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## Intestacy and the Surviving Spouse

Virginia's original statute of descent, enacted in 1785, was drafted by Thomas Jefferson with the advice and criticism of Edmund Pendleton and George Wythe. It abolished the law of primogeniture and made realty descendible in parcenary to the next of kin, as personal property was by the statute of distribution. Along with the abolition of primogeniture another improvement over the common law was made by Jefferson when he gave the surviving spouse an interest under intestate succession apart from dower and curtesy.<sup>1</sup> To be sure, the surviving spouse did not take until the tenth step, but that was a great improvement over the common law which gave the surviving spouse no fee interest whatsoever.

It was not until 1922<sup>2</sup> that the surviving spouse moved up to the fourth step in the course of descents. This advancement of the surviving spouse may have been prompted by the changing concept of the family as a unit. In earlier times, the term family frequently provoked thought of uncles, aunts, cousins, grandparents, and numerous other relatives and in-laws all living together in the ancestral home and depending upon the joint efforts of all for livelihood and protection. By the twentieth century the concept of the family as a unit had changed to include just the parents and children with perhaps a few families including dependent collaterals or ancestors. With this diminution of a previously broad concept it was no doubt felt by the Virginia legislature that the surviving spouse, the very core of the family group, should take in preference to more remote relatives who were often so far detached from the decedent as to be termed "laughing heirs." Since that time no material<sup>3</sup> change has been made in the course of descents generally, and the same steps of descent are in effect today<sup>4</sup> as were law in 1923. The General Assembly of 1922 made a step in the right direction but its mistake was in not going far enough.

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<sup>1</sup> Va. Code §2548 (1887).

<sup>2</sup> Va. Acts 1922, p. 861.

<sup>3</sup> In 1923 uncles and aunts were put in step seven, as they had evidently been entirely left out of the 1922 act through an oversight.

<sup>4</sup> Va. Code §64-1 (1950).

Under Virginia law the surviving spouse of an intestate has always been included in the first class of distributees. Under the Code of 1887 if a wife died intestate leaving a surviving husband, he would take all of the personalty; if no husband survived, the personalty would pass in the same order as realty. Under the same law, if a man died intestate leaving a wife surviving, she would take one-third of the personal estate when issue also survived; if no issue survived, she would take all of the personalty that the husband acquired from her by reason of the marriage under the old married woman's law and one-half of any other personal property of which he died possessed.<sup>5</sup> By 1919 the distinction between the intestacy of a man and that of a woman had been withdrawn, and a surviving spouse was given one-third of the personalty if issue survived; otherwise, all of the personal estate passed to the intestate's surviving spouse.<sup>6</sup> Since that time no material change has been made in the distribution.

At present an intestate's property passes differently in Virginia depending upon whether it is personalty or realty. Real property descends through the fourth step in the following course:

First. To his children and their descendants.

Second. If there be no child, nor the descendants of any child, then to his or her father or mother, or the survivor.

Third. If there be neither father nor mother, then to his or her brothers and sisters, and their descendants.

Fourth. If there be none such, then the whole shall go to the surviving consort of the intestate.<sup>7</sup>

Personal property is distributed in the same fashion with two major exceptions:<sup>8</sup>

(1) Infants.—The personal estate of an infant shall be distributed as if he were an adult.<sup>9</sup>

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<sup>5</sup> Va. Code §2557 (1887).

<sup>6</sup> Va. Code §5273 (1919).

<sup>7</sup> Va. Code §64-1 (1950).

<sup>8</sup> Va. Code §64-11 (1950).

<sup>9</sup> Va. Code §64-9 (1950): "Descents from infants in certain cases.—If an infant die without issue, having title to real estate derived by gift, devise, or descent from one of his parents, the whole of it shall descend and pass to his kindred on the side of the parent from whom it was so derived, if any such kindred be living at the death of the infant. If there be none such, then it shall descend and pass to his kindred on the side of the other parent."

(2) Married persons.—If the intestate was married, the surviving husband or wife shall be entitled to one-third of the surplus (after payment of funeral expenses, costs of administration, etc.), if the intestate left surviving children or their descendants (a) of the marriage which was dissolved by the death of the intestate, (b) of a former marriage, (c) by legal adoption, or (d) though such children were illegitimate, if the intestate was a wife; but if no such children or their descendants survive, the surviving husband or wife shall be entitled to the whole of such surplus.

Perhaps the reason the surviving spouse seems to fare so much better under the statute of distribution than that of descent is that the surviving spouse is entitled to dower or curtesy and had been so entitled even under the common law. The first statutes gave the widow dower in only one-third of the real estate of the decedent regardless of whether issue survived or whether the decedent died testate or intestate. In 1924 an act was passed giving the widow dower in one-third of the realty free from the rights of creditors, and if the decedent dies intestate and without issue, the widow also has dower in the excess two-thirds subject to the rights of creditors.<sup>10</sup> In 1922 a provision was enacted giving the widower the same curtesy rights as the dower rights of a widow.<sup>11</sup>

Aside from the obvious reasons of dower and curtesy another reason for the difference in transmission of the two types of property may be found in the early history of this country. The first settlers had very little personal property; to them land was, for all intents and purposes, the sole measure of wealth. The old concepts of land as power and land as wealth lingered on. There was something magic and something unique about real property. It had not then become the everyday unit of commerce that it is today, and the early lawmakers, imbued with English tradition, felt that a definitive difference should be made between realty and personalty.

Returning to the obvious reasons for the difference, it was felt that dower and curtesy were adequate interests in realty for the surviving spouses and there was no need for giving a definite

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<sup>10</sup> Va. Acts 1924, p. 460.

<sup>11</sup> Va. Acts 1922, p. 861 (wording clarified by Va. Acts 1924, p. 508).

statutory share in fee to the surviving consort. Perhaps a life estate in all or a portion of the land of the decedent was sufficient during an age when it was the custom for land to remain in the same family for generations, when very little land was transferred by sale but most passed by gift, will or descent, and when one holding a life interest had, for all practical purposes, the same benefits as one holding the fee. Dower or curtesy did not act as a very serious restraint on the free alienation of land because few ever thought of selling part of the family estate. However, with the passage of time a new economy has developed in Virginia, as in the nation. No longer is land such a prominent measure of wealth. The family estate tradition has been pushed into the background by the new avidity for subdivision. At the present time land is just another basic commodity of commerce and as such should receive no different treatment under the law of intestate succession than personalty.

As so much of the wealth of a modern decedent is likely to be in the form of bonds and shares of stock, dower and curtesy estates are not deemed to make adequate provisions and have been abolished under the Model Probate Code as drafted by the Real Property Division of the American Bar Association. This theory is supported by the fact that twenty-three states<sup>12</sup> have either abolished dower and curtesy or else had never enacted such provisions or adopted the common law. At least seven other states<sup>13</sup> have retained dower but it is subject to being barred by the widow's election to take her statutory share. The majority of the states that have no dower or curtesy estates also make no distinction between the distribution of personalty and descent of realty. Because they do tend to clog land titles and make alienation more difficult, Virginia should abolish dower and curtesy. The purpose of these estates would be more successfully met by providing a definite interest in fee for the surviving consort.

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<sup>12</sup> Arizona, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Louisiana, Maine, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Washington, and Wyoming.

<sup>13</sup> Florida, Georgia, Illinois, Maryland, Massachusetts, Michigan, Missouri, and South Carolina.

In all except thirteen states<sup>14</sup> the surviving spouse is given a share of the intestate's property, real or personal, that has priority over all other classes of beneficiaries. In five<sup>15</sup> of these thirteen states the surviving spouse takes in the second step, yielding only to issue of the intestate. The statutes providing these paramount interests for surviving spouses fall roughly into three categories. One such category is evidenced by the statutes of New York, Connecticut, and Massachusetts.<sup>16</sup> The share of personalty and realty given the surviving spouse of an intestate under New York law is as follows:

1. If children and/or their representatives survive—one-third.
2. If no child or descendant but a parent or parents survive—\$5,000 and one-half the residue.
3. If no descendant or parent but a brother, sister, nephew, or niece survives—\$10,000 and one-half the residue.
4. If no descendant, parent, brother, sister, nephew, or niece survives the whole estate.<sup>17</sup>

The law of Massachusetts follows the same general theory but is even more simplified in that if the decedent leaves issue, the surviving spouse takes one-third of the property, but if he or she leaves no issue but kindred of any degree surviving, the surviving spouse takes \$10,000 and one-half the remaining personal and real property; if no issue or kindred survive, the surviving spouse takes all.<sup>18</sup> Connecticut provides a slight variation by giving the surviving spouse the usual one-third where children survive, and if no children survive, the consort takes all of the estate of the decedent absolutely to the extent of \$5,000 and one-half absolutely of the remainder, and when no child and no parent survive the decedent, the spouse takes the whole estate.<sup>19</sup> The least desirable of these three statutes is that of Massachusetts, if one is to assume that the average individual would not wish next of kin who are more remote than brothers and sisters or the issue of such deceased brothers and sisters to benefit from the estate at the expense of the surviving spouse.

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<sup>14</sup> Alabama, Delaware, Kentucky, Louisiana, New Jersey, North Carolina, Oregon, Rhode Island, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

<sup>15</sup> New Jersey, Oregon, Rhode Island, Texas, and Wisconsin.

<sup>16</sup> Also, Iowa, Louisiana, Maine, North Dakota, Pennsylvania, Utah, and Wyoming.

<sup>17</sup> N.Y. Decedent Estate Law §83 (1950).

<sup>18</sup> Ann. Laws of Mass. Ch. 190 (Supp. 1953).

<sup>19</sup> Conn.Gen.Stats. §7309 (1949).

Another type of provision for the surviving spouse is exemplified by the Indiana Probate Code.<sup>20</sup> In Indiana the share of the surviving spouse of an intestate is as follows:

1. One-third of the net estate if the decedent is survived by two or more children, by one or more children and the issue of one or more deceased children, or by the issue of two or more deceased children; or
2. One-half of the net estate if the decedent is survived by one child or issue of one deceased child; or
3. Three-fourths of the net estate if the decedent is survived by one or both parents and no surviving issue; or
4. All the net estate if the decedent is survived by no descendants or parents.<sup>21</sup>

The third category of shares for surviving spouses can be illustrated by the laws of Florida, Georgia, and Mississippi, which provide that the surviving spouse shall take in class one with a child and the same amount as a child. This provision is modified by the Georgia statute which places a one-fifth minimum on the share to be given the wife.<sup>22</sup> Thus, if a man died intestate leaving five children and a wife, the wife would get one-fifth of the estate and each child would get one-fifth of the remaining four-fifths or sixteen per cent of the total estate. Apart from the thirteen states first mentioned that do not give the surviving spouse a definite statutory share superior to other beneficiaries, all of the other states either fall squarely within one of the above categories or else have some combination of parts of them.

The Georgia-type statute is definitely in the minority, for although most states seem to feel that the parents, brothers, sisters, nieces, and nephews of an intestate should not take to the exclusion of the surviving spouse, neither do they feel that the surviving spouse should take to the total exclusion of such kindred, especially not to the exclusion of the parents when no descendants survive. The Indiana and Connecticut statutes are both concerned, when there are no descendants but a parent and a

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<sup>20</sup> Other states having the same general scheme are California, Idaho, Illinois, Michigan, Nebraska, Nevada, Ohio, Oklahoma, and South Carolina.

<sup>21</sup> Burns' Anno. Ind. Stats. Sec. 6:201 (1953). The life estate provision in the paragraph which follows the quoted part detracts from the merit of this statute and hence is not considered here.

<sup>22</sup> Code of Ga. Ann. §113-903 (1933).

spouse surviving, that the parent(s) share in the estate with the spouse. However, this concern does not extend to other kindred where there are also no parents. The Indiana statute more ably and simply accomplishes its purposes because the share given the parents is not contingent upon the size of the estate being beyond a given value. There appears to be no logical reason why a parent should have an interest in an estate in one case while in another case involving the exact same family structure the parent should have no interest simply because the estate is smaller.

Unlike Indiana and Connecticut some states have a broader concept of the kindred who share with the surviving spouse and include brothers and sisters and their descendants. This extension of concern is manifest in the act of North Dakota which provides that if there are no children or parents, but a brother, sister, niece, or nephew surviving, the spouse is given \$25,000 and one-half the remainder of the estate and the residue after such share is given to such surviving brothers, sisters, and their descendants per stirpes.<sup>23</sup> Other states, such as Pennsylvania,<sup>24</sup> go further still and when no children or descendants but blood kin of any degree survive, such blood kin take the residue of the estate after the surviving spouse's share of \$10,000 and one-half the remainder. The provisions of these states, such as Pennsylvania and North Dakota, are based upon a modification of the "blood kin" theory upon which the present Virginia statute of descent is based.

According to an early Virginia case<sup>25</sup> the statute of descent was "founded on the affections of the heart, and follows the current in its natural flow, preferring as heirs the classes nearest in blood." The 1954 amendment to Virginia Code Section 63-358<sup>26</sup> seems to modify the very theory upon which the statute of descent is founded. Apart from the dubious argument of "blood kin" there is no logical reason why an intestate's brother, sister, nephew, or niece should take any part of his estate in preference to his surviving spouse. However, since in Virginia a child is, certain circumstances being present, under a duty to care for

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<sup>23</sup> N.D. Rev. Code §56-0104 (1943).

<sup>24</sup> Purdon's Pa. Stat. Ann. §20-1.2 (1950).

<sup>25</sup> Davis v. Rowe, 6 Rand. 355 (Va. 1828).

<sup>26</sup> An adopted child inherits only from and through his adopted parents and not his natural parents.

his parents,<sup>27</sup> it appears only just that where no descendants survive, the parents of a decedent should share in the estate to some extent with the surviving spouse. Following this reasoning, and because of the arbitrariness of statutes allowing the surviving spouse a given sum and a fraction of the remainder, if the General Assembly should decide to draft a new statute of descent and distribution, the portion of the Indiana law referred to above would serve as an excellent guide.

A proposal has been made by the Joint Committee on Legislation and Law Reform of the Virginia State Bar and the Virginia State Bar Association to improve the condition of the surviving consort by adopting House Bill No. 298, amending Virginia Code Section 64-1. The only effect of the Bill would be to prefer the wife or husband over parents, if they survive, and over brothers and sisters, and their descendants; that is, the surviving spouse would be moved up to step two in the course of descents. If this amendment is adopted by the General Assembly there will still be approximately thirty-five states that give the surviving consort a better position in connection with the descent of real property than does Virginia. That the Committee recognizes the obvious weakness of this proposal is manifest in the following two statements quoted from the report of the Committee:

. . . it is thought that no injustice to parents or brothers and sisters could possibly result in a case where the wife takes, since if the decedent has any definite ideas with reference to providing for brothers and sisters and/or surviving parents, under the present day state of society, he will in nine cases out of ten, do so by will rather than by reliance upon the statute.

. . . And there is, of course, always the right of the decedent to make provisions for his widow, if there are children, by will.<sup>28</sup>

In its attempt to support a statute, the sole purpose of which is to determine the descent of the property of a decedent who did not leave a will, it would appear that the Committee is relying too heavily upon the decedent's right to make a will.

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<sup>27</sup> Va. Code §20-88 (1950).

<sup>28</sup> Report of the Committee on Legislation and Law Reform, 3 Va. Bar News 6 (1955).

The Committee specifically states that they see no necessity for making any change in either the dower or curtesy statutes. It is gratifying to see the desire of this group to improve the status of the surviving spouse, but it is disheartening to note the ease with which they dismiss the possibility of changing the dower and curtesy statutes. The first requirement of any code of law dealing with intestate succession is that it should be as clear and as easy to administer as possible. The Virginia statute is clear but it will never be easy to administer until the estates of dower and curtesy are abolished. The inconvenience of administration that results from the conferment of life interests is unreasonable. In addition to obstructing land titles and making alienation more difficult, these estates frequently form the basis for family dissension.

With the abolition of dower and curtesy a statutory share for the surviving spouse is imperative. Another requirement of an intestate succession law is that it reflect as nearly as possible the intention of the ordinary layman. The Virginia statute of descent is a trap for the unwary. The average man often believes that when he dies his wife will inherit all his property, or at least one-third of it; if he has heard of dower, he generally construes it to be a fee interest. The wife shares this belief and when the husband dies she sometimes sells the property which she believes belongs to her but which actually may belong to some grandnephew. Misconceptions such as these are a real source of disturbance and of entanglement in the law of real property and can only be avoided by changing the statute to correspond to the wishes and belief of the common man. In keeping with these changes, and as there is no longer any foundation for it, the distinction between the descent of realty and the distribution of personalty should be set aside.

Change simply for the sake of change should be avoided, and especially in this field should be made only after careful consideration of our system of law as a whole. However, it would seem when statutes are capable of so many inequities and result in a burden on an otherwise smoothly functioning law of property that the matter should be studied thoroughly and a law drafted more in keeping with modern legislation and the current structure of society.

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