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## THE WIDOW'S ALLOWANCE

*By Hugh McLean of the Denver Bar*

IT appears that another legal landmark is about to be submerged in the rising tide of dollars, and that the horse has lost to Ford and General Motors another traditional post of honor. If House Bill No. 548, now before our Legislature, becomes a law, no more will our Colorado widows be permitted to console themselves with "one cow and calf, one saddle and bridle, one horse" each, as for so many years they have done under Sec. 5347 C. L. 1921 and its predecessors. No more shall we behold appraisers, court-appointed for that sole purpose, solemnly determining the value of horses, cows and calves which exist only on paper, to-wit: the appraiser's warrant, and of six months' provisions and fuel (Sec. 5915 C. L. 1921) which cannot be found in the larder or coal-bin of our modern widow, who, conveniently situated in a steam-heated, frigidaired, piggly-wigglyed apartment, lives from can to mouth. Nor will the clerk hereafter scan and total the figures which our accommodatingly imaginative appraisers have placed on these hypothetical animals, provisions, beds and pictures, to see that the total exactly equals, but does not exceed, the sacred statutory figure, two thousand dollars. Hereafter, under the new law, it is assumed that the widow, unless she expressly declares to the contrary, will accept nothing but hard cash in payment of her allowance.

This proposed statutory revision, and several comparatively recent decisions of our Colorado Supreme Court, have suggested this brief and quite unscholarly note on the purpose, nature and incidents of this so-called widow's allowance, under our statute and decisions.

1. The widow's allowance is not an interest in the estate, passing by descent, but a preferred claim against the estate, to be paid out of the personal property, if sufficient, if not, from the real estate. *Grover v. Clover*, 69 Colo. 72 (1917).

2. Allowance by the court constitutes a judgment in favor of the widow against the administrator; the money is no longer in *custodia legis*; the administrator by the judgment becomes a debtor, and is subject to garnishment in attachment proceedings against the widow. Nothing in the statute ex-

empts the allowance from garnishment, and the court declines to determine or even discuss the question of public policy involved, these questions being legislative, not judicial. *Dry Goods Co. v. Larimer County Bank*, 75 Colo. 451 (1924).

3. Only a widow "residing in this state" is entitled. For example, in *Bubser v. Hermann*, 71 Colo. 95 (1922), three years before the husband's death, the wife had removed to Iowa and remained there until his death. She neither corresponded with the husband, nor received any support from him, but made her own way by operating a rooming-house. *Held*: Widow's allowance denied. While the legal domicile of the wife may, for certain purposes, be that of the husband, she may have, and did have here, a separate residence. She was residing apart from the husband, discharging no duties toward him, and was maintaining herself; therefore the reason of the statute to provide after the husband's death for her, who before his death had been dependent on him, fails. "The thing for which the allowance is a substitute not having existed, there is no reason for the allowance."

4. The allowance may be waived by antenuptial or separation agreement; but the waiver must be explicit and will not be implied from general language.

Here we have an interesting series of cases, showing considerable difference of opinion in the court. In chronological order they are as follows:

In *Wilson v. Wilson*, 55 Colo. 70 (1913), the husband and wife made an antenuptial agreement providing that neither should inherit from the other, and that the survivor "shall not claim any interest whatever in the estate of the deceased party by virtue of said marriage." The husband further agreed that a reasonable portion of his estate should be held in trust by his executors to support the wife in as comfortable a manner as during the marriage. The husband died and the wife claims the widow's allowance. *Held*: Allowance granted. The widow's allowance is a claim, not an interest in the estate. The contract relates only to the widow's distributive share; its general provisions do not waive the widow's allowance, especially in view of the later clauses expressly providing for her support. She no more waived her claim under the statute

than she would have waived her claim on her husband's promissory note, if she had held one.

In *Deeble v. Alerton*, 58 Colo. 166 (1914), the husband and wife, after living together for thirty years, executed a separation agreement providing that neither would claim from the other any money or property and that neither should be liable for the support or debts of the other. The husband died; the wife claims her widow's allowance. *Held*: Allowance granted. The contract does not waive the widow's allowance, which is designed to protect widows and children and the State as well. It cannot be waived by presumption, assumption or construction. *If it may be waived at all* it must be in terms that do not admit of doubt.

In *Remington v. Remington*, 72 Colo. 132 (1922), a contract between husband and wife recited that for sufficient considerations the wife waived and released all rights in the husband's property, including her right to inherit from him; that he should have the right to dispose of all of his property by will, and if he did not do so it should descend to his legal heirs other than the wife. On the husband's death the wife claims the widow's allowance. *Held*: Allowance granted. The subject matter of the contract was property, whereas the widow's allowance is neither an interest in the property of the husband nor is it an interest in his estate. It is a charge against the estate, part of the costs of administration, and is a right given by statute on grounds of public policy.

In *Brimble v. Sicker*, 83 Colo. 494 (1928), the husband and wife, both elderly, were married in 1914. Four months later they executed a written agreement forthwith to separate; and in consideration of \$150 and some chickens, the wife agreed not to claim support, nor alimony if divorce should later be had. Each further agreed to waive any claims to moneys, property or assets that might be due from the estate of the other "as widow or husband or heir or in any other manner." They remained undivorced, living apart, until 1926, when the husband died. The wife claimed her widow's allowance. *Held*: Allowance denied. The wife expressly waived the only claim she had as widow, viz, the widow's allowance, which is alienable and may be garnisheed after allowance. The basic public policy involved is the duty of

the husband to support the wife—here there was none. Walker J. specially concurred, and Adams, Campbell and Whitford JJ. dissented, on the ground that public policy is fixed by the legislature, not by the court; that the State is a party, and its rights cannot be contracted away. The basic reason for the allowance is that the wife may have something to live on after the husband is dead, so that the State will not have to support her. The inadequacy of the consideration here shown emphasizes the need of protecting the wife.

In *U. S. National Bank v. Stuart*, 83 Colo. 546 (1928), the husband and wife, each over sixty years of age at the time of their marriage, and each having separate property, made an antenuptial contract providing that neither should acquire any interest "in the property of the other by virtue of their marriage, or any rights arising therefrom including inheritance." Some years after marriage this antenuptial contract was reaffirmed in a writing which recited "we have each a sufficient amount of property to support ourselves comfortably the rest of our lives." On the husband's death the wife claimed her widow's allowance, which was granted by the County Court. On writ of error to the Supreme Court, one justice not sitting, the remaining six were equally divided, wherefore the judgment of the County Court was affirmed by operation of law.

In view of the decided and fundamental differences of opinion among the judges, might it not be desirable for the legislature more explicitly to define the right involved? As matters now stand under the latest authoritative pronouncement of the Court in the *Brimble v. Sicker* case, (83 Colo. 494), the widow's allowance is to be treated merely as a preferred claim against the estate, subject to garnishment, and capable of being waived by express contract. This gives the wife a right which she can use to bargain with in connection with antenuptial contracts or separation agreements. If, on the other hand, as the minority of the court seem to think, it should be treated in the light of a spendthrift trust for the widow, for her protection and that of the state, then further legislation is necessary. Such paternalistic protection seems, on the whole, neither necessary nor desirable.