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STATE OF WASHINGTON

No. 86412-8

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

In the Matter of the Estate of James W. Haviland.

DONALD HAVILAND, ELIZABETH HAVILAND, and MARTHA  
CLAUSER,

Respondents,

v.

MARY HAVILAND,

Petitioner.

MARY HAVILAND'S RESPONSE TO BRIEF OF *AMICUS CURIAE*  
BRUCE R. MOEN

Ladd B. Leavens, WSBA #11501  
William K. Rasmussen, WSBA #20029  
DAVIS WRIGHT TREMAINE LLP  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101-3045  
(206) 622-3150 Phone  
(206) 757-7700 Fax  
email – [laddleavens@dwt.com](mailto:laddleavens@dwt.com)  
[billrasmussen@dwt.com](mailto:billrasmussen@dwt.com)

*Attorneys for Respondent Mary Haviland*

ORIGINAL

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Mary Haviland, the petitioner in this Court and the respondent in the Court of Appeals (hereinafter “Petitioner”) files this brief in response to the Brief of Amicus Curiae Bruce R. Moen.

## I. ARGUMENT

### A. **The Plenary Power of the Legislature Does Not Extend to Post Death Modifications of the Laws of Succession.**

Mr. Moen first argues that the State has plenary power to pass new laws governing succession, and that the State may change the laws governing succession of decedent’s estates, and may modify or eliminate a beneficiary’s right to inherit, even *after* the decedent has died. For this proposition Mr. Moen’s cites two cases: *Estate of Ward*, 183 Wash. 604, 609-610 (1935) and *Estate of Little*, 106 Wn.2d 269, 273 (1986). *Estate of Ward* is one of several tax cases<sup>1</sup> decided in the 1930s holding that certain amendments to Washington State inheritance tax laws contained in the Revenue Act of 1935, Laws of 1935, ch. 180, could be applied to pending estates, even though the decedent had died prior to the effective date of the amendments. These issues, and most of the cases, were discussed below in the Brief of Respondent, at 36-38. There are at least two answers to the argument. First, the State’s power under its taxing authority is extremely broad, and overrides any taxpayer’s vested rights in property. Indeed, the

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<sup>1</sup> *Estate of Nogleberg*, 200 Wash. 652 (1939); *Estate of Button*, 190 Wash. 333 (1937); *Estate of Fotheringham*, 183 Wash. 579 (1935).

very process of taxation is a process by which the State takes, as a tax, property in which a taxpayer has a vested right. By imposing an annual tax on real property, for example, the legislature requires each property owner to pay a certain sum of money out of the taxpayer's assets, irrespective of when acquired, or otherwise to forfeit the taxpayer's interest in the property, likewise irrespective of when acquired. There is no argument that the abuser amendments to the slayer statute are a tax, or that they were promulgated under the legislature's taxing authority. Second, although the Legislature had plenary taxing authority, the Legislature in the law under consideration in *Estate of Ward* gave the taxpayer the ability to avoid the effect of the new tax by paying the tax due under the law as it existed immediately prior to the effective date of the statute:

Sec. 124. The provisions of the title . . . shall apply to all cases pending in the inheritance tax and escheat division and to all cases pending in any of the courts of this state, whether on appeal or otherwise, at the time this act takes effect, whether the death of the decedent occurred prior to the passage of this act or subsequent thereto: *Provided, however,* That the inheritance tax now due before the passage of this act may be paid under the law effective immediately before the passage of this act if paid within ten months from the time this law becomes effective . . . .

Revenue Act of 1935, Laws of 1935, ch. 180, § 124.

Mr. Moen also relies, for his argument that the Legislature has plenary authority to change of laws of succession after the death of a decedent, on *Estate of Little, supra*, which he accurately quotes as saying:

Since succession to intestate property is at the will of (and subject to the sovereign political power of) the state, the state may regulate and control such succession as it deems necessary.

Amicus Brief of Bruce R. Moen, at 4, *quoting Estate of Little*, 106 Wn.2d at 273. The error in Mr. Moen's reliance on this language is twofold. First, the facts in *Estate of Little* bear no resemblance to the facts in this case. The court in *Estate of Little* was called upon to determine the effect of a statute enacted in 1967, *see id.* at 276, on the disposition of the assets of the estate of a decedent who died some sixteen years later, on July 13, 1983. Second, Mr. Moen in his brief omits the subsequent sentence of the court's opinion, in which the court stated:

Thus, the Legislature may change, condition, or abrogate the law of succession, *subject only to certain constitutional limitations, none of which are pertinent to this case.*

*Estate of Little*, 106 Wn.2d at 273 (emphasis added). In support of this statement, the *Little* court cited 23 Am. Jur. 2d *Descent and Distribution* § 10, at 761. Although the section numbers of American Jurisprudence

2d. have changed, the court was likely referring to what in the 2002 edition is Section 7, which contains language almost identical to that in the court's opinion. App. 2-3. In the following section, Section 8, the authors of Am. Jur. describe at least one of the "constitutional limitations" to which they were referring in Section 7:

Because, at the death of an intestate, the right to succeed to his or her property is fixed according to law, this right constitutes property and is entitled to constitutional protection as such. Thus, once the right to inherit accrues or vests, any subsequent change in the law cannot affect one's status as a potential heir.

23 Am. Jur. 2d *Descent and Distribution* § 8, at 650-651 (2002) (App. 3-4); *see also id.* § 14, at 665-66 (App. 8-9.).

Mr. Moen thus cites no authority for the proposition that the plenary power of the Legislature to regulate succession of decedents' estate extends to the ability to change the laws of succession after the death of the decedent, and indeed relies on authority holding exactly the opposite, in accordance with the position taken by Petitioner in this appeal.

**B. The Power of Personal Representatives in the Courts to Clear Title to Property and Recover Assets of Decedent's Prior to the Close of Probate Does Not Include the Power to Enforce Against Heirs and Beneficiaries Changes to the Laws of Succession Passed After the Date of Death, in Violation of the Constitution.**

Petitioner Haviland does not generally disagree with the propositions of law that Mr. Moen sets forth in paragraph III.B.2 of his brief, in which he argues that personal representatives and the courts have the authority to clear title to and recover assets of decedents prior to the close of the probate process. None of the authorities to which Mr. Moen refers, however, and indeed very little if any of his argument, is directed to the proposition that the personal representative may enforce statutes that change the laws of succession to disinherit persons who, at the date of death, were lawful beneficiaries of the estate, or heirs of the decedent. The case of *Estate of Whitehead*, No. 58624-6-1, noted at 139 Wn. App. 1038 (2007), an unpublished opinion to which Mr. Moen makes reference, is illustrative.<sup>2</sup> Ms. Whitehead arranged for the slaying of her husband, who died on March 18, 2005. The law (specifically, the slayer's statute, RCW 11.84.010 et seq.) as of the date of death prohibited her from inheriting from her husband. As a consequence, it is incorrect to say, as Mr. Moen posits, that title to her husband's estate vested in

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<sup>2</sup> Notwithstanding Mr. Moen's protestation to the contrary, it does appear that Mr. Moen cited this unpublished case as authority in violation of GR 14.1(a), and Petitioner Haviland objects and moves to strike this portion of his brief.

Mrs. Whitehead at the moment that she succeeded in her plan to kill her husband. Under the law in existence at the date of death, she was not entitled to inherit, and title did not vest in her.

**C. Limiting Application of the Abuser Amendments to Estates of Decedents Dying After July 26, 2009 Would Not Lead to Errors and Lack of Uniformity.**

In Section III.B. of his brief, Mr. Moen argues that recognizing and protecting Mary Haviland's constitutional rights in this case would lead to errors and lack of uniformity. Mr. Moen devotes part of this argument to the proposition that the legislature did not expressly state that the abuser amendments should be applied only to estates of decedent's dying after the effective date of the statute. He is correct, but the legislature also did not say that the amendments should be applied to estates of decedents who died before the effective date of the statute. A fair reading of the amendments is that they are silent on the question. This issue was addressed below in the Brief of Respondent, at 24-26, and will not be repeated here. The remainder of Mr. Moen's argument, that protecting Mary Haviland's constitutional rights will upset the orderly distribution of decedent's estate, is unconvincing. There is no reason to assume that the application of this law in a manner that protects the constitutional rights of the citizens of this state to due process of law will upset the orderly administration of probates at all. Moreover, even if the legislature had

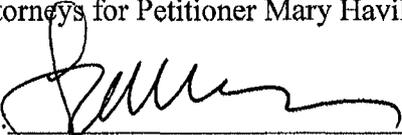
expressed the intention to apply the amendments to past conduct and to previously opened estates, that intent would not override the constitutional prohibition. Likewise, if the application of this statute to estates of decedents long dead when the statute became effective were to create disorder in the administration of probate estates, that problem would have to be fixed by legislation that complied with the constitution, not by disregarding the constitution for reasons of expediency.

## II. CONCLUSION

Mr. Moen in his brief never addresses the constitutional question that is at the heart of this case, and never addresses - indeed scarcely mentions - the fact that the legislature enacted the abuser amendments some 20 months after the date of Dr. Haviland's death. Mr. Moen offers no reason why the decision of Judge Ehrlik in the trial court should not be affirmed.

Respectfully submitted this 31<sup>st</sup> day of May, 2012.

DAVIS WRIGHT TREMAINE LLP  
Attorneys for Petitioner Mary Haviland

By: 

Ladd B. Leavens  
WSBA #11501

PROOF OF SERVICE

The undersigned hereby certifies and declares under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

On this day I caused a copy of the document to which this is attached to be served on counsel of record via messenger as follows:

Suzanne C. Howle  
Carol Vaughn  
Thompson & Howle  
601 Union St., Suite 3232  
Seattle, WA 98101

Howard M. Goodfriend  
Smith Goodfriend PS  
1109 First Avenue, Suite 500  
Seattle, WA 98101-2988

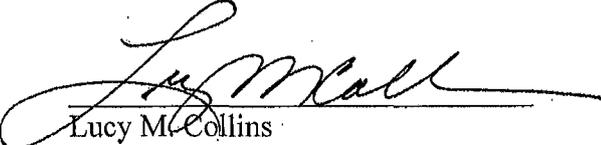
Richard L. Furman  
Aiken, St. Louis & Siljeg, P.S.  
801 Second Avenue, Suite 1200  
Seattle, WA 98104-1571

Katherine George  
Harrison Benis & Spence LLP  
2101 Fourth Ave., Suite 1900  
Seattle, WA 98121

Barbara A. Isenhour  
Isenhour Bleck PLLC  
1200 Fifth Ave., suite 2020  
Seattle, WA 98101-3132

Bruce R. Moen  
Moen Law Offices, P.S.  
600 University St., Suite 3312  
Seattle, WA 98101-4172

Executed at Seattle, Washington this 31<sup>st</sup> day of May, 2012.

  
Lucy M. Collins

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intestate property is by force and operation of statute<sup>4</sup> and not by contract<sup>5</sup> or other act of the deceased person.<sup>6</sup>

◆ **Caution:** The prospect of inheritance (an "expectancy") does not constitute a vested right, is not properly defined as property,<sup>7</sup> and is not entitled to constitutional protection.<sup>8</sup> In other words, one who is the heir apparent of another living person has no rights that cannot constitutionally be abrogated by a statute repealing, modifying, or changing the course of descent and distribution.<sup>9</sup>

## § 7 Power of state to change, condition, or abrogate succession

Under the view that, because succession to intestate property is at the will of, and subject to, the sovereign political power of the state,<sup>1</sup> the state may regulate and control such succession<sup>2</sup> as it deems necessary.<sup>3</sup> Thus, the

<sup>4</sup>Maxwell v. Bugbee, 250 U.S. 525, 40 S. Ct. 2, 63 L. Ed. 1124 (1919); Eckland v. Jankowski, 407 Ill. 263, 95 N.E.2d 342, 22 A.L.R.2d 1102 (1950); Richardson's Adm'r v. Borders, 246 Ky. 303, 54 S.W.2d 676, 87 A.L.R. 196 (1932); Whorff v. Johnson, 143 Me. 198, 58 A.2d 553, 3 A.L.R.2d 160 (1948); Wilson v. Anderson, 232 N.C. 212, 59 S.E.2d 836, 18 A.L.R.2d 951 (1950); In re Frazier's Estate, 180 Or. 232, 177 P.2d 254, 170 A.L.R. 729 (1947); In re Knowles' Estate, 295 Pa. 571, 145 A. 797, 63 A.L.R. 1086 (1929).

Where a statute expressly declares who may inherit lands, there is no room for an implied right on the part of others. Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166 (1920).

<sup>5</sup>In re Klapp's Estate, 197 Mich. 615, 164 N.W. 381 (1917); Couch v. Couch, 35 Tenn. App. 464, 248 S.W.2d 327 (1951).

As to enforcement against an heir of a contract to leave property by will, see Am. Jur. 2d, Wills § 373.

<sup>6</sup>Bauman v. Hogue, 160 Ohio St. 296, 52 Ohio Op. 183, 116 N.E.2d 439 (1953).

<sup>7</sup>Estate of Castiglioni, 40 Cal. App. 4th 367, 47 Cal. Rptr. 2d 288 (4th Dist. 1995); In re Smith's Estate, 1940 OK 419, 188 Okla. 158, 107 P.2d 188 (1940).

As assignment or release of an expectancy, see §§ 168 et seq.

<sup>8</sup>Matter of Estate of Wilson, 610 N.E.2d 851 (Ind. Ct. App. 5th Dist. 1993).

As to the power of the legislature to change intestate succession statutes, see § 7.

<sup>9</sup>Richardson's Adm'r v. Borders, 246 Ky. 303, 54 S.W.2d 676, 87 A.L.R. 196 (1932); Gilliam v. Guaranty Trust Co. of New York, 186 N.Y. 127, 78 N.E. 697 (1906).

### [Section 7]

<sup>1</sup>§ 6.

<sup>2</sup>Eckland v. Jankowski, 407 Ill. 263, 95 N.E.2d 342, 22 A.L.R.2d 1102 (1950).

<sup>3</sup>Wailes v. Curators of Central College, 363 Mo. 932, 254 S.W.2d 645, 37 A.L.R.2d 326 (1953).

legislature may change,<sup>4</sup> condition,<sup>5</sup> or abrogate<sup>6</sup> the law of succession;<sup>7</sup> subject to certain constitutional limitations.<sup>8</sup>

There is no general constitutional limitation affecting the right of inheritance.<sup>9</sup>

The Fourteenth Amendment to the United States Constitution does not deprive the states of the power to determine the limitations and restrictions upon the right to inherit property, but at most can only be held to restrain such an exercise of power as would exclude the conception of government and discretion, and that would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority.<sup>10</sup> However, although the state and federal governments have broad authority to adjust the rules governing the descent and devise of property without implicating the guaranties of the just compensation clause of the Fifth Amendment, the complete abolition of both the descent and devise of a particular class of property may constitute a "taking" within the meaning of that clause.<sup>11</sup>

## § 8 —Alteration of right to succession after death of intestate

Because, at the death of an intestate, the right to succeed to his or her property is fixed according to law,<sup>1</sup> this right constitutes property and is

<sup>4</sup>Jefferson v. Fink, 247 U.S. 288, 38 S. Ct. 516, 62 L. Ed. 1117 (1918); Chase Manhattan Bank v. Commissioner of Revenue Services, 45 Conn. Supp. 368, 716 A.2d 950 (Super. Tax 1997); Richardson's Adm'r v. Borders, 246 Ky. 303, 54 S.W.2d 676, 87 A.L.R. 196 (1932) (no vested rights in existing laws); Wailes v. Curators of Central College, 363 Mo. 932, 254 S.W.2d 645, 37 A.L.R.2d 326 (1958); In re Holibaugh's Will, 18 N.J. 229, 113 A.2d 654, 52 A.L.R.2d 1222 (1955); Hazard v. Bliss, 43 R.I. 431, 113 A. 469, 23 A.L.R. 826 (1921); McFadden v. McNorton, 193 Va. 455, 69 S.E.2d 445 (1952).

<sup>5</sup>In re Porter's Estate, 129 Cal. 86, 61 P. 659 (1900); Chase Manhattan Bank v. Commissioner of Revenue Services, 45 Conn. Supp. 368, 716 A.2d 950 (Super. Tax 1997); National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N.E. 973 (1911), aff'd, 232 U.S. 58, 34 S. Ct. 209, 58 L. Ed. 504 (1914); Ferry v. Campbell, 110 Iowa 290, 81 N.W. 604 (1900); State v. Bazille, 97 Minn. 11, 106 N.W. 93 (1905); State ex rel. McClintock v. Guinotte, 275 Mo. 298, 204 S.W. 806 (1918); In re Dows' Estate, 167 N.Y. 227, 60 N.E. 439 (1901), aff'd, 183 U.S. 278, 22 S. Ct. 213, 46 L. Ed. 196 (1902).

<sup>6</sup>Estate of Murphy, 37 Cal. App. 3d 411, 112 Cal. Rptr. 317 (1st Dist. 1974); Alexander v. Lamar, 188 Ga. 273, 3 S.E.2d 656, 123 A.L.R. 1032 (1939); State v. Mollier, 96 Kan.

514, 152 P. 771 (1915); State ex rel. McClintock v. Guinotte, 275 Mo. 298, 204 S.W. 806 (1918); Strauss v. State, 36 N.D. 594, 162 N.W. 908 (1917).

<sup>7</sup>Richardson's Adm'r v. Borders, 246 Ky. 303, 54 S.W.2d 676, 87 A.L.R. 196 (1932); Cox v. Cox, 1923 OK 397, 95 Okla. 14, 217 P. 493 (1923); Hazard v. Bliss, 43 R.I. 431, 113 A. 469, 23 A.L.R. 826 (1921); In re Ward's Estate, 183 Wash. 604, 49 P.2d 485, 102 A.L.R. 496 (1935).

<sup>8</sup>Cross v. Benson, 68 Kan. 495, 75 P. 558 (1904); Richardson's Adm'r v. Borders, 246 Ky. 303, 54 S.W.2d 676, 87 A.L.R. 196 (1932); Ostrander v. Preece, 129 Ohio St. 625, 3 Ohio Op. 24, 196 N.E. 670, 103 A.L.R. 218 (1935); In re Harkness' Estate, 1921 OK 329, 83 Okla. 107, 204 P. 911, 42 A.L.R. 399 (1921).

<sup>9</sup>In re Taitmeyer's Estate, 60 Cal. App. 2d 699, 141 P.2d 504 (1st Dist. 1943).

<sup>10</sup>Maxwell v. Bugbee, 250 U.S. 525, 40 S. Ct. 2, 63 L. Ed. 1124 (1919); Campbell v. State of Cal., 200 U.S. 87, 26 S. Ct. 182, 50 L. Ed. 382 (1906); In re Holibaugh's Will, 18 N.J. 229, 113 A.2d 654, 52 A.L.R.2d 1222 (1955).

<sup>11</sup>Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987).

### [Section 8]

§§ 66 et seq.

entitled to constitutional protection as such.<sup>2</sup> Thus, once the right to inherit accrues or vests, any subsequent change in law cannot affect one's status as a potential heir.<sup>3</sup>

## C. CONSTRUCTION OF STATUTES

### *Statutory References*

Uniform Probate Code §§ 1-102, 1-103

### **Research References**

#### *West's Digest References*

Descent and Distribution Ⓒ-6

#### *Annotation References*

A.L.R. Digest: Descent and Distribution §§ 1, 2

A.L.R. Index: Decedent's Estates; Descent and Distribution; Heirs or Next of Kin

## § 9 Generally

### **Research References**

West's Key Number Digest, Descent and Distribution Ⓒ-6

An intestate succession statute cannot be changed by a court to conform to the court's conception of right and justice in a particular case.<sup>1</sup>

Statutes of descent and distribution may be considered as positive and, in some degree, arbitrary rules.<sup>2</sup> It has been held that these statutes, being in derogation of the common law, are to be strictly construed.<sup>3</sup> However, it has also been held that they are remedial and should be liberally construed, though they are in derogation of the common law.<sup>4</sup> Which of these generalizations is controlling may depend on the particular provision being construed.<sup>5</sup> The Uniform Probate Code, for example, expressly provides that the Code is to be liberally construed.<sup>6</sup>

Although it is not bound to follow as a precedent its own erroneous judgment in another case, a court will not lightly, or in a doubtful case, overturn

<sup>2</sup>Jefferson v. Fink, 247 U.S. 288, 38 S. Ct. 516, 62 L. Ed. 1117 (1918); In re Speed's Estate, 216 Ill. 23, 74 N.E. 809 (1905), aff'd, 208 U.S. 553, 27 S. Ct. 171, 51 L. Ed. 314 (1906); State ex rel. McClintock v. Guinotte, 275 Mo. 298, 204 S.W. 806 (1918); Oleff v. Hodapp, 129 Ohio St. 432, 2 Ohio Op. 409, 195 N.E. 838, 98 A.L.R. 764 (1935); In re Springer's Estate, 97 Wash. 546, 166 P. 1134 (1917).

As to when title to property of a decedent passes to heirs, see §§ 14, 17, 18.

<sup>3</sup>In re Estate of Carlson, 457 N.W.2d 789 (Minn. Ct. App. 1990).

[Section 9]

<sup>1</sup>In re Kirby's Estate, 162 Cal. 91, 121 P.

370 (1912); Williams v. Lee, 130 Miss. 481, 94 So. 454; 28 A.L.R. 1124 (1923); State ex rel. McClintock v. Guinotte, 275 Mo. 298, 204 S.W. 806 (1918).

<sup>2</sup>State ex rel. McClintock v. Guinotte, 275 Mo. 298, 204 S.W. 806 (1918).

<sup>3</sup>Kidney v. Waite, 178 A.D. 260, 165 N.Y.S. 671 (4th Dep't 1917).

<sup>4</sup>Gallup v. Bailey, 46 N.M. 344, 129 P.2d 56, 142 A.L.R. 1441 (1942).

<sup>5</sup>In re Howland's Will, 125 N.Y.S.2d 234 (Sur. Ct. 1953), decree rev'd on other grounds, 284 A.D. 306, 132 N.Y.S.2d 451 (4th Dep't 1954).

<sup>6</sup>Uniform Probate Code § 1-102.

its previous construction of a statute of descent and distribution if the construction has not been challenged for many years and has generally been accepted and acted upon as a rule of property.<sup>7</sup> This is out of consideration for the necessity of certainty in the law.<sup>8</sup>

Judicial decisions of a state from which local statutes of descent and distribution were taken are of high authority on questions of those statutes.<sup>9</sup>

A statutory provision that is part of a legislative scheme establishing rules of descent must be construed with reference to the other provisions to which it is related.<sup>10</sup> For example, a pretermission statute entitling a child not named in a will to such proportionate share of the estate of his or her deceased parent as the child would have taken had the parent died intestate is in pari materia with the general statute of descent and distribution, and the two should be construed together.<sup>11</sup>

## § 10 Resort to common law or civil law

Statutes of descent and distribution are generally designed to provide a complete scheme for the transmission of the property of an intestate decedent, and if this is the case, there is no occasion to resort to the rules of descent and distribution of either the common law or the civil law.<sup>1</sup>

Even if the common-law and civil-law rules of descent and distribution are regarded as wholly abrogated by statute, resort to these sources to determine the meaning of terms employed in a local statute is proper.<sup>2</sup>

The Uniform Probate Code provides that, unless displaced by particular provisions of the Code, the principles of law and equity supplement its provisions.<sup>3</sup>

## § 11 Retroactive operation

As a general rule, a statute of descent and distribution will not be given retroactive effect unless this is the manifest intent of the legislature as expressed in the statute.<sup>1</sup> Thus, if the intention of the legislature is to make

<sup>7</sup>Merchants' Nat. Bank of Mobile v. Hubbard, 222 Ala. 518, 133 So. 723, 74 A.L.R. 646 (1931).

<sup>8</sup>Merchants' Nat. Bank of Mobile v. Hubbard, 222 Ala. 518, 133 So. 723, 74 A.L.R. 646 (1931).

<sup>9</sup>In re Reil's Estate, 70 Idaho 64, 211 P.2d 407, 19 A.L.R.2d 186 (1949).

As to choice of law and intestate succession, see §§ 12, 13.

<sup>10</sup>Caffee v. Thompson, 262 Ala. 684, 81 So. 2d 358, 55 A.L.R.2d 638 (1955).

<sup>11</sup>Gallup v. Bailey, 46 N.M. 344, 129 P.2d 56, 142 A.L.R. 1441 (1942).

[Section 10]

<sup>1</sup>Broward v. Broward, 96 Fla. 131, 117 So. 691 (1928); In re Reil's Estate, 70 Idaho 64, 211 P.2d 407, 19 A.L.R.2d 186 (1949); Harrison v. Harrison, 21 N.M. 372, 155 P. 356 (1916); In re Long's Estate, 1936 OK 813, 180 Okla. 28, 67 P.2d 41, 110 A.L.R. 1002 (1936); Copenhaver v. Pendleton, 155 Va. 463, 155 S.E. 802, 77 A.L.R. 324 (1930).

<sup>2</sup>Truelove v. Truelove, 172 Ind. 441, 86 N.E. 1018 (1909), modified on other grounds, 172 Ind. 441, 88 N.E. 516 (1909).

<sup>3</sup>Uniform Probate Code § 1-103.

[Section 11]

<sup>1</sup>Jarvis v. Jarvis, 288 Mich. 608, 286 N.W.

a statute applicable to estates settled prior to its enactment, the legislative language should be specific and exact.<sup>2</sup>

If a statute states that it applies only to estates of persons dying after a certain date and that the law in force prior to the taking effect of the act shall apply to the estates of persons dying before that date, the statute clearly is not retroactive;<sup>3</sup> and a declaration in a section of a statute of descent and distribution that it is to take effect immediately excludes the idea that it should have any retroactive application.<sup>4</sup>

## II. WHAT LAW GOVERNS

### Research References

#### *Text References*

Restatement Second, Conflict of Laws §§ 236, 260

#### *West's Digest References*

Descent and Distribution ¶3 to 5

#### *Annotation References*

A.L.R. Digest: Descent and Distribution § 1

A.L.R. Index: Decedent's Estates; Descent and Distribution; Heirs or Next of Kin

## § 12 Descent of real property

### Research References

Restatement Second, Conflict of Laws § 286

West's Key Number Digest, Descent and Distribution ¶3, 4.

All questions of title to land are decided in accordance with the law of the state where the land is.<sup>1</sup> Thus, the devolution of real property upon the death of its owner intestate follows the course prescribed by the law of descent of

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96 (1939); *In re Germaine*, 268 N.Y. 475, 198 N.E. 229 (1935) (holding that a statute allowing the next of kin of the spouse of an intestate decedent to inherit in the absence of other known relatives did not enable the next of kin to take money paid into the state treasury, under the law in force at the decedent's death, to be held for such persons as might later appear to be entitled).

<sup>2</sup>*In re Germaine*, 268 N.Y. 475, 198 N.E. 229 (1935).

<sup>3</sup>*In re Waring's Will*, 275 N.Y. 6, 9 N.E.2d 754 (1937).

<sup>4</sup>*In re Matthews' Will*, 255 A.D. 80, 5 N.Y. S.2d 707 (2d Dep't 1938), order aff'd, 279 N.Y. 732, 18 N.E.2d 683 (1939).

#### [Section 12]

<sup>1</sup>Am. Jur. 2d, Conflict of Laws § 33.

the state in which the land is situated,<sup>2</sup> and state court decisions construing the situs state's statute of descent are controlling upon the federal courts.<sup>3</sup>

◆ **Observation:** The law of the situs may provide for application of the law of the domicile as to distribution and descent, but this rule is permissive, and the law of the situs as "supreme" may provide otherwise.<sup>4</sup> Although the courts of the situs would usually apply their own local law, they may in certain situations look to the local laws of another state to determine questions involving intestate succession to local land.<sup>5</sup>

## § 13 Distribution of personal property

### Research References

Restatement Second, Conflict of Laws § 260

West's Key Number Digest, Descent and Distribution ⇨3, 5

As in the case of real property,<sup>1</sup> the power to regulate the transmission, administration, and distribution of personal property on the death of its owner rests in the state in which the property is located, and the laws of other states have no bearing except as that state refers to and adopts them as a part of its own law.<sup>2</sup> Or, as sometimes stated, personal property is distributed pursuant to the law of the decedent's domicil, but the law of a place where ancillary administration is taken governs the payment of debts and matters of administration in that jurisdiction.<sup>3</sup>

On the question of the distribution of the surplus, however, as distinct from the administration of the estate, personal property is to be distributed according to the rules applicable in the state of the owner's domicil at the time of his or her death.<sup>4</sup> Thus, who is entitled to take as distributee, whether he or she takes per stirpes or per capita, and the nature and extent of the right of representation are determined by the rules applied in the state of

<sup>2</sup>Sullivan v. Kidd, 254 U.S. 433, 41 S. Ct. 158, 65 L. Ed. 344 (1921); In re Grace's Estate, 88 Cal. App. 2d 956, 200 P.2d 189 (1st Dist. 1948); Fuhrhop v. Austin, 385 Ill. 149, 52 N.E.2d 267 (1943); In re Drumheller's Estate, 252 Iowa 1378, 110 N.W.2d 833, 87 A.L.R.2d 1233 (1961).

Because land of an estate was sold in another state and the surplus was remitted to the administrator at the decedent's domicil, the fund was liable to the claims of domiciliary creditors, and the balance would be distributed according to the law of the state where the land was located. Wolfe v. Lewisburg Trust & Safe Deposit Co., 305 Pa. 583, 158 A. 567, 81 A.L.R. 660 (1931).

<sup>3</sup>Jackson v. Harris, 43 F.2d 513 (C.C.A. 10th Cir. 1930) (statute of descent and distribution).

<sup>4</sup>Matter of Khotim, 41 N.Y.2d 845, 393 N.Y.S.2d 702, 362 N.E.2d 253 (1977).

<sup>5</sup>Restatement Second, Conflict of Laws § 236 Comment a.

### [Section 13]

§ 12.

<sup>2</sup>Frick v. Com. of Pennsylvania, 268 U.S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A.L.R. 316 (1925); In re Clark's Estate, 148 Cal. 108, 82 P. 760 (1905); In re De Lano's Estate, 181 Kan. 729, 315 P.2d 611 (1957).

<sup>3</sup>Am. Jur. 2d, Executors and Administrators § 1059.

<sup>4</sup>Eidman v. Martinez, 184 U.S. 578, 22 S. Ct. 515, 46 L. Ed. 697 (1902); In re Burnison's Estate, 33 Cal. 2d 638, 204 P.2d 330 (1949), judgment aff'd, 339 U.S. 87, 70 S. Ct. 508, 94 L. Ed. 675 (1950); Cook v. Todd's Estate, 249 Iowa 1274, 90 N.W.2d 23, 66 A.L.R.2d 1257 (1958).

domicil of the owner, regardless of where the property happens to be located.<sup>5</sup> However, a state statute may provide, contrary to the general rule, that personal property located in the state shall pass, upon the death of its owner intestate, according to the rules of distribution in effect in that state.<sup>6</sup>

Another way of stating this rule is to say that, in all instances, property passes under the law of the state in which it is located, and the manner of its passing is determined by the conflict of laws rule adopted as a matter of policy by that state.<sup>7</sup>

### III. WHEN PROPERTY DESCENDS OR PASSES

#### Research References

##### *West's Digest References*

Descent and Distribution ⇨9, 11, 17

##### *Annotation References*

A.L.R. Digest: Descent and Distribution § 43

A.L.R. Index: Decedent's Estates; Descent and Distribution; Heirs or Next of Kin

##### *Forms References*

7A Am. Jur. Legal Forms 2d, Descent and Distribution §§ 88:12 to 88:14

## § 14 Generally

#### Research References

West's Key Number Digest, Descent and Distribution ⇨9, 11, 17

As a rule, the right to the succession of the property of a decedent is vested at his or her death.<sup>1</sup> That is, the right to possession of an intestate's property<sup>2</sup> and the right to take through intestate succession<sup>3</sup> accrues immediately on the death of the ancestor, subject only to the control of the court for purposes of administering the estate,<sup>4</sup> including the payment of claims

<sup>5</sup>In re Vanderwarker's Estate, 81 Minn. 197, 83 N.W. 538 (1900); In re Olson's Estate, 194 Wash. 219, 77 P.2d 781 (1938).

<sup>6</sup>Ewing v. Warren, 144 Miss. 233, 109 So. 601 (1926).

<sup>7</sup>In re De Lano's Estate, 181 Kan. 729, 315 P.2d 611 (1957); In re Rapoport's Estate, 317 Mich. 291, 26 N.W.2d 777 (1947); Hutchison v. Ross, 262 N.Y. 381, 187 N.E. 65, 89 A.L.R. 1007 (1933).

#### [Section 14]

<sup>1</sup>Jefferson v. Fink, 247 U.S. 288, 38 S. Ct. 516, 62 L. Ed. 1117 (1918); Rauhut v. Short, 26 Conn. Supp. 55, 212 A.2d 827 (Super. Ct. 1965); Matter of Estate of Wilson, 610 N.E.2d 851 (Ind. Ct. App. 5th Dist. 1993); Rowe v. Cullen, 177 Md. 357, 9 A.2d 585 (1939); Scamman v. Scamman, 56 Ohio L. Abs. 272, 90

N.E.2d 617 (C.P. 1950); DeWitt v. Cavender, 1994 OK CIV APP 93, 878 P.2d 1077 (Okla. Ct. App. Div. 1 1994); Gentry v. Gentry, 924 S.W.2d 678 (Tenn. 1996); Henson v. Jarmon, 758 S.W.2d 368 (Tex. App. Tyler 1988).

<sup>2</sup>People v. McCormick, 784 P.2d 808 (Colo. Ct. App. 1989).

<sup>3</sup>Sheehan v. Estate of Gamberg, 677 P.2d 254 (Alaska 1984); Raczynski v. Judge, 186 Cal. App. 3d 504, 230 Cal. Rptr. 741 (2d Dist. 1986); Blackman v. Baxter, Reed & Co., 125 Iowa 118, 100 N.W. 75 (1904); Rowe v. Cullen, 177 Md. 357, 9 A.2d 585 (1939); Ware v. Beach, 1957 OK 166, 322 P.2d 635 (Okla. 1957); Headrick v. McDowell, 102 Va. 124, 45 S.E. 804 (1903); In re Verchot's Estate, 4 Wash. 2d 574, 104 P.2d 490 (1940).

<sup>4</sup>Ware v. Beach, 1957 OK 166, 322 P.2d 635 (Okla. 1957).

against the estate.<sup>5</sup> From this general rule, it follows that an estate must be distributed among heirs and distributees according to the law as it exists at the time of the death of the ancestor.<sup>6</sup> In some jurisdictions, however, the heirs' title to real and personal property vests at different times.<sup>7</sup>

Under the view that title passes immediately, passage of title to the heirs does not require settlement of the estate or a probate order declaring heirship.<sup>8</sup> Even if the vesting of an interest is suspended until the happening of some event, once the event does happen, the right by descent depends on the law as it stood when the descent was cast.<sup>9</sup> Also, because title passes immediately at the death of the owner, a judgment creditor of the owner cannot create a new property interest, such as a judgment lien, in the decedent's estate.<sup>10</sup>

◆ **Observation:** Because title passes to the heirs at the death of the intestate, neither the estate<sup>11</sup> nor the executor or administrator<sup>12</sup> is the owner of the decedent's property.

## § 15 Effect of uncertainty as to existence of surplus and identities of takers

Although the right to the succession of the property of a decedent is vested at his or her death,<sup>1</sup> the interests of the heirs and distributees are uncertain until it is ascertained that a surplus remains after the debts and expenses of administration are paid.<sup>2</sup>

<sup>5</sup>Sheehan v. Estate of Gamberg, 677 P.2d 254 (Alaska 1984); Gentry v. Gentry, 924 S.W.2d 678 (Tenn. 1996).

As to the impact of this view on the right to disclaim or renounce one's rights as an heir, see §§ 157 et seq.

<sup>6</sup>In re Ruff's Estate, 159 Fla. 777, 32 So. 2d 840, 175 A.L.R. 370 (1947); McCormick v. Hall, 337 Ill. 232, 168 N.E. 900, 66 A.L.R. 1062 (1929); Skinner v. Morrow, 318 S.W.2d 419 (Ky. 1958); In re Holibaugh's Will, 18 N.J. 229, 113 A.2d 654, 52 A.L.R.2d 1222 (1955); Wilson v. Anderson, 232 N.C. 212, 59 S.E.2d 836, 18 A.L.R.2d 951 (1950); Scamman v. Scamman, 56 Ohio L. Abs. 272, 90 N.E.2d 617 (C.P. 1950); In re McLeod's Estate, 159 Or. 687, 82 P.2d 884 (1938).

<sup>7</sup>§§ 17, 18.

<sup>8</sup>Mischke v. Mischke, 253 Neb. 439, 571 N.W.2d 248 (1997).

<sup>9</sup>North v. Graham, 235 Ill. 178, 85 N.E. 267 (1908).

<sup>10</sup>Sheehan v. Estate of Gamberg, 677 P.2d 254 (Alaska 1984).

<sup>11</sup>Olson v. Toy, 46 Cal. App. 4th 818, 54 Cal. Rptr. 2d 29 (3d Dist. 1996).

<sup>12</sup>Raczynski v. Judge, 186 Cal. App. 3d 504, 230 Cal. Rptr. 741 (2d Dist. 1986).

As to an administrator's power over a decedent's property, generally, see Am. Jur. 2d, Executors and Administrators §§ 359 et seq.

### [Section 15]

<sup>1</sup>§ 14.

<sup>2</sup>In re McLeod's Estate, 159 Or. 687, 82 P.2d 884 (1938).

The right of a purported illegitimate child of a deceased to receive assets of an estate as an heir did not vest until it was determined whether the claimant was in fact an offspring, and the rights of other heirs whose shares would be affected by such determination similarly could not vest. Tenopir v. Boles Estate, 342 So. 2d 130 (Fla. Dist. Ct. App. 1st Dist. 1977).

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The attached Mary Haviland's Response to Brief of Amicus Curiae Bruce R. Moen is filed on behalf of Ladd Leavens, counsel for Respondent Mary Haviland.

Thank you for your attention to this matter.

Lucy Collins

**Lucy Collins** | Davis Wright Tremaine LLP .  
Assistant to Ladd Leavens  
1201 Third Avenue, Suite 2200 | Seattle, WA 98101  
Tel: (206) 757-8442 | Fax: (206) 757-7700  
Email: [lucycollins@dwt.com](mailto:lucycollins@dwt.com) | Website: [www.dwt.com](http://www.dwt.com)

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