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THE WIDOW'S ELECTION TO TAKE AGAINST A WILL*

In most jurisdictions other than the community property states a widow is given a dower or statutory share in her husband's property of which she cannot be deprived by her husband's will.¹ If the husband makes a testamentary gift to his widow which is expressly in lieu of these rights, she is put to her election. Furthermore, the majority of states have statutes to the effect that a testamentary provision for a widow is in lieu of her dower or statutory share unless a contrary intention is manifested in the will.² Thus, the widow must also elect if such a contrary intention fails to appear in the will.

If a case for election exists and the widow has not been barred from her dower or statutory share,³ she will undoubtedly elect against the will if she is dissatisfied with the will provisions. When the widow so elects, there is necessarily a disruption of the testator's dispositive plan.⁴ After the widow takes her share of the estate, the property remaining subject to the operation of the will is usually less than it would have been. Consequently, the manner in which the remaining property is to be disposed must be determined. The cases are rare in which a testator, anticipating his wife's election, has made provision in his will for the distribution of the property remaining after her share is taken,⁵

*This article will appear in two installments, the first discussing the situation where a widow may elect against her husband's will, and the second taking up the evil effects of such an election and possible remedial measures. The second installment will appear in the summer issue of the Review.

¹ 3 VERNIER AMERICAN FAMILY LAWS 351-352, 448 (1935). See section 189 of the third volume of Vernier for a discussion of these marital property rights and a table of state statutes concerning them. The Wisconsin statute is Section 233.14, which provides that, in the event of a widow's election against her husband's will or his failure to provide for her in his will, she is to receive her dower share under Section 233.01, *i.e.*, a one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage; an estate in the homestead for life or until remarriage; and one-third of the husband's net personal estate.

² 3 VERNIER, *supra*, n. 1, at 414, 415.

³ WIS. STATS. (1953) §233.13. In general a widow may be barred by means of a jointure or pecuniary provision, an antenuptial contract or settlement, a post-nuptial contract or settlement, or a deed. See 3 VERNIER, *supra*, n. 1, §195-198, §200. Under the Wisconsin statutes a wife may be barred of her dower and homestead rights under Section 233.14 by joining with her husband in a conveyance to a third person or by executing a quitclaim deed to a third person to whom her husband has already conveyed the property (Section 235.27), or by doing the same through a power of attorney (Section 235.28); she may be barred from her *entire* statutory share under Section 233.14 by means of a jointure or pecuniary provision (Sections 233.09, 233.10, 233.11, 233.12, and 233.14). The next installment of this article will consider the exclusiveness of the Wisconsin statutes on jointures and pecuniary provisions as a bar to a widow's statutory share under Section 233.14.

⁴ See Note, *Effects of Widow's Election to Take Against Will*, 24 IOWA L. REV. 714 (1939) for an excellent discussion of the effects of a widow's election.

⁵ *Ibid.*, 24 IOWA L. REV. at 719, 720.

but where such provision is made the testator's direction is followed.⁶ In some jurisdictions statutes determined how the will is to operate on the remaining property.⁷ In the absence of statute or an express provision in the will regarding the method of distribution, the courts try to carry out the provisions of the will as best they can, relying on the presumed intention of the testator.⁸ However, where a statute or the presumed intention of the testator is relied upon in determining the distribution of the property, many difficult problems arise, and in extreme cases the testator's will is rendered ineffective.⁹

It is the purpose of this article to consider; (1) the possibilities of a widow's election under present Wisconsin law, (2) the evil effects of such an election, and (3) the means by which these evils may be prevented or mitigated.

I. Situations Where the Widow May Elect to Take Against the Will

A. Where Will Gives Widow Less Than Statutory Share Under Section 233.14

It is impracticable to generalize as to the factors which will cause a widow's election. The nature of the will provisions, the kind and amount of the estate assets, and the personal circumstances of the widow are some of the most important factors, and they will of course vary from case to case. However, it can be said that ordinarily whenever a widow is given less under the will than the statutory share she is entitled to under Section 233.14 of the Wisconsin Statutes,¹⁰ she may decide to take against the will.

At times a testator will give his wife less than her statutory share because of ill feeling between them, but there are many other situations in which a husband will be disinclined to give his wife much by will. For example, (1) the wife may have a separate estate which is more than adequate for her needs. Perhaps the husband has already given her a substantial share of his property by an inter vivos transfer. (2) There may be substantial non-probate assets which will pass to the wife at the husband's death. For instance, the hus-

⁶ *Pittman v. Pittman*, 81 Kan. 643, 107 P. 235 (1910); *Kohl's Estate*, 336 Pa. 376, 9 A.2d 346 (1939); *Mohn's Appeal*, 76 Pa. 92 (1874); *Bard's Estate*, 58 Pa. 393 (1868).

⁷ 7 AM. JUR. WILLS, §1549, 1055; *supra*, n. 4 at 726-728.

⁸ *Merchant's Nat. Bank v. Hubbard*, 222 Ala. 518, 133 So. 723 (1931); *Ward v. Ward*, 153 Kan. 222, 109 P.2d 68 (1941); *Estate of McLean*, 219 Wis. 222, 262 N.W. 707 (1935). See Notes, 27 L.R.A. (N.S.) 602 (1910); Ann. Cas. 1913 E 417, *supp.* Ann. Cas. 1918 C 413.

⁹ *Fennell v. Fennell*, 80 Kan. 730, 106 P. 1038 (1909), modified, 81 Kan. 642, 106 P. 1040 (1910). See *In re Estate of Hunter*, 129 Neb. 529, 536, 262 N.W. 41, 44 (1935). Cf. *Chamberlain v. Chamberlain*, 3 Lans. 348, 382 (N.Y. 1870); *Sevier v. Woodson*, 205 Mo. 202, 104 S.W. 1 (1907). See Notes, 27 L.R.A. (N.S.) 602 (1910); Ann. Cas. 1913 E 418.

¹⁰ See *supra*, n. 1 for provisions of Section 233.14.

band may have an insurance policy on his life which is payable to his widow and he may have given up the right to change the beneficiary. Thus, she will get the insurance proceeds as a matter of course, unless premium payments are not met. Deeming the insurance proceeds sufficient provision for his wife, the testator may leave her little or nothing in his will. (3) An older man may marry after amassing certain wealth. His wife has not aided him in the accumulation of his estate, and he feels that a one-third portion of his property is more than she is entitled to. Perhaps he has children of a former marriage to whom he wants most of his wealth to go.

A widow may also get less under the will than her statutory share where the husband has conveyed large amounts of realty during his lifetime without his wife's joinder, or where his will fails to dispose of a substantial amount of his property. If the widow takes under the will, she is barred from her statutory share in such property as well as in property disposed of by the will.¹¹ However, if the widow takes against the will, she gets her dower in all the lands of which her husband was seized of an estate of inheritance at any time during the marriage,¹² which lands necessarily include those conveyed by the husband without his wife's joinder or otherwise undisposed of by the will. She also takes one-third of the husband's "net personal estate,"¹³ which net personal estate includes intestate personalty. Thus, if the husband has alienated a substantial amount of realty without his wife's joinder, or if considerable property passes intestate, it may be that the wife's statutory share under Section 233.14 of the Wisconsin Statutes will be greater than the benefits given her by the will.

B. Where Will Gives Widow More Than Statutory Share Under Section 233.14

Even though the testamentary gifts to a widow are of greater value than her statutory share, there are factors which may cause her to elect. For instance, the widow may prefer outright interests to interests for life.¹⁴ Thus, if the will gives her a life interest in property, which life interest will amount to more than the wife's statutory share if she lives her life expectancy, the widow may take her statutory share, since she then receives absolute interests in the testator's non-homestead realty and personalty.

Another possible reason for a widow's election, notwithstanding the fact that the will gives her more than her statutory share, may be found where the husband dies partially intestate. Partial intestacy

¹¹ WIS. STATS. (1953) §233.01, 233.13, 233.14; *Hardy v. Scales*, 54 Wis. 452, 11 N.W. 590 (1882); *Chapman v. Chapman*, 128 Wis. 413, 107 N.W. 668 (1906).

¹² WIS. STATS. (1953) §233.14, 233.01.

¹³ WIS. STATS. (1953) §233.14, 318.01.

¹⁴ *In re Will of Muskat*, 224 Wis. 245, 271 N.W. 837 (1937); *Will of Borchert*, 259 Wis. 361, 48 N.W. 2d 496 (1951).

may occur where a legacy or devise lapses or is void, where a residuary clause is lacking or incomplete, or wherever the husband fails to dispose of all his property by will. In any of these situations, if a widow abides by her husband's will, the weight of authority in the United States says that she does not share under the intestate statutes¹⁵ in the property which passes intestate.¹⁶ Wisconsin in the early cases of *Hardy v. Scales*¹⁷ and *Chapman v. Chapman*¹⁸ held with the majority.¹⁹ On the other hand, if the widow takes under the law, there is a strong possibility that she will participate in certain of the intestate property as heir or next of kin in addition to receiving her statutory share under Section 233.14, Wisconsin Statutes. (Of course, we are assuming a case where a widow's share under the intestate statutes is greater than her statutory share under Section 233.14.) We must distinguish between two situations. The first is where the intestate property involved is the property which the widow has renounced, *i.e.*, where it is the widow's act which has caused the partial intestacy.²⁰ In this case the courts usually refuse to allow the widow to take under the intestate statutes.²¹ Such is the holding in a recent Wisconsin decision, *Will of Uihlein*.²² The second situation involves property rendered intestate by means other than the widow's election. Authority is split as to whether a widow should take such intestate property under the intestate statutes. Some courts have denied her this right on the ground that she has already received a share in the entire estate and should not be permitted to take a second time.²³ Others have held that since there *is* an intestacy she should be entitled to share under the intestate statutes.²⁴

¹⁵ WIS. STATS. (1953), ch. 237 and §318.01.

¹⁶ Cases collected in Notes, L.R.A. 1917 D 762; Ann. Cas. 1918 B 986; 93 A.L.R. 1384 (1934). The question is treated in considerable detail by Phelps, *The Widow's Right of Election in the Estate of Her Husband*, 37 MICH. L. REV. 236, 401 (1938). See Sayre, *Husband and Wife as Statutory Heirs*, 42 HARV. L. REV. 330 (1929), for criticism of the majority view.

¹⁷ *Hardy v. Scales*, 54 Wis. 452, 11 N.W. 590 (1882).

¹⁸ *Chapman v. Chapman*, 128 Wis. 413, 107 N.W. 668 (1906).

¹⁹ See Note, *Partial Intestacy—The Right of a Widow to Share in the Intestate Property of Her Husband Who Has Disposed of Less Than All of His Property by Will*, 1950 WIS. L. REV. 182, for criticism of the Wisconsin decisions.

²⁰ Ordinarily the interest which the widow renounces is not considered intestate property; rather, it is used to compensate disappointed beneficiaries under the will. 2 POMEROY, EQUITY JURISPRUDENCE 464 (5th ed. 1941). Occasionally, however, such property is considered intestate property. *Fife v. Fife*, 320 Ill. 270, 150 N.E. 630 (1926); *Harris v. Harris*, 139 Md. 187, 114 A. 909 (1921). Such was the holding in *Will of Uihlein*, 264 Wis. 362, 59 N.W. 2d 641 (1953), where compensation was not required.

²¹ *Shoup v. Shoup*, 319 Ill. 179, 149 N.E. 746 (1925); *Appeal of Sims' Estate*, 162 Okla. 35, 18 P. 2d 1077 (1933).

²² 264 Wis. 362, 385-389, 59 N.W. 2d 641, 653, 654 (1953).

²³ *Boynton v. Boynton*, 266 Mass. 454, 165 N.E. 489 (1929).

²⁴ *Blatt v. Blatt*, 79 Colo. 57, 243 Pac. 1099 (1926); *Dale v. Bartley*, 58 Ind. 101 (1877); *Cain v. Barnwell*, 124 Miss. 860, 87 So. 484 (1921).

In the *Uihlein* case the Wisconsin court did not have to decide this second situation, but the opinion is couched in very broad language and would appear to be a holding that, when a husband dies partially intestate, no matter for what reason, and a widow takes under the law, she is to get no share in the intestate property as heir or next of kin, but only her statutory share under Section 233.14. However, the implication that a widow will not take under the intestate statutes property which passes intestate for reasons other than the widow's election is pure dictum, since the decision in the *Uihlein* case is restricted to property which became intestate because of the widow's renunciation. Of course, the language in the opinion, as strong as it is, cannot be completely disregarded. Yet, there is a good possibility that the Wisconsin court will allow the widow to share under the intestate statutes when the intestate property was not rendered such by virtue of her election, since this appears to be the better view. Certainly, there is no valid reason to exclude her from such intestate property—any presumed intent on the part of the testator is immaterial as to property of which he has failed to dispose;²⁵ also denying the widow a share in the intestate property as heir or next of kin whether she takes under or against her husband's will is analytically unsound.

Thus, if there is a substantial amount of property which is left undisposed of by the testator's will and which is not rendered intestate by the widow's election, it may be to the widow's advantage to elect against the will even though her statutory share under Section 233.14 is less than what the will gives her, because of the probability that she will also take a share in the property as heir or next of kin.

One more factor which may influence a widow to take against the will, whether or not her statutory share is greater than the testamentary gifts in her favor, is the question of creditors rights. If the debts of the testator are large, it may be advisable for the widow to take under the law. If she takes under the will, the debts of the husband may consume all the personalty bequeathed to her except the widow's allowance under Section 313.15,²⁶ and all the realty devised to her²⁷ except for the homestead exemption of \$5,000.²⁸ Also, this exemption may be eaten up by taxes; laborers', mechanics' and purchase money liens;²⁹ or mortgages other than purchase money mortgages which are con-

²⁵ 1 AMERICAN LAW OF PROPERTY 733 (1952). Paul L. Sayre, in 42 HARV. L. REV. 330, *Husband and Wife as Statutory Heirs* (1929), contends that a widow electing against her husband's will should not participate in intestate property as statutory heir. However, his position is based on the premise that the particular jurisdiction allows taking as statutory heir where the widow abides by her husband's will.

²⁶ See WIS. STATS. (1953) §313.15.

²⁷ WIS. STATS. (1953) §316.01.

²⁸ WIS. STATS. (1953) §238.04, 237.025, 370.01 (14), 272.20.

²⁹ WIS. STATS. (1953) §272.20.

mented to by the wife by means of her joinder in the mortgage or her execution of a separate mortgage.³⁰

However, if the widow takes against the will, she gets substantially more protection against her husband's creditors whenever the estate includes realty. As to personalty the situation is the same as though she took under the will, since the "net personal estate" of the testator, of which the widow gets a one-third portion under Section 233.14, is the personalty of the husband after payment of debts.³¹ Thus, the only personalty free from his debts is the widow's allowance under Section 313.15, which is awarded to her whether or not the husband dies testate. However, in regard to realty, the widow gets a great deal more protection from estate creditors than if she took under the will. As to homestead realty, there is a possibility that the widow may receive her interest in the homestead entirely exempt from her husband's debts if she takes against the will. Section 233.14 provides that the widow gets the same homestead rights as though the testator died intestate leaving lawful issue. Section 237.02(2), which pertains to the *descent* of a homestead, provides that if a decedent leaves a widow and issue the homestead goes to the widow so long as not remarried, and upon remarriage or death to the original decedent's heirs according to Section 237.01, provided that the limitation as to the value of the homestead in Section 272.20 (*i.e.*, the \$5,000 limitation) shall not apply to a widow during widowhood.³² Consequently, where the widow takes under the law, the homestead descends to her free of the value limitation of Section 272.20. It is conceivable that Section 237.02(2) also removes the \$5,000 limitation on *exemption*, so that the widow's homestead rights are entirely free from her husband's debts.³³ Of course, we must remember that this exemption may be consumed by the lawful liens mentioned above in discussing the exemption where the widow takes under the will. However, in a given case it may be to the widow's advantage to take under the law even though the will gives her the homestead, since she may get a greater exemption than the \$5,000 allowed her if she takes under the will.³⁴

³⁰ WIS. STATS. (1953) §235.01.

³¹ WIS. STATS. (1953) §233.14, 313.15, 318.01; *supra*, n. 22, 264 Wis. at 376; Ford v. Ford, 88 Wis. 122, 59 N.W. 464 (1894).

³² The proviso is a 1951 amendment (L. 1951, ch. 727 §23m). There are no decisions on whether it applies to a case where a widow elects and no issue *actually* survive the testator, but a literal interpretation of Sections 233.14 and 237.02(2) gives the widow her homestead rights in the entire homestead even though no issue actually survive.

³³ There are no Wisconsin decisions on this point, but see *Survey of 1951 Wisconsin Legislation*, 35 MARQ. L. REV. 142, 143 for a discussion of the possibility of an unlimited exemption under Section 237.02(2).

³⁴ Examples of such a case are (1) where there are no lawful liens and the widow's homestead rights (*i.e.*, her estate for life or until remarriage) are

Regarding non-homestead realty, Section 233.14 gives the widow the same dower in the testator's land as if he had died intestate. Thus, one-third of the testator's non-homestead realty goes to the widow free of the claims of both general and secured creditors,³⁵ unless the latter have mortgages given prior to the marriage,³⁶ purchase money mortgages,³⁷ or mortgages in which the wife had joined.³⁸ In the event that such mortgages exist, Section 233.06 provides that when the realty is sold to pay off the mortgage debt, the widow gets one-third of any surplus remaining after payment of the mortgage and expenses of the sale. Thus, where there are no mortgages superior to the widow's dower right, or where there is a portion of the non-homestead realty uncovered by such mortgages, it is advisable for the widow to take against the will. If she receives anything at all by virtue of her dower right, she is better off than if she goes under the will, because, as pointed out above, abiding by the will subjects all non-homestead realty to the claims of unsecured creditors.³⁹

C. Tax Considerations

It is beyond the scope of this article to go into a detailed discussion of the tax factors involved in a widow's election, but it does not appear that such factors in themselves will ordinarily be sufficient to cause a widow to elect. At the state level, a Wisconsin inheritance tax is imposed upon the widow as to property passing to her at her husband's death, whether the property passes under the will or by virtue of her election.⁴⁰ As to the federal estate tax, Section 811 (b) of the Internal Revenue Code, requires the inclusion in the gross estate of the full value of the decedent's property without any deduction for the

worth more than \$5000, or (2) where such liens leave untouched a portion of the homestead's value in excess of \$15,000. In the latter situation, Wis. STATS. (1953) §233.01 is applicable. This section provides that a widow is to have her *dower* in the proceeds of her husband's homestead in lieu of her homestead rights where the premises are sold while the widow has homestead rights therein. However, *compare* Wis. STATS. (1953) §316.11(1), which Section seems to conflict with Section 233.01 in providing that where a mortgaged homestead is sold the widow gets her dower *and* homestead interests in the proceeds.

³⁵ United States v. Ettelson, 67 F. Supp. 257 (1946), *rev'd* on other grounds in United States v. Ettelson, 159 F. 2d 193 (1947); Melms v. Pabst Brewing Co., 93 Wis. 140, 66 N.W. 518 (1896); Cowan v. Lindsay, 30 Wis. 586 (1872).

³⁶ Wis. STATS. (1953) §233.04.

³⁷ Wis. STATS. (1953) §233.05.

³⁸ Wis. STATS. (1953) §233.06.

³⁹ However, even though the widow fails to elect against the will within the required time under Section 233.14, it is conceivable that Section 233.17, which entitles the widow to her dower if she is deprived of a provision made for her by will in lieu of dower, might give relief to the widow where creditors deprive her of the provision made for her in the will. But there are no Wisconsin cases on this point.

⁴⁰ Wis. STATS. (1953) §72.01(1) provides for taxing transfers passing by will or the intestate laws, and Wis. STATS. (1953) §72.24 defines "intestate laws of the state" as including the dower, homestead, and other statutory rights and allowances of a widow.

surviving widow's dower or statutory substitute.⁴¹ If the widow accepts a bequest or devise in lieu of dower or its statutory substitute, the value of the property thus passing to her must be included in the gross estate under Section 811 (a), and the amount so included may not be diminished by deducting the value of the widow's dower or statutory share.⁴²

However, a widow's election against the will may give her a federal estate tax advantage where the testamentary provisions in her favor are not set up so as to qualify for the marital deduction.⁴³ In such a case electing against the will decreases the federal estate tax, since the widow's dower right in the realty and her statutory share in the personalty qualify for the marital deduction.⁴⁴ Thus, where the widow's share of the estate must bear a portion of the federal estate tax whether or not she takes under the will, her tax burden will be lightened by an election against the will.

Aside from this situation, it appears that a widow's election will give her a tax advantage only if she can thereby escape having her share of the estate bear any burden of the federal estate tax. It was on this theory that the *Uihlein* case⁴⁵ was brought to the Wisconsin Supreme Court. There the question was whether the testator's "net personal estate," of which the wife was entitled to a one-third portion under Section 233.14, was to be determined before or after taxes. The court held:

"It seems to us that the words "*net estate*" of our statute are clear and unambiguous and are subject to no other interpretation than that they mean that part of the estate which remains after payment of all charges against the entire estate. Federal estate taxes stand in no different category than do debts or administration expenses . . ."⁴⁶

The court's holding is all the more significant in view of the fact that the testator had specifically provided that all estate and inheritance taxes were to be paid from the residue, and a prior Wisconsin case⁴⁷ had said that the "residue" of a testator's estate where his widow takes against the will consists of that part of the general estate which remains after deducting debts, specific legacies, and the *widow's share*. The court in the *Uihlein* case stated that had the widow abided by the will she would have taken under the residuary clause after deduction

⁴¹ See U.S. Treas. Reg. 105, §81.14.

⁴² See T. D. 3319, dtd. April 5, 1922; Title Guarantee & Trust Co. v. Edwards, 290 F. 617 (1922); Schuette, Executrix of Estate of Harry S. Harkness v. Bowers, 32 F.2d 817 (1929), *aff'd* 40 F.2d 208 (1930).

⁴³ This situation existed in the *Uihlein* case.

⁴⁴ INT. REV. CODE §812(e) (3) (C).

⁴⁵ Will of *Uihlein*, *supra*, n. 20.

⁴⁶ *Supra*, n. 22, 264 Wis. at 376.

⁴⁷ Will of Reynolds, 151 Wis. 375, 138 N.W. 1019 (1912).

of the federal estate tax, and she should not be given an advantage tax-wise by her election.⁴⁸ Yet, the real basis of the court's decision appears in the following passage:

"In electing to take under the law she is not entitled to claim the benefit of the provisions directing payment of federal estate taxes out of the residue. Such clause of the will remains effective as between the recipients of specific legacies and the remaindermen who take the residue, but the widow's renunciation of the will prevents such clause from being operative so as to relieve her share from the impact of the federal estate tax."⁴⁹

Thus, it is apparent that even an express direction in a will that the widow's share is to be free from federal estate taxes will be of no avail in the event that the widow takes her statutory share under Section 233.14.⁵⁰

Consequently, since the widow's share under Section 233.14 is not free from the burden of the federal estate tax, there is no advantage to her tax-wise in electing against the will. Furthermore, in cases where she would take her share under the will tax free, there is clearly a tax disadvantage. Under certain circumstances this disadvantage is especially acute, due to the fact that the widow's election increases the federal estate tax. For example, suppose the widow is given the income from a testamentary trust and a power of appointment over the corpus of the trust in favor of her estate, so that the trust corpus qualifies for the marital deduction under Section 812 (e)(1)(F) of the Internal Revenue Code, and the value of this trust corpus is determined by means of a formula, so as to qualify for the full fifty percent (50%) of the testator's adjusted gross estate allowed as a marital deduction. The widow, desiring the outright interests in her husband's property which Section 233.14 affords to her instead of the life interest given her in the will, takes under the law. As a result, considerably less than fifty percent (50%) of the adjusted gross qualifies for the marital deduction.⁵¹ Consequently, the federal estate tax is greater than if the widow had taken under the will, and the widow's share is subject to an even greater tax burden than would ordinarily result from her election.

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⁴⁸ *Supra*, n. 22, 264 Wis. at 377.

⁴⁹ *Supra*, n. 22, 264 Wis. at 377, 378.

⁵⁰ Note that the holding in the Uihlein case is restricted to a situation where the testator leaves sufficient *personalty* to pay the federal estate tax. There is no Wisconsin decision as to a case where *personalty* is insufficient.

⁵¹ Only one-third of the non-homestead realty and one-third of the net personal estate, *i.e.*, the widow's dower and her statutory share in the *personalty* under Section 233.14, qualify for the marital deduction. INT. REV. CODE, §812(e) (3) (C). The widow's homestead rights, *i.e.*, her estate in the homestead for life or until remarriage, do not qualify because of the terminable interest rule. INT. REV. CODE, §812(e) (1) (B).