture property in any manner during his lifetime or by will. *Heirs, Etc., of Payne v. Seay*, 478 P.2d 889, 896 (Okla. 1970); *In re Griffin's Estate*, 199 Okla. 676, 189 P.2d 933 (1947).

A complete set of survivorship patterns illustrating application of Oklahoma's intestate succession statute is found in 1 R. HUFF, OKLAHOMA PROBATE LAW AND PRACTICE § 35 (1957).

44. Okla. Stat. tit. 84, § 44 (1971).

45. Compare, e.g., UNIFORM PROBATE CODE § 2-102 with *id.* §§ 2-201 to -207.

46. OKLA. STAT. tit. 84, § 213, Fifth (1971).

47. OKLA. STAT. tit. 84, § 44 (1971) (emphasis added).

48. When a surviving spouse receives less under the will than the laws of succession would give, and fails to make an election, it is mandatory that the decree of distribution provide for the surviving spouse to receive the statutory share instead of the share provided by will. Unless it so provides the decree is probably void.

1 R. HUFF, *supra* note 43, at 347 (footnote omitted); see *Ward v. Cook*, 152 Okla. 234, 3 P.2d 728 (1931) (collateral attack successful).

Oklahoma's usage of the coverture/separate property distinction in spousal succession is less than felicitous and may even be counter-productive.

First, Oklahoma is not a community property state for all purposes nor even in all spousal succession. The distinction, if it ever is relevant, becomes so only after a spouse's death *and* only when specific, but not too uncommon, survivorship patterns occur. The contingency little motivates spouses adequately to identify property as separate or as acquired during coverture. Consequently, tracing of property, with its inherent difficulties and including the fact that title may not be conclusive,<sup>49</sup> frequently will be necessary. Ultimately, the character of property may be determined by presumption.<sup>50</sup>

Second, although it is desirable to adjust the interest of the surviving spouse in an estate on the basis of what kindred of the decedent survive,<sup>51</sup> the adjustment can be accomplished in far less troublesome ways than by post-mortem injection of the coverture property concept. Models abound.<sup>52</sup>

Lastly, the coverture property concept in succession, when applicable and coupled with other Oklahoma policies, causes problems to spill over into postnuptial estate planning. In addition, the prospect of the concept's applicability causes problems which may cloud inter vivos donative transactions. These matters merit separate discussion.

#### POSTNUPTIAL ESTATE PLANNING

Oklahoma's coverture property concept, in combination with her policies relating to postnuptial contracts and post-mortem election of will benefits, may permit a surviving spouse to frustrate legitimate post-nuptial estate planning.

Consider the following frequently encountered situation:

Late in their marriage after the probability of being survived by issue reasonably has passed them by, husband and wife agree upon the dispositions of their estates after their deaths. Reciting their mutual

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49. Oklahoma has accepted the common-law resulting trust doctrine. See *Seran v. Davis*, 174 Okla. 433, 50 P.2d 662 (1935); cf. OKLA. STAT. tit. 60, § 137 (1971). Record title is, however, conclusive of ownership of property acquired during Oklahoma's years as a "true" community property state. OKLA. STAT. tit. 32, § 83 (1971); see *Catron v. First Nat'l Bank & Trust Co.*, 434 P.2d 263 (Okla. 1967).

50. See note 28 *supra* and accompanying text.

51. See UNIFORM PROBATE CODE § 2-102, comment. See also Lilly, *The Uniform Probate Code and Oklahoma Law: A Comparison*, 8 TULSA L.J. 159, 163-67 (1972).

52. E.g., UNIFORM PROBATE CODE § 2-102.

promises as consideration, they enter into a written contract containing the following provisions: (1) that all their property, regardless of who holds title, was accumulated by their joint industry during coverture; (2) that each would execute a will providing (a) that the survivor takes without restriction or limitation all of the estate of the first to die and (b) that, on the death of the survivor, *all* of the survivor's estate is to be divided into equal parts and descend one-half to the "heirs" of the husband and one-half to the "heirs" of the wife; and (3) that the contract and wills shall be irrevocable except by the written consent of both husband and wife during their lifetimes and absolutely irrevocable after the death of either of them. The wills called for by the contract were then executed.<sup>53</sup>

Few would quibble over the legitimacy or even the desirability of the estate plan agreed upon, and the hypothetical postnuptial contract would be a valid and enforceable one in most states<sup>54</sup> and under the Uniform Probate Code.<sup>55</sup>

Under Oklahoma law, however, the contractual estate plan can readily be nullified by either spouse.

In *In re Blaydes' Estate*,<sup>56</sup> the Oklahoma Supreme Court held:

A husband and wife cannot, by contract . . . , and by the making of . . . will[s] in pursuance thereto, nullify the provisions of 84 O.S. 1941 § 44 known as the "forced heir statute."<sup>57</sup>

The forced heir statute states that a surviving spouse cannot receive "less in value than would be obtained through succession by law . . . ." <sup>58</sup> The intestate succession statute states that the survivor shall take "the whole estate" if the spouse leaves no issue, parent or sibling.<sup>59</sup> Even if the spouse leaves either parent or sibling, but no issue, the survivor is entitled to all of the coverture property.<sup>60</sup>

The quality of the estate contemplated by the intestate succession statute for the survivor is of one "not . . . subject to any other limita-

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53. The hypothetical facts are based on actual facts appearing in *Simmons v. Richards*, 441 P.2d 378 (Okla. 1968), and *Little v. Cunningham*, 381 P.2d 144 (Okla. 1963).

54. See 1 DE FUNIAK § 136; 26A C.J.S. *Descent and Distribution* § 58(b) (1956).

55. See UNIFORM PROBATE CODE §§ 2-204, -701, 6-201.

56. 202 Okla. 558, 216 P.2d 277 (1950).

57. *Id.* (court syllabus par. 3). The statute cited in the quoted text has been recodified as OKLA. STAT. tit. 84, § 44 (1971).

58. OKLA. STAT. tit. 84, § 44 (1971).

59. OKLA. STAT. tit. 84, § 213, Fifth (1971).

60. *Id.*, Second. See notes 40-48 *supra* and accompanying text.

tions than those applicable to property otherwise inherited. . . ."<sup>61</sup> In other words, the survivor is to have absolute power of alienation over the property inherited.<sup>62</sup> The hypothetical contract and conforming will, on the other hand, give the survivor

a limited estate in the property which [is] in effect a life estate with extensive powers of management, control and disposition, *but it [does] not give . . . the whole estate*, because it limit[s] the survivor] to a life estate but with right of disposal of the property during [the survivor's] lifetime. This [is] a lessor [sic] interest than [the survivor is] entitled to receive under the statutory law of intestate succession.<sup>63</sup>

The contract is voidable; only by an election by a spouse to take the lesser estate does the contract become an enforceable one.

(Before discussing the means by which a spouse can defeat the hypothetical estate plan, one matter needs to be touched upon. In relevant reported cases, all spousal property admittedly was coverture property.<sup>64</sup> Suppose, however, that one or both of the spouses owned separate property at the time of execution of the contract. Since separate property can be converted into coverture property,<sup>65</sup> and assuming there are no vested third-party rights that can be affected thereby, execution of the contract may operate *inter sese*, in equity at least, to effect a conversion of the separate to coverture property. Thus could all spousally owned property be subject to the succession right.)

Oklahoma is highly protective of her spouses in the rules of election. No election may here be made prior to the death of the spouse.<sup>66</sup> Our contract nor a conforming will forecloses the survivor from taking the succession right;<sup>67</sup> no estoppel arises from their executions. After the death of one spouse, however, an election by the other may be made. Whereas in most jurisdictions the surviving spouse takes under the will unless an election to take under succession law is made,<sup>68</sup> Oklahoma follows the more protective minority rule. Our surviving spouse

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61. See *Little v. Cunningham*, 381 P.2d 144, 147 (Okla. 1963) following *Black v. Haynes*, 45 Okla. 363, 145 P. 362 (1914).

62. Cases cited note 43 *supra*.

63. See *Little v. Cunningham*, 381 P.2d 144, 147 (Okla. 1963) (emphasis added).

64. *E.g.*, cases cited note 53 *supra*.

65. See note 27 *supra* and accompanying text.

66. *In re Blaydes' Estate*, 202 Okla. 558, 561, 216 P.2d 277, 280 (1950).

67. See *id.* Irrevocability of wills is alien to Oklahoma law. See OKLA. STAT. tit. 84, §§ 52, 101 (1971); *Lyons v. Luster*, 359 P.2d 567 (Okla. 1961). Revocation by one spouse while both are alive becomes a breach only if that spouse later elects to take under the contract.

68. See E. SCOLES & E. HALBACH, *supra* note 15, at 77.

must be decreed the greater estate given by succession law if no election to take will benefits is made.<sup>69</sup>

Since election, express or implied, is the key to post-mortem validity of our contract, the estate plan easily can be avoided. Following probate of the first spouse's will, the survivor need only file an election to take under succession law, and the decree of distribution must so provide.<sup>70</sup> If the survivor dies during the course of administration of the first estate and without having made an election, the share under succession law must be decreed to the survivor's estate;<sup>71</sup> the estate plan has in effect been nullified by operation of law. Even if the survivor does nothing, through ignorance, oversight or otherwise, a decree awarding less than the succession right probably is void;<sup>72</sup> no election should be implied from the survivor's failure to act. It seems that an election to take under the first spouse's will, and thus be bound to the terms of a postnuptial contract, can be implied only when the will and contract confer on the survivor a greater estate than is required by succession law.<sup>73</sup> Thus, when the first estate is administered, only an express election to take under the will validates our contract and binds the survivor to its terms. Absent that election the survivor may revoke his earlier will and die intestate or will his estate in any manner he sees fit.

*Simmons v. Richards*<sup>74</sup> illustrates another method by which the survivor may avoid our contract. The coverture property of record title had been held by husband and wife in joint tenancy with rights of survivorship. Following her husband's death, the widow did not offer his will made pursuant to their contract for probate. Instead, a statutory proceeding<sup>75</sup> was held to determine his death, to terminate the joint tenancy and thus to vest title to the property in the widow. Later she executed a will inconsistent with the terms of their contract. In a suit by the husband's heirs, the supreme court held:

It is obvious that her later will in which [the widow] revoked

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69. See note 48 *supra*.

70. *Little v. Cunningham*, 381 P.2d 144 (Okla. 1963).

71. See *Stinson v. Sherman*, 405 P.2d 172 (Okla. 1965).

72. See note 48 *supra*.

73. See *Little v. Cunningham*, 381 P.2d 144, 148 (Okla. 1963), *distinguishing Cook v. Hahn*, 198 Okla. 364, 178 P.2d 894 (1947).

Dictum in *Simmons v. Richards*, 441 P.2d 378, 380-81 (Okla. 1968), however, suggests that "evidence of . . . oral statements" of the survivor may suffice to constitute an election. Perhaps the dictum will not generate a rule of law.

74. 441 P.2d 378 (Okla. 1968).

75. OKLA. STAT. tit. 58, § 911 (1971).

the prior joint [contractual] will was an election not to take under the joint will. Thereupon she acquired the whole estate by intestate succession [sic] with the power to dispose of the same by her will.<sup>76</sup>

Even if execution of the contract by the spouses altered *inter sese* the survivorship rights in the joint tenancy property, the property was nonetheless coverture property, and the postnuptial contract could not operate to deprive the widow of her succession right.<sup>77</sup>

The decided cases give rise to interesting speculation about the strength and scope of the combination of Oklahoma policies in respect to coverture property, postnuptial contracts and forced heirship.

Suppose that our hypothetical couple had decided to use an *inter vivos* trust as their estate planning device rather than the contract and wills, that they conveyed the coverture property to a trustee, reserving the income and an unlimited joint power of invasion to themselves during their lifetimes; and that on the death of the first spouse, the income and an unlimited power of invasion is reserved to the survivor, at whose death, however, the corpus remaining is to be conveyed in an agreed upon manner. The surviving spouse clearly could effectively terminate the trust by a complete invasion of corpus. If, however, the survivor's invasion power were not unlimited, *Simmons v. Richards* is strong authority for the absolute right to the coverture property embraced within the trust by right of succession. There appears to be no reason why the survivor cannot "elect" to take the property free of the trust and absolutely: transfer of the coverture property into the trust should not give rise to an estoppel nor postnuptially change the coverture character of the property and give rise to indefeasible third-party rights.

Even a contractual estate plan which is facially valid at the time of its execution could subsequently run afoul of the combination of Oklahoma policies. Assume that spouses with one child agree that the survivor shall take absolutely one-half of the first decedent's estate and that the remaining one-half shall be placed in trust for the survivor for life with the remainder to their issue, if any, and, in default of issue, to agreed upon collateral relatives. If no issue survive on the death of the first spouse, the contract is voidable by the survivor as to any coverture property within the decedent's estate: the survivor's succes-

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76. 441 P.2d at 381.

77. *See id.* Although the court seems to confuse the law of succession with that of joint tenancy, the result of *Simmons* is consistent with pure succession law cases such as *Little v. Cunningham*, 381 P.2d 144 (Okla. 1963).

sion rights can be determined only on the death of the first spouse and, in this case, the survivor is entitled to take all of the coverture property.<sup>78</sup>

The foregoing examples have been carefully chosen to incorporate the coverture property concept as the specific factor giving rise to the voidability of the hypothetical estate plans. Oklahoma's injection of the coverture property concept into spousal succession has already been criticized<sup>79</sup> and, although applicable, need not be iterated. Elimination of the concept, thus making Oklahoma a "pure" common law property state, would at least remove a contingency which inhibits effective spousal estate planning in many cases.

Additionally, however, Oklahoma might well reconsider not only her election and postnuptial contract policies but her antenuptial contract policy as well. By antenuptial contract a prospective spouse may give up all succession rights, including forced heirship election,<sup>80</sup> the statutory homestead, exempt property and family allowance rights, however, may not be waived.<sup>81</sup> The Uniform Probate Code is representative of the modern trend:

The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse . . . is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver . . .<sup>82</sup>

Even if Oklahoma were to retain her coverture property concept, a provision such as that in the Code would permit her spouses to engage in postnuptial estate planning with full expectations that the plans would be given effect.

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78. Authorities cited notes 57-60 *supra*.

79. See text accompanying notes 49-52 *supra*.

80. OKLA. STAT. tit. 84, § 44 (1971).

81. See Lilly, *supra* note 51, at 177-78.

82. UNIFORM PROBATE CODE § 2-204.

## INTER VIVOS GIFTS

It always has been the statutory law of Oklahoma that, except for the compulsory support obligation,<sup>83</sup> "neither husband nor wife has any interest in the *separate property* of the other . . . ."<sup>84</sup> As early as 1903 the supreme court recognized

that the law makes it possible for a man during his life to give practically all of his property to those whom he owes no obligation, and deprive those of his own household of the comforts of life; but this is only an incident to the right of husband and wife to own and control *separate property*.<sup>85</sup>

Although an illusory gift of separate property does not defeat succession rights of the spouse or heirs, only creditors or someone representing them or their interests can recall a completed gift.<sup>86</sup> In 1972 the court reaffirmed the principle that a gift of separate property is binding as against the donor's successors.<sup>87</sup>

In community property states, as in Oklahoma, gifts of separate property may be rather freely made. Donation of community property is, however, variously limited. Where Spanish law is followed, for example, gifts of community property may be neither unreasonable nor made with intent to injure or defraud the wife.<sup>88</sup>

Oklahoma, it appears, has moved in the direction of Spanish law insofar as inter vivos donation of property acquired during coverture is concerned. The leading case, decided in 1972, is *Sanditen v. Sanditen*.<sup>89</sup>

Mrs. Sanditen alleged that her husband had given his relatives, the defendants, property acquired by their joint efforts during coverture. The gifts apparently exceeded eight million dollars in total value. The transfers allegedly were made without her knowledge and with intent to defraud her of her marital and vested rights. In reversing the trial court order sustaining a demurrer to the petition, the supreme court said:

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83. OKLA. STAT. tit. 32, § 3 (1971). See text accompanying note 7 *supra*.

84. OKLA. STAT. tit. 32, § 4 (1971) (emphasis added).

85. Farrell v. Puthoff, 13 Okla. 159, 163, 174 P. 96, 97 (1903) (emphasis added).

86. See *id.*; Courts v. Aldridge, 190 Okla. 29, 120 P.2d 362 (1941).

87. Irvin v. Thompson, 500 P.2d 283 (Okla. 1972).

88. See generally 1 DE FUNIAK §§ 117, 119, 122.

In California the wife must join in conveyances of community realty, CAL. CIV. CODE § 5127 (West 1970), and consent in writing to gifts of community personalty, *id.* § 5125, fully to protect transferees.

89. 496 P.2d 365 (Okla. 1972).



While we do not agree with plaintiff's argument that a wife has a vested interest in jointly acquired property, we do find, by this opinion, that a married man cannot make gifts of jointly acquired property during his lifetime without the consent or knowledge of his wife where the transfer is in fraud of the wife's marital rights.<sup>90</sup>

In reaching its conclusion, the court relied heavily on analogy. Spousal succession rights are not defeated by incomplete gifts.<sup>91</sup> Property rights in divorce are not defeated by gifts, even complete ones, made in anticipation of commencement of divorce proceedings.<sup>92</sup> The support obligation is not defeated by gifts which overly deplete the

90. *Id.* at 367.

The argument that a wife's interest in coverture property is vested was based on language in two cases concerning property rights incident to divorce. Coverture property, the court said in *Thompson v. Thompson*, 70 Okla. 207, 208, 173 P. 1037, 1038 (1918), "is regarded as being held by a species of common ownership." "If property has been acquired by joint effort during marriage the wife has a vested interest therein which is not forfeited even though she may be at fault." *Collins v. Oklahoma Tax Comm'n*, 446 P.2d 290, 295 (Okla. 1968). These cases are, however, brushed aside in *Sanditen*, 496 P.2d at 367:

They do not purport to construe the vested interest of a wife in jointly acquired property beyond the statutory disposition of property in a divorce action. When a divorce action is pending her right to the jointly acquired property is vested. But the vesting takes place by reason of the divorce pendency under our statute and not by the marriage relationship which existed between the parties.

A wife does not have joint ownership in jointly acquired property as we held in *Catron v. [First National Bank & Trust Co. of Tulsa]*, Okla., 434 P.2d 263 (1967), for if she did that would return this jurisdiction to a community property state which [sic] was repealed by the legislature in 1949.

The language in *Sanditen* is as unfortunate as the language in *Thompson* and *Collins*, *supra*, for it seems to place a premium on divorce. See 496 P.2d at 369 (dissenting opinion). If a wife files an action for divorce, her interest in coverture property becomes "vested." So long as the marriage continues, however, her interest in that property is only "contingent." See text accompanying note 30 *supra*. The court seems to suggest that, within the limits permitted by *Sanditen*, a husband may freely transfer property until a divorce action is commenced. *But see* *Bennett v. Bennett*, 15 Okla. 286, 81 P. 632 (1905). The court should have said that divorce pendency restricts alienation of property, but that it vests only as the result of a court decree—the position it took in *York v. Trigg*, 87 Okla. 214, 209 P. 417 (1922), to explain "vested interest" language in *Davis v. Davis*, 61 Okla. 275, 161 P. 190 (1916).

91. 496 P.2d at 367. Where a donor spouse does not intend to divest himself of ownership, control and enjoyment of property, the "gift" is incomplete, the property is part of his estate by way of resulting trust, and thus it is subject to the survivor's succession rights. The court could have cited as authority *Courts v. Aldridge*, 190 Okla. 29, 120 P.2d 362 (1941). *Accord*, *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937). This judicially created rule applies to separate and jointly acquired property.

92. 496 P.2d at 367. The divorcing court has extensive powers in respect to property of the spouses. Jointly acquired property is subject to an equitable division; a spouse's separate property is subject to alimony, support and litigation costs. *See* OKLA. STAT. tit. 12, §§ 1275-76, 1278 (1971). A spouse may be treated as a quasi creditor in relation to transfers in fraud of property rights in divorce. *Bennett v. Bennett*, 15 Okla. 286, 81 P. 632 (1905) (alimony); *see* OKLA. STAT. tit. 24, § 109 (1971).

obligated estate.<sup>93</sup> The homestead right is not defeated by improper transfer.<sup>94</sup> "When a husband has violated these rights his actions constitute a fraud upon the marital rights of the wife."<sup>95</sup> Thus did the court recognize that the legislature, in regulating spousal property, has based rights on the marriage itself and on events which may occur during or in termination of the marriage,<sup>96</sup> and that the courts have responded, as necessary, to secure those rights.

Addressing itself to the issue presented by Mrs. Sanditen's petition, the court said:

We see no difference in this case. If the plaintiff's husband gave away their jointly acquired property with an intent to defraud her of her marital rights to this property upon his death then the law should be just as responsive in protecting her interest as instances . . . where the gift is made anticipatory to a divorce, or where it is given incomplete with an attempt [sic] to defeat her interest upon his death. In all of these instances the principle criteria [sic] is the fraudulent intent of the husband to deprive the wife of her marital rights as provided by statute.<sup>97</sup>

In this manner the court recognized another marital right, one apparently based on the expectancy of a spouse in intestate succession.<sup>98</sup>

There can be little doubt that the *Sanditen* decision poses many questions, as much perhaps for what the court's opinion does not say as for what it does say, and perhaps because it was decided on demurrer.

The only attempt of the court to define the scope of and clarify the right announced is the following provocative paragraph:

93. 496 P.2d at 367. See note 7 *supra* and accompanying text. One who furnishes necessities to a spouse may treat depleting gifts as fraudulent conveyances. See OKLA. STAT. tit. 24, §§ 101-07 (1971); cf. *Anderson v. Neiman-Marcus Co.*, 185 Okla. 568, 95 P.2d 584 (1939). The supported spouse should be considered a quasi creditor as to such gifts. See note 92 *supra*.

94. 496 P.2d at 367. A conveyance of the homestead to a third person by one spouse alone may be set aside unless it has been recorded for ten years or unless the conveying spouse was abandoned. OKLA. STAT. tit. 16, §§ 4, 6 (1971).

95. 496 P.2d at 367.

96. See the statement of the court quoted in the text accompanying note 30 *supra*.

97. 496 P.2d at 367-68.

98. [T]he only meaning that can be attributed to [Mrs. Sanditen's] allegation is that her husband fraudulently gave the property away so she would not inherit it at his death as provided in [the intestate succession statute]. The petition is not as precise and definitive as it should be, but perhaps it is excusable in view of the unexplored area of law that is involved. In any event, we can determine from it that if the facts alleged are true then she is entitled to relief in a court of law.

496 P.2d at 368.

Of course, we do not intend to diminish the authority of a husband as head of the family or interfere with his duty to support himself and his wife. By statute he has the right to use his separate property and property acquired during coverture to fulfil his marital obligations and to conduct the affairs of his business in a manner which he deems proper and necessary. Title 32 O.S. 1961, Section 3. Nor do we intend to prohibit either spouse from making gifts of their jointly acquired property. A wife cannot complain of reasonable gifts by a husband to his children by a former marriage. In *York v. Trigg*, 87 Okl. 214, 209 P. 417 (1922), we held specifically that a husband may give away property acquired during coverture unless it is shown the gift was made in fraud of the marital rights and that Title 84 O.S. 1961, Section 44, which prohibits a married man from bequeathing more than two thirds of his property away from his wife, does not in any way limit or restrict him in making such gifts. *It is only when the gift has sinister elements of fraud of the marital rights that the law protects the wife.* The burden of proof though rests strongly upon the wife. In determining the good faith of the charitable transfers the court must look to the condition and relationship of the parties, the amount of the gifts in relation to the husband's estate and income and all other attending circumstances.<sup>99</sup>

The meaning of the court's language is difficult to fathom; some of its thoughts seem at best only tangentially germane to the issue confronting it. The quoted language nor any other in *Sanditen* makes clear just what "marital right" it is of the wife that can be defrauded by the husband's gifts, but, whatever it is, the husband must apparently be "reasonable" in his dealings related to it.

The court's mention of *York v. Trigg*<sup>100</sup> is somewhat puzzling for that case is not predictive of the result in *Sanditen*. *York* merits discussion, however, as it appears to limit the scope of the *Sanditen* rule.

Jerome and Elizabeth York were married in Illinois in 1870 at a time when neither owned property. They resided in four common law property states—Illinois, Kansas, Arkansas and Tennessee—before moving to Oklahoma in 1912. When Jerome died an Oklahoma resident in 1919 he was survived by his widow and four children. His estate at death was valued at between \$100,000 and \$150,000, of which his last will provided that \$70,000 was to be placed in trust for his widow. The court observed, however, that but for inter vivos gifts

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99. *Id.* (emphasis added).

100. 87 Okla. 214, 209 P. 417 (1922).

to two of his children the estate would have been valued at more than a half million dollars. The widow's action sought to set aside the gifts and enlarge the estate subject to her forced share election. Since all of the property had been accumulated during the York marriage, the issue framed by counsel was:

Can a married man, by gifts inter vivos, give away personal and real property acquired during coverture by joint industry of himself and wife, and thus defeat his wife of any interest in such property?<sup>101</sup>

In response, the court first concluded that the gifts to his children had been freely and voluntarily made and that they were complete and not illusory. The court then quoted from three earlier cases. The two Oklahoma cases<sup>102</sup> concerned gifts by a husband of his separate property only. The federal case,<sup>103</sup> which followed Kansas law, is supportive of the *York* result, however. The court next addressed itself to the protections afforded Mrs. York by Oklahoma law:

[U]nder rights of inheritance conferred upon the wife by statute, the rule is that the husband may, during his lifetime, by gifts or conveyances made in good faith, without any intention of defrauding the wife, transfer his real or personal property.<sup>104</sup>

The court added:

It would undoubtedly require a strained construction of [the forced heir statute], prohibiting the husband from bequeathing more than two-thirds of his property away from his wife, to construe it as providing a prohibition or restriction against a married man disposing of his property by conveyance, gift, or otherwise during his lifetime. The statute is not susceptible of such construction.

Under [the support statute], the husband owes the duty to his wife of supporting her out of his property. It is plain that the only claim or interest that the wife has against the property of her husband during his lifetime is that it is liable for her proper support. It appears from the evidence in the case at bar that Jerome B. York during his lifetime at all times amply provided for the support of his wife, the plaintiff in this action. In his will he made adequate provision for her support. Should she elect not to take under the will, she

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101. *Id.* at 217, 209 P. at 420.

102. *Garrison v. Spencer*, 58 Okla. 442, 160 P. 493 (1916); *Farrell v. Puthoff*, 13 Okla. 159, 74 P. 96 (1903). See text accompanying notes 83-87 *supra*.

103. *Williams v. Williams*, 40 F. 521 (C.C.D. Kans. 1889).

104. 87 Okla. at 220, 209 P. at 423.

would inherit a one-third interest in the estate of her deceased husband, valued from \$100,000 to \$150,000. Under no view of the facts can it be said that the deceased failed to discharge any marital duty that he owed to the plaintiff in this action during the existence of such relation. Any conveyance or gift by the husband of his property not in fraud of the marital rights of his wife are [sic] valid as to her.

The evidence in this action clearly establishes the fact that for 30 years prior to the death of Jerome B. York his wife, the plaintiff in this action, by reason of being insane, was wholly mentally incompetent to transact the ordinary business affairs of life, and, if the contention of counsel for the plaintiff is to be sustained that Jerome B. York was restricted in the conveyance or transfer of his property, it would have been necessary for him in order to carry on the ordinary transactions with reference to his property to have had a guardian appointed for his wife as an incompetent, and in all sales and conveyances of such property had the guardian of his wife join in such sales and conveyances under proper orders of the probate court. We are clearly of the opinion that there is [sic] no restriction or limitation upon Jerome B. York in disposing of his property during his lifetime in the absence of fraud.<sup>105</sup>

Relying on *In re Estate of Stone*,<sup>106</sup> counsel finally argued that Mrs. York had a tangible vested interest in her husband's property during his lifetime. *Stone*, however, was brushed aside:

[T]he court was construing the second paragraph of [the intestate succession statute], wherein it is provided that, if the decedent leaves no issue, the estate goes one-half to the surviving husband or wife and the remaining one-half to the decedent's father or mother unless the property was acquired by the joint industry of the husband or wife during coverture; then, in that event, the whole estate should go to the survivor. *The statute has no application to a case except where there is no issue.*<sup>107</sup>

Two conclusions can be drawn from *York*. First, divorce and homestead aside,<sup>108</sup> during continuance of the marriage only gifts which render the husband unable to support his wife may constitute a fraud upon her marital rights.<sup>109</sup> Second, the coverture property concept is

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105. *Id.* at 220, 209 P. at 424.

106. 86 Okla. 33, 206 P. 246 (1922). Counsel also relied on the divorce case of *Davis v. Davis*, 61 Okla. 275, 161 P. 190 (1916).

107. 87 Okla. at 222, 209 P. at 424 (emphasis added). The construed statute is quoted in part in the text accompanying note 42 *supra*.

108. See notes 92 and 94 *supra* and accompanying text.

109. See note 93 *supra* and accompanying text.

inapplicable when the husband dies survived by issue; only gifts which were made involuntarily or which were incomplete may constitute a fraud upon the marital rights of the widow.<sup>110</sup>

On the basis of the foregoing, it must be assumed that Mr. Sanditen was not survived by issue. That fact, however, nowhere appears in the court's opinion.<sup>111</sup> Had there been issue of the marriage, no succession right of the widow could have been predicated on the coverture property concept, and *York* permits voluntary and complete gifts of coverture property so long as the support obligation is properly met.

It is unfortunate that *Sanditen* was decided on demurrer and that no reported case has yet applied its "rule" to the merits. We can, therefore, only speculate about application of the "rule."

First, we know that "[t]he burden of proof rests strongly upon" the surviving spouse who seeks to set aside a charitable transfer.<sup>112</sup> It would have been more helpful had the court used traditional language in establishing the proof standard. It does not seem unreasonable, however, to assume that "clear and convincing proof" is required.<sup>113</sup>

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110. *York v. Trigg*, 87 Okla. 214, 209 P. 417 (1922) (by implication).

111. It is interesting to note that Mr. Sanditen was living at the time his wife filed her action against the defendants. He had, however, died prior to the trial court's ruling on the demurrer to the petition. *Tulsa World*, Jun. 4, 1970, § B, at 1, col. 2. Mrs. Sanditen was his guardian.

Mrs. Sanditen's action, insofar as it was based on the intestate succession and forced heir statutes, would seem to have been premature while her husband was living, at least so long as we adhere to the lifetime fertility rule. Justice Lavender in dissent suggests, however, that an action might be appropriate if "the husband knew he was about to pass away . . ." 496 P.2d at 370.

112. 496 P.2d at 368.

113. On July 8, 1975, the supreme court decided the case of *Alexander v. Alexander*, 538 P.2d 200 (Okla. 1975), and emphasized the proof burden of the surviving spouse as follows:

Contingent marital rights are not destroyed if the transfer is in fraud of those marital rights. It is only when there are sinister elements of fraud of the marital right that the law protects the surviving spouse. The burden of proof rests strongly on that surviving spouse. Fraud will not be implied from doubtful circumstances which only awaken suspicion. [*Sanditen v. Sanditen*, 496 P.2d 365 (Okla. 1972)]. A transfer that defeats contingent marital rights is not ineffective, per se. Fraud of those marital rights must be proven and judicially determined.

In the case at bar, the most doubtful circumstance is the omission of the wife from the will. This occurred in 1964 after the marriage in 1958. The first savings certificate held in joint tenancy other than with the wife was issued in 1970. The other joint tenancy savings certificate was issued in 1972. The total face value of the two certificates was \$24,000. The wife, through joint tenancy, received the house in town with a value of some \$6,000. She also received her interest in the approximately \$12,000 estate by her election to take by succession. These circumstances could be found to awaken suspicion. They do not prove fraud. Fraud will not be implied from the circumstances of this case.

Second,

[i]n determining the good faith of the charitable transfer the court must look to the condition and relationship of the parties, the amount of the gifts in relation to the husband's estate and income and all other attending circumstances.<sup>114</sup>

One noted authority on domestic relations has puzzled over the *Sanditen* rule as follows:

Just what does *Sanditen* hold concerning the limitations on the husband's right to give away jointly acquired property? The majority opinion merely tells us that the plaintiff's petition alleged that the husband "fraudulently" gave the jointly acquired property away so that the wife could not inherit it. What conceivable meaning would "fraudulent" have in this context? Does it refer to the husband's subjective intent? Or does it refer to the usual meaning of fraudulent conveyance, i.e., a transfer for less than fair consideration made when a person believes he will incur debts beyond his ability to pay as they mature? . . . Or does it refer to a sham transfer, one after which the husband remains in substantial control of the property?<sup>115</sup>

It appears that *Sanditen* does establish a test based on the donor spouse's intention in making a gift. If the spouse's express intention is to deprive his survivor of coverture property, and that can be proved, the gift, even if complete, is made in bad faith, and *Sanditen* clearly is broad enough to permit the survivor to have it set aside. An express intention rule alone, though expanding prior law, would be of little comfort to surviving spouses since true intention is easily concealed. To be of real effect, *Sanditen* must contemplate a rule based as well upon the donor spouse's subjective intent, that is, in appropriate circumstances a court must be able to impute a fraudulent intention. The language of the decision suggests such a rule.<sup>116</sup>

Two bases upon which a fraudulent intention can be imputed readily appear. First is the "contemplation of death" idea suggested by the dissenting justice: "If the situation were such that the husband knew he was about to pass away . . . I could probably concur with the

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538 P.2d at 204.

Somewhat beyond the scope of this article is the probable effect of Oklahoma's Dead Man's Statute, OKLA. STAT. tit. 12, § 384 (1971), especially when the donee is plaintiff as, for example, in a suit for a declaratory judgment or to remove a cloud on title.

114. 496 P.2d at 368.

115. H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 531 (2d ed. 1974).

116. See the language quoted in the text accompanying note 14 *supra*.

result reached by the majority . . . ."<sup>117</sup> On this basis the court could develop a rather mechanical rule as is utilized in federal tax law<sup>118</sup> and to be applied in any case. A mechanical rule would act much in the nature of a statute of limitations and provide some protection to the spouse's donees.<sup>119</sup> The majority's language suggests, however, a flexible rule to be applied case by case, the proximity of the gift to death being one of the "attending circumstances" to be considered. Second is the idea of "support." Gifts which render the survivor unable to maintain the standard of living enjoyed during the marriage would be fraudulent and should be set aside. In any event, only by further development in future cases shall we know the direction the supreme court intends the law to go.

The *Sanditen* decision is an unfortunate one for several reasons. First, the coverture property marital right need never have been recognized by the court. "The law is fundamental that an expectant heir has no vested interest or estate in property which he may subsequently inherit."<sup>120</sup> Although the court clearly recognizes the right as a contingent one, even that is not mandated by the intestate succession statute which merely states that "where the property is acquired . . . during coverture . . . the whole *estate* shall go to the survivor . . . ."<sup>121</sup> The term "estate" could have been defined as it traditionally has been to include only property in the estate to be administered, that is, property which can be vested in the heirs only by court decree, saving to them only the rights to have set aside involuntary and illusory transfers made by the decedent. The expansion of spousal succession law is unwarranted.

Second, the decision establishes greater disparity than existed before it between a surviving spouse whose deceased spouse is survived by issue and one whose deceased spouse is not survived by issue. The property rights which persuaded the *Sanditen* court to recognize the coverture property marital right—incomplete gifts, property in divorce, the support obligation and homestead<sup>122</sup>—are all available to the survivor whether or not the deceased spouse is survived by issue. The limitations placed by *Sanditen* upon a husband as head of the family, and where there is no issue, approach those of a true community prop-

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117. 496 P.2d at 370 (dissenting opinion).

118. See INT. REV. CODE OF 1954, § 2035.

119. See text accompanying notes 125-26 *infra*.

120. *York v. Trigg*, 87 Okla. 214, 222, 209 P. 417, 425 (1922).

121. OKLA. STAT. tit. 84, § 213, Second (1971) (emphasis added).

122. See notes 91-95 *supra* and accompanying text.



erty state,<sup>123</sup> whereas *York* leaves a husband with issue relatively unhampered.<sup>124</sup> The expanded protection is unwarranted.

The third reason that *Sanditen* is an unfortunante decision is suggested by the dissenting justice:

The "contingent marital rights" referred to in the majority opinion are in my view entirely too speculative and flimsy to form the basis for allowing a surviving spouse to void the other spouse's gifts of property made over a period of many, many years while they were living together as man and wife.<sup>125</sup>

*Sanditen* itself well illustrates the point. The action was commenced in 1969; the eight million dollars was allegedly given away during the years from 1941 through 1961.<sup>126</sup> Since one's heirs cannot be foretold, theoretically at least, no gift of coverture property is absolutely safe from recall until and unless the donor spouse dies survived by issue or unless the other spouse consents to the gift or has knowledge of it and does nothing about it within a reasonable time. The implications of *Sanditen* for title examiners, transfer agents and others who facilitate and approve property transfers, though perhaps speculative at this point, could prove troublesome in future cases if its doctrine is further expanded. As a practical matter, full protection from a *Sanditen* recall may require that both spouses join in or consent in writing to any transfer of property owned by either spouse. The uncertainty affecting all persons interested in a coverture property transfer is unwarranted.

#### CONCLUSION

Oklahoma's utilization of her community-property-like coverture property concept to adjust the share in succession of a surviving spouse is troublesome primarily because its applicability can be determined only at the death of the first spouse and on the basis of what relatives survive the spouse. Although the concept is relevant in divorce,<sup>127</sup> its application is mechanical only in spousal succession. These factors little motivate spouses adequately to identify spousally owned property by categories, a situation which is conducive of estate wasting litigation.

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123. See note 88 *supra* and accompanying text.

124. See text accompanying notes 108-10 *supra*.

125. 496 P.2d at 370 (dissenting opinion).

126. *Tulsa World*, Jun. 4, 1970, § B, at 1, col. 2.

127. The divorcing court makes a "just and reasonable" division of coverture property. See OKLA. STAT. tit. 12, § 1278 (1971); *Thompson v. Thompson*, 70 Okla. 207, 173 P. 1037 (1918).

The retroactive effect of the coverture property concept should be eliminated from Oklahoma succession law; the survivor's share should be adjusted by a factor that is certain, as is the case in almost all common law property states.

The coverture property spillover into spousal estate planning frequently frustrates legitimate, reasonable and desirable goals of spouses. Although elimination of the coverture property concept from succession law would validate some currently proscribed plans, modernization of Oklahoma's policies toward ante- and postnuptial contracts and election of will benefits would greatly enlarge the ability of all spouses effectively to plan financially for their deaths.

The *Sanditen* decision, not being mandated by the succession statute, should be overruled at the first opportunity, either judicially or by legislation. By building on the coverture property concept the supreme court has unnecessarily complicated the law of inter vivos gifts and permitted unwarranted disparity in the possible effect to be accorded gifts of coverture property by a spouse with issue and those by a spouse without issue.

Oklahoma should give up her hybrid status and become totally either a community property or a common law property state. Greater spousal protection is provided by community property law than is the case in most common law property states. The protection can be nearly equal, however, if, in a common law property state, the law is expanded to deny a spouse the ability by concerted effort effectively to disinherit the survivor.<sup>128</sup>

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128. See, e.g., UNIFORM PROBATE CODE §§ 2-201 to -207.