

Changes to Vermont's Probate Law: Increasing the Surviving Spouse's Share and Other Measures

More than two hundred years ago—in 1787 to be precise—Vermont enacted an intestacy statute as well as dower and curtesy provisions that have changed very little over time.¹ In 2009, the Vermont legislature finally adopted significant revisions to these statutory sections.² The new provisions increase the share of the surviving spouse, both the intestate share and the elective share (a surviving spouse has long been able to take a statutory minimum share if the share provided in a will is inadequate). These changes more closely match the average decedent's probable intent in intestacy and increase a spouse's protection from disinheritance by will. The changes also remove long-standing ambiguities and confusion in our state's probate laws.

Under prior law, the surviving spouse's share, both the intestate share and the elective share, depended on the nature of the property—real or personal—and the number of surviving descendants.³ If the decedent left a surviving spouse and collateral kindred but no descendants, it was anyone's guess how sections 401, 461, and 551(2) were to be applied.⁴ Moreover, the surviving spouse was entitled to the household furnishings only if the decedent left no issue.⁵

Intestacy

S.26 increases the surviving spouse's share significantly if the decedent dies intestate. The primary impetus for S.26 was the concern among legislators that a surviving spouse was not entitled to all of an intestate decedent's probate estate if the decedent had any descendants or any collateral kindred. Surprisingly, section 551(2) had allowed any kindred, even to the far reaches of the table of consanguinity, to share the intestate decedent's property with the surviving spouse.⁶ In response to requests from the legislature, the Probate and Trust Section of the Vermont Bar Association,⁷ working in large measure from recommendations made by the Probate Judges' Study Committee of 2004, proposed the various changes that were incorporated into the law.

Surviving Spouse's Share

Section 311⁸ of the new law gives the surviving spouse the decedent's entire probate estate if either (1) all of the decedent's descendants are also the descendants of the surviving spouse or (2) the decedent had no surviving descendants. It also abolishes the distinction between real and personal property. The surviving spouse is now entitled to the same share of the personal property as of the real property.

Example 1

Donald and Sally were married and had three children—Ann, Bert, and Carol. They owned the family home as tenants by the entirety. Donald died without a will owning other real property worth \$300,000 and personal property worth \$150,000. Under prior law, Sally would have received only one-third of the personal property (section 401) and one-third of Sam's real property (section 461), in addition to the house. The rest of the property would have passed to their children. Under new section 311, Sally would receive all of the real and personal property, and the children would receive nothing.

Example 2

Doris and Sam were married and had no children. They owned the family home as tenants by the entirety. Doris owned other real property valued at \$525,000. She died without a will, survived by Sam and two third cousins. Under prior law (section 551(2)), Sam would have received \$25,000 plus half the remaining value of Doris's real property for a total of \$275,000 in addition to the house. Doris's two third cousins would have received the other \$250,000 of her property. Under new section 311, Sam would receive all of the property, and the third cousins would receive nothing.

Section 311 also provides that if the decedent leaves any descendants who are not descendants of the surviving spouse, the surviving spouse will be entitled to only fifty percent of the probate estate.

Example 3

Daniel and Sarah were married. Daniel has two children, Ellen and Frank, from a prior marriage. Daniel and Sarah have one child, Gary. They own the family home as tenants by the entirety. Daniel owns other real property worth \$600,000. Under prior law (section 461), Sarah would have received one-third of the real property—that is, \$200,000 plus the house. Under section 311, Sarah would be entitled to one-half of that property, or \$300,000 plus the house.

The fundamental premise of section 311 is that the average decedent would expect the surviving spouse to receive all of the property unless the decedent had specifically designated that particular property was to pass to others either through a will, the creation of a revocable trust, the creation of a joint tenancy with some other person, or some similar arrangement. This is the purpose of any intestacy statute, that is, to provide a default estate plan for those decedents who fail to execute a will.

Under S.26, the surviving spouse is also entitled to "all furnishings and furniture in the decedent's household when the decedent leaves no descendants who object."⁹ If there is any objection, the probate court has discretion to determine what, if any, of such property will pass to the surviving spouse.¹⁰ The court may consider a number of factors in making the award, including the length of the marriage, the sentimental and monetary value of the property, and the source of the decedent's interest in the property.¹¹ Under prior law, the surviving spouse only received the household goods if the decedent died intestate, leaving no descendants.¹²

Example 4

Diane and Silas were married and had two children, Henry and Isabel. They owned the family home as tenants by the entirety. Diane owned other real property worth \$150,000. Under prior law, the household furnishings would have been distributed under section

401, with one-third going to Silas and two-thirds going to Henry and Isabel, unless Silas could establish that those furnishings belonged to him or to Diane and him as joint tenants. Under new section 312, those household furnishings will pass to Silas, the surviving spouse, unless Henry or Isabel objects.

New section 313 provides that if the decedent's estate consists principally of a vessel, snowmobile, or all-terrain vehicle, the surviving spouse will be deemed the owner. This simply carries over former section 403a. S.26 does not disturb the surviving spouse's right to the decedent's motor vehicles,¹³ but it does add a new subsection (a)(5) to section 2023 of title 23 to recognize TOD (transfer on death) beneficiary designations on motor vehicle titles, which is enormously convenient in avoiding probate.¹⁴

Section 314 retains the basic provisions of section 551 if the decedent has no surviving spouse. Under section 314, any portion of the decedent's intestate estate that does not pass to the surviving spouse passes first to the decedent's descendants by right of representation. Subsection (c) adopts the English (otherwise known as the "classic" or "strict") system of representation. That is, when property passes by representation, it is divided at the level of the children even if all pre-decease the decedent. Prior to S.26, it was not clear what system of representation Vermont followed.¹⁵

Example 5

Donna is married to Sidney and they have three children, Joan, Karl, and Luke. Joan predeceases Donna, leaving two children (Mark and Ned); Karl predeceases Donna, leaving one child (Owen); and Luke predeceases Donna, leaving three children (Paul, Quinn, and Robin). Sidney also predeceases Donna. When Donna dies, her property will be divided into three parts because she had three children. One share will pass to Mark and Ned; one share will pass to Owen; and one share will pass to Paul, Quinn, and Robin. Thus, Donna's grandchildren will take different shares: Mark and Ned will each receive one-sixth; Owen will receive one-third; and Paul, Quinn, and Robin will each receive one-ninth. Under prior law, all of the grandchildren would have shared equally.¹⁶

As under current law, if a decedent has neither a surviving spouse nor descendants, the property will pass first to the decedent's parents equally or to the survivor, then to the decedent's siblings or descendants of deceased siblings, then the descendant's grandparents, and finally to decedent's next of kin in equal degree.¹⁷ Now, however, descendants of any deceased siblings will take by representation, with the property being divided at the level of the siblings even if all have predeceased the decedent.¹⁸ Under prior law, descendants of a decedent's siblings would only take by representation if one of the siblings survived decedent.¹⁹

Example 6

David dies, survived by a brother, Tom, and the two children of his deceased sister, Ursala. Under section 314, Tom will take one-half of David's property and Ursala's two children will share the other half. Now assume that Tom also predeceases David, leaving one child. Tom's child will take his share, that is, one-half of Tom's property. Ursala's children will share the other half. Under prior law, the nieces and nephews would have shared equally—that is, each would have received one-third.²⁰

Section 337 adds a new requirement: that an individual must survive the decedent by 120 hours to inherit from the decedent. If there is not clear and convincing evidence that the individual survived the decedent, it is deemed that the individual has failed to survive the requisite 120 hours. Section 303 provides that an individual in gestation is treated as living at the relevant time if that individual lives for more than 120 hours after birth. These provisions are new to Vermont law but can be found in many other jurisdictions.²¹ They simplify probate proceedings by avoiding multiple proceedings and reflect the probable intent of the average decedent.

New section 301(b) allows a decedent to make a will that expressly excludes or limits the rights of an individual or a class of individuals. Such a "negative will" does not need to dispose of any property. As long as it is validly executed,²² the decedent's wishes will prevail over the intestate provisions. The only exception is the right of the surviving spouse to take an elective share under section 319.²³

Elective Share

Under prior law, the surviving spouse's elective share was essentially the same as the intestate share, usually one-third of decedent's property.²⁴ New section 319 increases the share of the surviving spouse, giving the surviving spouse the right to one-half of the probate estate after payment of claims and expenses in lieu of the provisions of the decedent's will.²⁵ The surviving spouse must be living at the time the election is made, but if the spouse is disabled, a guardian or attorney in fact under a durable power of attorney may make the election for the surviving spouse.²⁶

Example 7

Henry and Wanda have been married for fifteen years. Henry has two children from a prior marriage, and Wanda has one child from a prior marriage. Henry's will leaves all of his property to his two children. If Wanda files for her elective share, she will receive one-half of Henry's property.

The bar committee strongly recommended a provision expressly allowing for postnuptial agreements, where spouses who are represented independently could voluntarily choose to forego the elective share in the event one dies. A husband and wife in a second marriage without a prenuptial agreement, who are independently self-sufficient, could therefore ensure that upon the death of the first spouse, the decedent's assets could pass entirely to the decedent's heirs. This provision, however, met some resistance among certain attorneys concerned about the potential coercion of a spouse even if independently represented, and the legislature did not adopt it. This issue merits further study and perhaps reconsideration.

Section 319 does not take into account the length of the marriage, the existence of non-probate transfers made by the decedent, or the surviving spouse's property. A clever decedent may therefore disinherit his spouse through non-probate transfers such as trusts and beneficiary designations, as under current law.

Some protection for the surviving spouse against disinheritance by non-probate transfers is found in section 321. That section, which expands former section 473 of Title 14 to apply to all of decedent's property rather than just real estate, provides that any voluntary

transfers made by the decedent during marriage (1) without adequate consideration, (2) designed to take effect at or after the decedent's death, and (3) for the primary purpose of defeating the spouse's elective share are void and inoperative to bar that claim. The section also provides that the decedent will be deemed to be the owner of the property for the purpose of assigning and setting out the surviving spouse's elective share.

This section may under certain facts reach revocable trusts created during marriage. Consequently, practitioners may want to consider obtaining spousal consent declaring that the transfer is not intended to defeat a spouse's elective share.

Other jurisdictions follow a more nuanced approach to the spousal elective share, reflecting the now common belief that a married couple is one economic unit. The Uniform Probate Code, for example, allows the surviving spouse a stated percentage of the "augmented estate" on a sliding scale based on the length of the marriage.²⁷ The augmented estate includes the decedent's net probate estate, the decedent's non-probate transfers to others, the decedent's non-probate transfers to the surviving spouse, and the surviving spouse's property.²⁸ Other jurisdictions have similar schemes.²⁹

Although S.26 greatly improves the elective share by raising it to one-half of the probate estate, a more comprehensive and nuanced approach to the problem could be considered in the future.

Allowances

S.26 clarifies and increases the allowances given to a surviving spouse. It increases the homestead allowance to \$125,000 from \$75,000.³⁰ It continues the allowance to the surviving spouse and family of the decedent during administration.³¹

S.26 extends the allowances for children until they are eighteen years of age rather than seven.³² Section 318 allows the probate court to order the executor or administrator to retain estate assets to provide an allowance for children after payment of debts.

Other Provisions

Significantly, new section 320 provides that a final divorce order voids any bequest to an individual who had

been the decedent's spouse at the time the will was executed. The will itself is not revoked, but the bequest to the former spouse is nullified unless the will specifically states to the contrary. S.26 adds a new section that provides the order in which assets will abate if there is insufficient property to pay all of decedent's debts, expenses, and bequests. Section 338 provides the following order of abatement, consistent with common law:

- (1) first, property not disposed of by the will,
- (2) next, residuary devises and bequests,
- (3) then, general devises and bequests, and
- (4) finally, specific devises and bequests.

S.26 retains many existing provisions, including: section 315 prohibiting a parent from inheriting from a child unless the parent has openly acknowledged the child and not refused to support the child; section 322 prohibiting one who intentionally and unlawfully kills the decedent from inheriting from the decedent or taking under his will (though it is revised to bar inheritance if one kills but is not convicted, as in a murder-suicide, and new section 418 applies to trusts); section 332 allowing an after-born child to take an intestate share of the decedent's estate unless it is apparent from the will that the decedent intended not to provide for the child; section 333 allowing a child who is omitted by mistake or accident from the decedent's will to take an intestate share; and section 335, which creates a substitute gift in the issue of a child or other kindred of a testator who die before the testator. Section 336 also improves the procedure for probating assets where a beneficiary is absent and unheard of.

In sum, this legislation represents a major improvement, simplification, and clarification of our often antiquated probate laws. Although further modifications should be considered, S.26 should result in more equitable and expected outcomes for our clients.

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¹ 14 Laws of Vermont 1785-1791, at 202-207 (John A. Williams ed., 1966).

² S.26, 2009-2010 Legislative Session (Vt. 2009). S.26 repeals sections 401 to 559 of title 14 (chapters 41, 43, and 45) and enacts new sections 301 to 338 (chapter 42) effective for decedents dying after June 1, 2009.

The amendments to title 14 are effective on passage, i.e., June 1, 2009. Other provisions, such as the change to the homestead allowance, are effective July 1, 2009. S.26, sec.14(b), 2009-2010 Legislative Session (Vt. 2009).

³ 14 VSA §§401, 461, 474, and 551(2). See generally, Stephanie J. Willbanks, *Parting is Such Sweet Sorrow, But Does It Have to be So Complicated? Transmission of Property at Death in Vermont*, 29 VT. L. REV. 895 (2005).

⁴ See Willbanks *supra* note 3.

⁵ 14 VSA §403.

⁶ 14 VSA §551 provided:

The real and personal estate of a decedent, not devised nor bequeathed and not otherwise appropriated and distributed in pursuance of law, shall descend in the following manner ... (2) If the decedent is married and leaves no issue and the surviving spouse does not elect to take a third in value of the real estate of which the decedent dies seized in his or her own right, or waives the provisions of the will of such decedent, such spouse shall be entitled to the whole of the decedent's estate forever, if it does not exceed \$25,000, but if it exceeds that sum, then such spouse shall be entitled to \$25,000 and half the remainder. The remainder of such estate shall descend as the whole would if the spouse did not survive. If the decedent has no kindred who may inherit the estate, such spouse shall be entitled to the whole of such estate ... (5) If none of the kindred above-named survives the decedent, the estate shall descend in equal shares to the next of kin in equal degree; but a person shall not be entitled, by right of representation, to the share of such next of kin who has died.

Other statutes, for example sections 2-102 and 2-103 of the Uniform Probate Code, give the surviving spouse between one-half and all of the intestate decedent's probate estate and limit inheritance to the descendants of the decedent's grandparents.

⁷ In addition to the authors, others closely involved included section chairman Robert S. Pratt, John C. Newman, and Judge Ernest Tobias Balivet. Robert M. Paolini of the Vermont Bar Association worked with the legislature.

⁸ All references are to new chapter 42 of title 14 of the Vermont Statutes Annotated unless otherwise noted.

⁹ §312.

¹⁰ *Id.*

¹¹ *Id.*

¹² 14 VSA §403 (now repealed).

¹³ 23 VSA §2023(e).

¹⁴ The amendment to 23 VSA §2023(e) is effective as of July 1, 2009.

¹⁵ See Willbanks *supra* note 3.

¹⁶ In re Martin's Estate, 120 A. 862, 96 Vt. 455 (1923).

¹⁷ §314.

¹⁸ *Id.*

¹⁹ Hatch v. Hatch, 21 Vt. 450 (1849).

²⁰ *Id.*

²¹ See, e.g., §2-101 of the Uniform Probate Code.

²² See 14 VSA §5 for the requirements of will execution.

²³ §301(c).

²⁴ 14 VSA §402.

²⁵ S.26 explicitly repeals both dower and curtesy. §302.

²⁶ §319(b).

²⁷ UPC §2-202.

²⁸ UPC §§2-203 – 2-207.

²⁹ See, e.g., Del. Code Ann. tit. 12, §902; N.Y. Estate, Powers & Trust Law §5-1.1-A.

³⁰ 27 VSA §§ 101, 102.

³¹ §316.

³² §§ 317 and 318.

