Wills: Election between Rights under Will and As Surviving Spouse

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thinking in the area of search and seizure. The United States Supreme Court in *Mapp v. Ohio* laid down the rule that evidence secured by unreasonable search and seizure is not admissible in state criminal prosecutions. Based on this and other recent decisions handed down by the United States Supreme Court, which show a growing concern over the rights of accused persons and which have forced the states to observe the full meaning of constitutional guarantees, a contrary finding in the *Rees* case would have been more desirable.

*Robert J. Fulgency*

**WILLS: ELECTION BETWEEN RIGHTS UNDER WILL AND AS SURVIVING SPOUSE**

By clear and unequivocal language the Oklahoma Legislature placed a limitation upon the power of one spouse to disinherit a surviving spouse, or give the survivor, by will, less than the survivor would receive through succession by law. The Oklahoma statutes are silent on any right or requirement of election to be made by the surviving spouse. Because of this fact various Oklahoma decisions have been inconsistent regarding the right of election by a surviving spouse. Thus, it has been a debatable question in Oklahoma whether a surviving spouse (if he or she was given less under the will than is provided for by statute) had to elect to take under the statute of succession prior to the final decree of distribution, or whether the election must be made to take under the will.

Apparently the recent case of *Stinson v. Sherman* presented to the Oklahoma Supreme Court an opportunity to settle this conflict over election by the surviving spouse. The facts in this case disclose that Icle Victoria Stinson died in 1952, leaving as heirs her husband, L. E. Stinson, and her daughter, Eugenia Sherman. Her Oklahoma estate consisted of real and personal property, the appraised value being about $22,000.00, and a community property estate of approximately $57,000.00. By the terms of her

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24. 367 U.S. 643 (1961). The Court ordered state courts not to admit evidence seized in violation of the fourth amendment. Cleveland police invaded Dollree Mapp's home without a warrant hunting a bombing suspect and policy slips. The police discovered obscene materials and she was convicted for possession of these materials.


3a. 405 P.2d 172 (Okla. 1965).
NOTES AND COMMENTS

will the testatrix gave her entire estate to her daughter, stating that her husband was well fixed financially and that the disposition of her estate had his full knowledge and approval. The record further disclosed that her surviving husband died approximately thirty-five days following the death of the testatrix. His deceased wife's will had not been offered for probate at the time of his death and he had made no election how he would take.

The County Court concluded that L. E. Stinson was a forced heir and that one-half of Icle Victoria Stinson's estate should be distributed to the estate of L. E. Stinson under the law of descent and distribution. It was determined that the other one-half of her estate should be distributed to her daughter.

The decision of the County Court was appealed to the District Court. Neither side appealed from the determination of the County Court that L. E. Stinson was a forced heir to those assets of the Estate of Icle Victoria Stinson which were non-community property. The only question for the District Court was the distribution of the community assets of the testatrix.

The District Court concluded that L. E. Stinson had not elected whether to take by succession or under the will of the testatrix prior to his death and as a result of his failure to make such an election he was a forced heir to all the non-community assets of her estate, but was not a forced heir to the community property assets of her estate. It was from this judgment that the appellants, the Administrators of the Estate of L. E. Stinson, perfected their appeal to the Supreme Court.

Before going further, references should be made to the remaining judicial background of the principal case. In 1964, the Oklahoma Supreme Court rendered a decision on exactly the same case. This decision appearing in the Pacific Reporter Advance Sheet on August 6, 1965. The decision related the facts exactly as set forth above. However, the court reached an entirely different conclusion than was reached in the principal case affirming the decision of the District Court. Justice Welch, speaking for the majority of the court, stated that the right of the surviving spouse to elect to take under the "Forced Heir" statute in contravention of, and against the will of the deceased, is a personal right. Thus, when L. E. Stinson died without having exercised this right, it expired with him. Therefore, since L. E. Stinson failed to make an election prior to his death, his estate took what was given to him under the will of his wife and not according to the controlling statute.

4 OKLA. STAT. tit. 84 § 213 (1961).
5 Stinson v. Sherman, 35 OKLA. B. A. J. 441 (1964). It should be noted that this case appeared in the Pacific Reporter Advance Sheets on August 6, 1965. Evidently the opinion was withdrawn for it did not appear in the designated bound volume.
6 OKLA. STAT. tit. 84 § 44 (1961).
7 OKLA. STAT. tit. 84 § 44 (1961).
The administrators of L. E. Stinson’s Estate advanced the argument that the Supreme Court in previous decisions had held that a will which leaves to the surviving spouse less than the survivor is entitled to under succession is void as to the surviving spouse. However, the Supreme Court took the position that this rule had been modified by subsequent decisions and that the more favorable view is that the will is voidable at the election of the survivor and forced heir. The court also referred to Odle v. Baskins, wherein the court had concluded that while administration proceedings are pending in the estate of a spouse who died testate, the surviving spouse, if the will is to be avoided, must elect to take by succession or be bound by the final decree of distribution under the will. Therefore, the failure of L. E. Stinson to elect to take under the “Forced Heir” statute prior to his death had the effect of making the will operative even though it gave him less than was provided for by statute. Justice Welch stated that the election of the surviving spouse to take under the statute was a personal right which does not survive to his heir or personal representatives. Consequently, the Administrators of L. E. Stinson’s estate could not make the election to take under the statute.

Thus, the principal case previously had been considered by the Supreme Court. However, when the court took this second look at Stinson v. Sherman, the previous decision was not mentioned and the court in a per curiam decision concluded that the District Court erred in holding that L. E. Stinson was not a forced heir to the community property assets of Icle Victoria Stinson’s Estate. The court stated that it had been decided that the community property law of Oklahoma was not a law of inheritance but a law of property and that according to the Oklahoma Community Property Statute, the executor of Mrs. Stinson’s estate is compelled to distribute the testatrix’s share of the community property as other property of her estate. The court concluded that by statute in Oklahoma one spouse legally cannot bequeath or devise away from the other so much of his or her estate that the survivor would receive less in value than would be received through succession by law. The court stated that this statutory rule also applies to community property assets once they have been distributed. In conclusion the court said that because L. E. Stinson did not elect to take under the will, the statute is controlling and the trial court has no alternative but to follow the law of succession.

10 190 Okla. 664, 126 P.2d 276 (1942).
14 OKLA. STAT. tit. 84 § 44 (1961).
15 OKLA. STAT. tit. 84 § 44 (1961).
16 OKLA. STAT. tit. 84 § 213 (1961).
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In this latest interpretation of Stinson v. Sherman, wherein the Supreme Court apparently settled the controversy in Oklahoma regarding the election of a surviving spouse, Justice Jackson concurred specially. In this special opinion the present position of the Supreme Court is apparently set forth.

According to Justice Jackson, it cannot be inferred from the "Forced Heir" statute that the surviving spouse must elect to take under the law of succession in order to avoid the provisions of the will which are in conflict with that statute. Justice Jackson pointed out that in several states there are cases which hold that if a surviving spouse fails to make the election to take under the statute, she takes under the will. However, in all the states where these cases were decided there is a statute which provides that where the surviving spouse does not make an election he or she is deemed to take under the will. The rule in Oklahoma is to the contrary. In Oklahoma it is the rule that if a will gives the surviving spouse less than the statute provides, the will is voidable as to such surviving spouse at his or her election. The will is rendered operative when the surviving spouse elects to take under the will, but is rendered inoperative as to such heir by his or her election to take under the law.

By analogy, the principle of offer and acceptance in contract law, according to Justice Jackson, expresses the view he is attempting to convey. A will which gives the surviving spouse less than a survivor would receive through succession by law is in the nature of an offer or invitation by the deceased to the surviving spouse to take less than the survivor would receive through succession by law. Such an offer or invitation, as in contract law, is not binding upon the surviving spouse and is ineffective unless the surviving spouse accepts by electing to take under the will. According to Justice Jackson, it will be the duty of the probate court at the time of distribution and final decree to determine whether the surviving spouse has accepted the offer by election to take under the will. Proof of the election to take under the will could be evidenced by a written election, verbal expressions to the court, or by conduct of the party. Absent evidence of an election to take under the will, it will be the duty of the trial court to give effect to the statute and make provisions for the surviving under the law of descent and distribution.

In view of the principal case it would appear that Title 84, Section 44, Oklahoma Statutes, is the controlling statute on the question of election by a surviving spouse. It appears that under this section a testator does not have the power to will away so much of his estate that the surviving spouse would receive less in value than would be obtained through succession by law. In effect, a will giving the surviving spouse less in value than what he or she is entitled to by statute is, in analogy to contract law,

17 Stinson v. Sherman, supra note 3a, at 176.