

REVOCABLE TRUST:
SPOUSAL SHARE AND HOMESTEAD

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I. Main Issue

Whether the 2005 amendment to Iowa Code §633.238, and the March 17, 2006 Sieh case will be interpreted to limit the share of a surviving spouse to one-third of the *value* of real property placed in trust; or whether §633.238 gives the surviving spouse an elective share that reaches the *underlying assets* in the trust?

II. Analysis

There are at least four areas of interpretation that lend support to the idea that the surviving spouse's elective share reaches the *underlying assets* in the trust and not just the *value* of the assets. The statute itself; the statute's interaction with other statutes; the 2006 Sieh case; and the legal concepts of equitable title and inchoate rights.

A. Statutory Language

§633.238 of the Iowa Code states:

1. The elective share of the surviving spouse shall be all of the following:
 - a. One-third in value of all the *legal or equitable estates* in *real property* possessed by the decedent at any time during the marriage which have not been sold on execution or other judicial sale, and to which the surviving spouse has made no express written relinquishment of right.
 - b. All *personal property* that, at the time of death, was in the hands of the decedent as the head of a family, exempt from execution.
 - c. One-third of all *personal property* of the decedent that is not necessary for the payment of debts and charges.
 - d. One-third in value of the *property* held in trust not necessary for the payment of debts and charges over which the decedent was a grantor and retained at the time of death the power to alter, amend, or revoke the trust, or over which the decedent waived or rescinded any such power within one year of the date of death,

and to which the surviving spouse has not made any express written relinquishment.

2. The elective share described in this section shall be in lieu of any property the spouse would otherwise receive under the last will and testament of the decedent, through intestacy, or under the terms of a revocable trust.¹

In §633.238(1)(a), the drafters used a specific reference to *real property*.² In §633.238(1)(b) and (c), the drafters used a specific reference to *personal property*.³ In §633.238(1)(d), the drafters did not qualify the term *property* with either the *real* or *personal* adjectives, which indicates the intended meaning was *property* as defined in the probate code.

Iowa Code §633.3(31) defines “property” as including “both real and personal property.”⁴ This suggests the drafters meant to include real property in §633.238(1)(d). An argument may be made, analogous to Iowa Land Title Standard 5.7 regarding real estate contracts, that property in a trust is generally considered to be personal property. But §4.1(38) mandates that §633.238(1)(d)’s use of *property* includes both *real* and *personal* property.⁵ This interpretation is also supported by Corpus Juris Secundum §21 and American Jurisprudence §47, which define property in trust as either real or personal,⁶ and by the Restatement (Third) of Trusts §40, which states that “[a]ny property can be trust property.”⁷

¹Iowa Code §633.238 (2005)(emphasis added).

²Iowa Code §633.238(1)(a) (2005).

³Iowa Code §633.238(1)(b) and (c) (2005).

⁴Iowa Code §633.3(31) (2005).

⁵Iowa Code §4.1(38) (2005)(stating that “[w]ords and phrases shall be construed according to the context and the *approved usage* of the language...”)(emphasis added); *See* Iowa Code §633.3 (2005)(stating “[w]hen used in this probate code, unless otherwise required by the context, or another division of this probate code, the following words and phrases shall be construed as follows...”); *See also T & K Roofing Co., Inc. v. Iowa Dep’t of Educ.*, 593

N.W.2d 159, 162 (Iowa 1999)(stating “[i]n the absence of a statutory definition or an established meaning in the law, we give words in a statute their ordinary and common meaning.”).

⁶*See* 90 C.J.S. *Trusts* §21 (stating that “[w]hile the subject matter of a trust must be lawful, definite property, there is no limitation or restriction on its kind or nature, it being the rule that a trust may exist in any property real or personal, legal or equitable ...”); 76 Am. Jur. *Trusts* §47 (stating that “[t]he res may consist of any type of transferable property, either realty or personalty, including undivided, future, or contingent interests therein.”).

⁷Restatement (Third) of Trusts §40 (2003).

A concern about this statutory interpretation is that the phrase, "...possessed by the decedent at any time during the marriage..."⁸ used in subsection (a) is not repeated in subsection (d). What this may indicate is that, only if there is real property in the trust *at the time of the decedent's death*, the surviving spouse is entitled to reach those underlying assets. Hence, the argument goes, the surviving spouse may not be allowed to reach the underlying assets if they were not held in trust at the time of the decedent's death. In other words, if the decedent was the trustee and sold property held in trust during his lifetime, upon his death the surviving spouse may only be able to reach the *proceeds from that sale* now in trust.

The problem with this analysis is that, if the trustor is able to transfer the real property into the revocable trust during his lifetime and then sell the property as trustee, the trustor may be able to deplete the proceeds from the real estate transaction. This would defeat the purpose of the elective share doctrine by allowing the grantor to circumvent spousal rights by transfer to a revocable trust. At common law, dower and curtesy protected the surviving spouse from disinheritance.⁹ These well established doctrines were replaced and refined with the spousal elective share.¹⁰

B. Legal versus Equitable Title

When the trustor of a revocable trust conveys property to the trustee, only the legal title is transferred to the trustee.¹¹ Equitable title remains with the trustor since he has complete control

⁸Iowa Code §633.238(1)(a) (2005).

⁹Nathaniel W. Schwickerath, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 DRAKE L. REV. 769, 798 (2000) ("Dower and curtesy were the common law solutions to spousal disinheritance, providing for a life estate in some or all of a deceased spouse's land in the surviving spouse."); citing GEORGE CRABB, A HISTORY OF ENGLISH LAW; OR AN ATTEMPT TO TRACE THE RISE, PROGRESS, AND SUCCESSIVE CHANGES, OF THE COMMON LAW; FROM THE EARLIEST PERIOD TO THE PRESENT TIME 98 (Fred B. Rothman & Co. 1987)(1831) (stating that doweries became "universal" during the feudal system).

¹⁰Nathaniel W. Schwickerath, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 DRAKE L. REV. at 798 (2000) ("These common law rules, in most jurisdictions, have given way to elective share statutes and the implementation of community property.").

¹¹See *In re: The Estate of Reginald Hall Johnson*, 397 So.2d 970, 973 (1981)(stating that where a decedent transferred property to a revocable trust he retained "...all equitable right, title, possession and interest in the property until his death"); Cf. *In re Kester*, 339 B.R. 749, 752 (2006) ("Under Kansas law, a trust beneficiary holds equitable title and the trustee holds legal title to property held by a trust."); *Flanner v. Fellows*, 206 Ill. 136, 140 (Ill. 1903)(stating "...we think it clear that while the legal title, at the date of the death of the testator, vested in the trustee, the equitable title vested in..." the beneficiaries).

over the trust.¹² If this analysis is correct, the inchoate interest that the surviving spouse has under §633.238(1)(a) remains with the equitable title of the trustor and ripens¹³ at the time of his death.

Due to the fact the trustor remains in possession of the equitable title, §633.238(1)(a) should continue to be the section of the Code used to determine the rights of the surviving spouse, and not §633.238(1)(d). If the surviving spouse has not relinquished her rights, she has a claim against one-third of the *equitable title to real estate* owned by the decedent at any time during their marriage under §633.238(1)(a).¹⁴

Because §633.238(1)(a) applies to a real estate interest owned by the decedent at any time during marriage, a spouse must relinquish her rights at some time prior to conveyance out of the trust. For example, if a wife joins in the quit claim deed from the husband to the trust, no further relinquishment may be required.¹⁵

C. 2006 Sieh Case

Sieh was not decided based on the statutory language in Iowa Code §633.238.¹⁶ Instead the court decided the case by adopting the American Law Institute (ALI) approach and the Restatements.¹⁷ The Restatement (Third) of Property states:

Although property owned or owned in substance by the decedent immediately before death that passed outside of probate at the decedent's death is not part of the decedent's probate estate, such property is owned in substance by the decedent through various powers or rights, such as the power to revoke, withdraw, invade, or sever, or to appoint the decedent or the decedent's estate as beneficiary. Consequently, for purposes of *calculating* the *amount* of the [spouse's] elective

¹²*Id.* See also BLACK'S LAW DICTIONARY 361 (2nd Pocket Edition 2001)(defining equitable interest as "[a]n interest held by virtue of an equitable title or claimed on equitable grounds, such as the interest held by a trust beneficiary," and defining inchoate interest as "[a] property interest that has not yet vested").

¹³*Caruth v. Caruth*, 103 N.W. 103, 103 (Iowa 1905)("The inchoate interest of one in the realty of the other ripens into a fee only by death. Not until the life of the owner has departed can it be material whether the interest of either husband or wife in the property of the other has been divested.").

¹⁴Iowa Code §633.238(1)(a) (2005).

¹⁵See Iowa Land Title Standard 5.7.

¹⁶See *Sieh v. Sieh*, 713 N.W.2d 194, 196 (2006)(relegating Iowa Code §633.238 to footnote 2).

¹⁷Restatement (Third) of Property: Wills and Donative Transfers §9.1 (2003); and Restatement (Third) of Trusts §25 (2003).

share the *value* of property owned or owned in substance by the decedent immediately before death that passed outside of probate at the decedent's death to donees other than the surviving spouse is counted as part of the decedent's "estate."¹⁸

This language appears to suggest that the underlying assets themselves may not be reached, but the *value* of those assets are used to *calculate* the surviving spouse's elective share. However, the Court goes on to say that the "assets" in the revocable trust are included in the statutory share of the surviving spouse.¹⁹ In other words, the rights of the surviving spouse actually attach to the underlying *assets*.

D. Interaction with Other Code Sections

It is important to notice that the elective share and homestead provisions interact with each other. Iowa Code §633.239 states "[t]he share of the surviving spouse in such real estate shall be set off in such manner as to include the homestead..."²⁰ Homestead is defined as:

[t]he homestead must embrace the house used as a home by the owner, and, if the owner has two or more houses thus used, the owner may select which the owner will retain. It may contain one or more contiguous lots or tracts of land, with the building and other appurtenances thereon, habitually and in good faith used as part of the same homestead.²¹

Hypothetically, this means that, if a 300 acre tract of land was held in trust and the trustor passed away, the surviving spouse would likely take the elective share - which would be the value of 100 acres *including* the homestead. If §633.238(1)(d) is only applicable to the value of the property in trust, this could leave the surviving spouse with a choice between taking the elective share or the homestead. If she takes the elective share, she could receive more value but lose the homestead. If instead, she takes the homestead, she receives less value. Assuming that the purpose of the elective share provision is to protect the surviving spouse, this result seems inconsistent. This analysis indicates that §633.238(1)(d) includes specific rights to the underlying real property - which is consistent with the statutory language addressed above.

III. Conclusion.

It does not appear that placing real property in a revocable trust can defeat a claim for homestead without express relinquishment by the surviving spouse. In *In re: The Estate of*

¹⁸*Sieh v. Sieh*, 713 N.W.2d at 197 (original emphasis omitted and emphasis added).

¹⁹*Id.* at 198.

²⁰Iowa Code §633.239 (2005).

²¹Iowa Code §561.1 (2005).

Reginald Hall Johnson, this issue came before the Florida Court of Appeals.²² In that case the trustor of a revocable trust, naming himself as both trustee and lifetime beneficiary, devised to his adult daughter real property that qualified as a homestead.²³ The court held that the homestead provision could not be circumvented by deeding the property to himself as trustee in a revocable trust.²⁴ This appears to be due to the fact that the homestead clearly entitles the surviving spouse to a specific piece of real property.

There does not currently appear to be case authority for this scenario where an elective share is at issue. But, the statutory language in Iowa Code §633.238 and the above analysis suggests the property in trust includes real property and is subject to the surviving spouse's elective share. In the alternative, the decedent retained the equitable title to the real property until his death, and at that time title to one-third of the property immediately becomes subject to the surviving spouse's elective share under §633.238(1)(a).

Consequently, it does not appear that the Trustee may convey the real property without first having the surviving spouse relinquish her rights. Both §633.238(1)(a) and §633.238(1)(d) appear to mandate this conclusion.

Iowa Code §561.13 states “[a] conveyance or encumbrance of, or contract to convey or encumber the homestead, if the owner is married, is not valid, unless and until the spouse of the owner executes the same or a like instrument...”²⁵ Therefore, the conveyance from the husband to the trust is not valid since Wife did not relinquish her homestead rights in any way. In addition, the *Sieh* Court has adopted the Restatement (Third) of Property §9.1, which states that the decedent owns, in substance, the property placed in trust.²⁶ Since the surviving spouse has not relinquished her rights to the elective share, Buyer does not take good title against that share.²⁷

If a wife [or husband] relinquished her rights by joining in the deed to the trust, the Trustee may be able to transfer the real property to a third party.²⁸ Iowa Code §633.238(1)(a) *could be* satisfied when the wife made a prior, express relinquishment of her rights to the real

²²See *In re: The Estate of Reginald Hall Johnson*, 397 So.2d 970 (1981).

²³*Id.* at 971.

²⁴*Id.*

²⁵Iowa Code §561.13 (2005).

²⁶*Sieh v. Sieh*, 713 N.W.2d at 197.

²⁷See also Iowa Code §633.238(1)(d)(2005).

²⁸See *Whitt v. Whitt*, 2003 Ohio 3046 (Ohio Ct. App. 2003)(stating that a quitclaim deed transfers all interest from the transferor to the transferee, except those interests specifically retained); see also Iowa Land Title Standard 5.7.

property. The key argument in this scenario is that, when the husband dies, even though §633.238(1)(a) has been satisfied, now §633.238(1)(d) applies. The prior relinquishment should also satisfy §633.238(1)(d). Unfortunately, this is not clear. The spousal rights may immediately re-attach, just like they would with a quit claim deed from wife to husband outside of trust.