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FIDUCIARY ADMINISTRATION-EXECUTORS AND ADMINISTRATORS-DEATH OF WIDOW AS AFFECTING AMOUNT OF HER ALLOWANCE

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FIDUCIARY ADMINISTRATION—EXECUTORS AND ADMINISTRATORS—DEATH OF WIDOW AS AFFECTING AMOUNT OF HER ALLOWANCE—A widow survived her husband by three months and thirteen days. Subsequent to the death of both, appraisers of the husband's estate set off to his widow \$750 as her year's allowance.¹ Executrix of the widow's estate filed an exception to the allowance and made application to increase the amount on the ground that the sum given would have been insufficient if the widow had lived the full year. Granting the application, the probate court found that a reasonable allowance based on twelve months would be \$5000. The court of appeals reversed, holding that the allowance should be based on the three month period during which the widow lived.² On certification, *held*, reversed, two judges dissenting. The widow's estate was entitled to an amount computed on the full twelve month period. *In re Estate of Croke: Clancy v. Cleveland Trust Co.*, 155 Ohio 434, 99 N.E. (2d) 483 (1951).

Statutes in most jurisdictions have been designed to meet the needs of the widow during the pendency of administration of the deceased's estate. Although varying in detail,³ these statutes are of two general forms: (1) an award may or may not be permitted, at the discretion of the probate court or other body, and (2) an award, but not necessarily the amount, is mandatory. Where statutes

¹ Ohio Code Ann. (Baldwin, 1948) §10509-74. "The appraisers also shall set off and allow to the widow . . . sufficient provisions or other property to support (her) for twelve months from the decedent's death. . . ."

² *Croke's Estate v. Clancy*, (Ohio App. 1950) 93 N.E. (2d) 799.

³ See 21 AM. JUR., Executors and Administrators §314; and 144 A.L.R. 270 (1943).

of the former type are in force,⁴ no problem arises as to amount if no allowance has been made prior to the widow's death. The courts consider either that the right to an award does not vest until the award is made by the proper tribunal, or that the right to an award is personal and abates with the widow's death.⁵ However, under a statute of the latter type⁶ the right is said to vest immediately upon the death of the spouse and is not personal to the widow.⁷ Heretofore, no question seems to have been raised in the latter jurisdictions as to whether the amount vesting is the full allowance for the statutory period if the widow dies before any amount is set off, although two courts have discussed the matter by way of dictum. In a Georgia case the court declared that the administrator of the widow's estate could make application for the widow's allowance, and that the amount was to be set aside "under the same rules and regulations as would apply in case the widow were alive, and the application had been made by her."⁸ A Missouri case suggests that, even if the widow had lived only one day longer than her spouse, her estate would be entitled to the entire twelve months' allowance.⁹ An Iowa case¹⁰ has been cited¹¹ erroneously as a slight variation of the

⁴ Wash. Rev. Stat. Ann. (Remington, 1932) §1476. "In addition to the awards provided for, the court may make such further reasonable allowance of cash out of the estate as may be necessary for the maintenance of the family according to their circumstances." Similar are Vt. Stat. (1947) §3021; Mass. Gen. Laws (1932) c. 196, §2.

⁵ See *State ex rel. Case v. Superior Court*, 23 Wash. (2d) 250, 160 P. (2d) 606 (1945). Perhaps what the courts mean when they speak of "vesting" is that the widow's being alive at the time of the tribunal's action is a condition precedent to the creation of any right to an award. It should be noted that this approach alone does not solve the question as to whether the right that does vest upon the tribunal's action is a personal right. Where the widow dies after the tribunal makes the award but before she receives all or a part of the payments, the personal right analysis must necessarily be invoked to preclude the receiving of the remainder of the payments by the widow's estate. *Adams v. Adams*, 10 Met. (51 Mass.) 170 (1845). Under the mandatory statutes, the vesting requirement is fulfilled automatically on the death of the husband; no personal right analysis appears to be applied. *Dorah v. Dorah*, 4 Ohio 292 (1854).

⁶ Ga. Code Ann. (1935) §113-1002: ". . . Upon the death of any person . . . leaving a widow . . . it shall be the duty of the ordinary . . . to appoint five discreet appraisers; and it shall be the duty of such appraisers . . . to set apart and assign to such widow . . . either in property or money, a sufficiency from the estate for [her] support and maintenance for a space of 12 months from the date of administration, . . . to be estimated according to the circumstances and standing of the family previous to the death of the testator or intestate. . . ."

⁷ *Brown v. Joiner*, 77 Ga. 232 (1886).

⁸ *Id.* at 234.

⁹ *Monahan v. Monahan's Estate*, 232 Mo. App. 91, 89 S.W. (2d) 153 (1936). However, the statute construed in that case has been revised. It appears that some specific personal property now vests immediately, but no further monetary allowance vests until action is taken by the court. Compare Mo. Rev. Stat. (1929) §§106, 107, with Mo. Rev. Stat. (1949) §462.450. One day's survival would not entitle the widow to a year's allowance under Ohio law. See Ohio Code Ann. (Baldwin, 1948) §10503-18.

¹⁰ *In re Estate of Rice*, 146 Iowa 48 at 50, 124 N.W. 792 (1910).

¹¹ 20 UNIV. CIN. L. REV. 134 (1951). The dictum in this case does not deal with the facts in which the widow has died prior to the awarding of the allowance. Iowa Code (1946) §635.12, is a discretionary statute. No property vests until the award is made. *Zunkel v. Colson*, 109 Iowa 695, 81 N.W. 175 (1899).

same position. In the principal case the majority of the court relies on two arguments: (1) the sweeping and mandatory language of the statute¹² admits of no exception pertinent here and does not require that the widow have need of the support, and (2) the right vests in the widow immediately upon death of the husband, so the quantity of the award is to be determined only by facts existing at the death of the husband. It is submitted that these arguments are supportable. However, the further suggestion by the court that the allowance must necessarily contemplate either support for twelve months in life or support for a portion of the twelve months plus funeral expenses can hardly be taken literally. The latter alternative would be highly impractical because of the difficulty of contemplating by *foresight* what portion of the year the widow would live, whereas viewing the matter by *hindsight* would be precluded by the court's previous argument that no facts subsequent to the husband's death may be considered. The holding of the case, however, appears to be consistent with the desirable policy of construing the statute most favorably for the widow. It prevents temptations that might cause delay in awarding the amount. It removes hesitation of a widow's creditors in extending her credit on more than a day-to-day basis, for they can feel assured that if she dies before any award is set off to her, the award will be sufficient to pay a year's requirements. Security for a widow during whatever period she lives within that year is thus assured.¹³

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¹² See note 1 *supra*.

¹³ The same holding would almost necessarily be reached in Georgia because of its express statutory requirement (see note 6 *supra*) that the amount be estimated in accordance with circumstances existing previous to the death of the husband.