TRUSTS AND SUCCESSION

TRUSTS AND SUCCESSION—ELECTION OF STATUTORY SHARE—NEBRASKA SUPREME COURT INTERPRETS "BEST INTERESTS" OF INCOMPETENT SURVIVING SPOUSE—*Clarkson v. First Nat. Bank of Omaha*, 193 Neb. 201, 226 N.W.2d 334 (1975).

INTRODUCTION

Most jurisdictions have a statutory provision allowing a spouse a specified percentage of her husband's[1] estate upon his death.[2] If he leaves no will, she receives that statutory distributive share of his estate automatically. If his will provides for her, she is put to an election. She may take the property given her by will, or she may renounce the will and elect to take her statutory share.[3] When the surviving spouse is mentally competent she may choose one or the other at whim.[4] More difficult problems arise when she is incompetent, as under such circumstances she is not legally qualified to make the election. If a court is authorized to elect for her, some standards are necessary to guide the decision.

In *Clarkson v. First Nat. Bank of Omaha*,[5] a case of first impression in Nebraska, the state supreme court interpreted the basis on which the election for an incompetent spouse should be made in this state. Section 30-108 of the Nebraska statutes leaves the

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1. For convenience we shall consider throughout this note that a husband has died leaving an incompetent widow.

2. *See* Phelps, *The Widow's Right of Election in the Estate of Her Husband*, 37 MICH. L. REV. 236 (1938).

3. According to Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966),

> [T]he decision to afford the surviving spouse a share in the estate of the other regardless of the wishes of the decedent is attributable to a network of policy concerns which surround the protection of the family unit—the obligation of support, the presumed contribution of the survivor's family, and the state's interest in protection from the burden of indigents—as well as to policies favoring economy in transmission of property, equality of sexes, and fairness among beneficiaries . . . .
>
> This portion is available regardless of the testator's wishes, regardless of the survivor's financial need, and regardless of how much or how little the survivor may have contributed to that wealth.

Id. at 682.

4. Friedman, *The Renounceable Will: The Problem of the Incompetent Spouse*, 1958 WIS. L. REV. 400 [hereinafter cited as *Friedman*].

5. 193 Neb. 201, 226 N.W.2d 334 (1975) [hereinafter cited as *Clarkson*].

choice to the probate court but offers little guidance as to what factors should be considered in reaching a decision. The statute provides only that the court shall make such election as "the *best interests* of such surviving husband or wife shall require."[6] The Nebraska Supreme Court, in a 4-3 decision, interpreted the statute to mean that the interests of an incompetent surviving spouse are best served by electing on her behalf the alternative which awards her the greater amount of money.[7]

In *Clarkson* the testator had married his second wife in 1953. Each had children from a prior marriage. No children were born of the second marriage. In 1965, four years before the execution of her husband's will, the 80 year old wife was declared incompetent with no prognosis for recovery.[8] Upon the testator's death his estate was valued at approximately $1,300,000. His will established a trust of one fourth of the assets of the estate, the income of which was to provide for the support of his widow. The will gave the trustee the power to invade the trust principal as he deemed necessary for the proper support and maintenance of the incompetent beneficiary. Upon the widow's death the trust would terminate, the remaining assets to be distributed by the terms of the widow's last will or by her exercise of a power of appointment given by the will. If Mrs. Clarkson failed to leave a will or exercise her power of appointment, the trust assets remaining upon her death were to be distributed by the terms of her husband's will. In the latter event each of Mrs. Clarkson's children would receive $25,000 and the balance would be shared by his two daughters.[9]

Should the widow elect to take under the statute rather than by the will, she would receive a fee interest in one fourth of the estate. Mr. Clarkson's will left in trust the same amount of money as she would have acquired in fee under the statute. While the amount of money involved would have been the same with either alternative, to the Nebraska Supreme Court, fee title seemed of greater value than a beneficial interest in the trust.[10]

The County Court of Douglas County, Nebraska, rejecting the recommendation of the court-appointed guardian ad litem, ordered

6. NEB. REV. STAT. § 30-108(2) (Reissue 1964) (emphasis added).
7. *Clarkson* at 207, 226 N.W.2d at 338.
8. *Id.* at 202, 226 N.W.2d at 335.
9. Mrs. Clarkson had no will which made specific reference to the general power of appointment created under her husband's will. Since she was incompetent at the time his will was executed and since her chances of recovery were nil, Mr. Clarkson could have expected that this provision of his will would be effective to dispose of the trust assets.
10. *Clarkson* at 204, 226 N.W.2d at 336.

an election for the widow under her husband's will.[11] The district court vacated the county court's order and remanded, electing to award the widow her statutory share.[12] On appeal, the Nebraska Supreme Court affirmed the district court's decision, following the view of a decided minority of the courts which have considered this issue.[13]

DISCUSSION OF MAJORITY AND MINORITY VIEWS

Cases dealing with problems involved in an election on behalf of an incompetent surviving spouse reach divergent and often irreconcilable conclusions.

Early cases avoided such problems by deciding simply that the incompetent spouse could not elect, nor could anyone elect for her.[14] The misfortunes of the incompetent's condition were remitted to the presumed humanity of her husband. Those early decisions established a strict precedent, and the harsh results led to statutes which provided that an election could be made on behalf of an incompetent surviving spouse.[15] Where no statute existed many courts found power in the court itself to exercise an election.[16]

Although the right of an incompetent to be elected for may now be conceded, there is little agreement on when it should be utilized and what factors should be considered. State statutes lack uniformity and display a wide variety of procedures.[17] At least two states, by statute, require that the election be in favor of the highest pecuniary benefit to the surviving spouse.[18] Most other statutes, like Nebraska's, offer little guidance.[19]

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11. In the Matter of the Estate of Joseph D. Clarkson, Deceased, Book 111, Page 320 (June 2, 1973), Douglas County, Nebraska.

12. Estate of Joseph D. Clarkson, Deceased, Doc. 664, No. 109 (January 25, 1974), District Court for the Fourth Judicial District of Nebraska.

13. 193 Neb. 201, 226 N.W.2d 335 (1975).

14. Crenshaw v. Carpenter, 69 Ala. 572, 575 (1881); Heavenridge v. Nelson, 56 Ind. 90, 94 (1877); Pinkerton v. Sargent, 102 Mass. 568, 571 (1869); Young v. Boardman, 97 Mo. 181, 189, 10 S.W. 48, 51 (1888).

15. *Friedman* at 405.

16. Van Steenwyck v. Washburn, 59 Wis. 483, 17 N.W. 289 (1883); *accord,* Andrews v. Bassett, 92 Mich. 449, 52 N.W. 743 (1892); Hardy v. Richards, 98 Miss. 625, 54 So. 76 (1911); Faster v. Gaster's Estate, 90 Neb. 529, 134 N.W. 235 (1912).

17. *Friedman* at 405.

18. KAN. STAT. ANN. § 59-2234 (1949); OHIO REV. CODE § 2107.45 (1953). These states have, in effect, adopted the "minority view" by statutory mandate. *See, e.g., In re* Callan's Estate, 101 Ohio App. 114, 135 N.E.2d 464 (1956).

19. Iowa directs the court to choose in the "best interests" of the incompetent. IOWA CODE ANN. § 633.244 (1964). Missouri says only that if

All states purport to be guided by the best interests of the incompetent surviving spouse. However, there are discernible and conflicting views as to what will achieve her best interests. States which have adopted the "majority view" approach each case by considering a wide range of factors so as to achieve flexibility in electing on behalf of an incompetent spouse. The "minority view" regards "best interest" as the alternative providing more money.[20]

Factors considered by courts advocating the "majority view" include: other provisions made for the incompetent spouse;[21] carrying out of the testator's intent;[22] the regard the widow would probably have had for her husband's will;[23] previous approval of the decedent's will by the surviving spouse;[24] the choice the widow would have made if competent;[25] and the possibility of the

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the surviving spouse is incompetent the guardian may elect for her. Mo. REV. STAT. § 474.200 (1969). Ohio directs the court to make the choice which "is better for" the incompetent. OHIO REV. CODE ANN. § 2106.45 (1953).

20. *Friedman* at 409. For cases exemplifying the "majority view," *see* First National Bank v. MacDonald, 100 Fla. 675, 130 So. 596 (1930); Manufacturer's Bank & Trust Co. v. Kunda, 353 Mo. 870, 185 S.W.2d 13. For an example of the "minority view," *see, In re* Callan's Estate, 101 Ohio App. 114, 135 N.E.2d 464 (1956); Emmert v. Hill, 226 Ill. App. 1 (1922).

21. Where an 80 year old widow had her own personal assets worth over $300,000 and her husband's will provided that the income and corpus of a testamentary trust be used only if her properties should prove insufficient to provide for her needs, the Florida Supreme Court made the election for the incompetent in favor of the will. Edwards v. Edwards, 106 So. 2d 558 (Fla. 1958). *Cf.* First Nat. Bank v. MacDonald, 100 Fla. 674, 130 So. 596 (1930), and Kinnett v. Hood, 25 Ill. 2d 600, 185 N.E.2d 888 (1962), where courts found the widow to be adequately provided for in the will.

22. In Grammer v. Bourke, 117 Ind. App. 151, —, 70 N.E.2d 198, 200 (1946), the Appellate Court of Indiana stated: "Courts strive always to discover and effectuate the intention of the testator, and in our opinion that intention should not be subject to being defeated for the benefit, not of the widow, but of her heirs or the beneficiaries under her will." *Accord*, First Nat. Bank v. MacDonald, 100 Fla. 675, 130 So. 596 (1930); Kinnett v. Hood, 25 Ill. 2d 600, 185 N.E.2d 888 (1962); *In re* Connor's Estate, 254 Mo. 65, 162 S.W. 252 (1914); and, *In re* Harris Estate, 351 Pa. 368, 41 A.2d 715 (1945).

23. Where, under the widow's will, executed before she became incompetent, her entire estate was devised to her husband had he survived her, the Florida Supreme Court felt this indicated that the widow would not have chosen to frustrate her husband's testamentary plans. Edwards v. Edwards, 106 So. 2d 558 (Fla. 1958). *See also*, Hamilton Nat. Bank v. Haynes, 180 Tenn. 247, 174 S.W.2d 39 (1943).

24. First Nat. Bank v. MacDonald, 100 Fla. 675, 130 So. 596 (1930); First Nat. Bank v. McMillan, 12 Ill. 2d 61, 145 N.E.2d 60 (1957); Huntington College v. Moore, 5 F. Supp. 541 (D.C. Mich. 1933).

25. The Minnesota Supreme Court attempted to make the determination by looking at the life and condition of the parties. Percy v. Hunt, 88 Minn. 404, 93 N.W. 314 (1903). *See generally*, Kinnett v. Hood, 25 Ill. 2d 600, 185 N.E.2d 888 (1962); Turner v. First Nat. Bank and Trust Co., 262

widow's recovery.[26] Most courts following the "majority view" consider what is required to amply provide for the needs, welfare and comfort of the widow.[27] The comparative monetary value between the benefits of the will and the statutory share is not ignored by "majority view" courts, but is generally not controlling.[28]

The so-called minority view cases, those favoring a strict monetary determination of the surviving incompetent's best interests, often cite the importance of her right to enrich her heirs.[29] One court refused to "penalize" the widow by denying her the statutory share because she was incompetent.[30]

Interestingly two of the major cases espousing the "minority view" and cited as authority in numerous cases have been overruled. The Illinois Supreme Court summarily disapproved *Emmert v. Hill*[31] in *Kinnett v. Hood* [*Kinnett*].[32] Although in *Kinnett* the election to renounce the will could be justified on purely monetary grounds because the widow's estate would thereby be increased, the Illinois court carefully weighed other considerations. The court concluded that since the only benefit to be derived through renunciation would inure to the widow's heirs, the order authorizing renunciation had been improvidently entered.[33]

Similarly, in *In re Kees' Estate* [*Kees' Estate*],[34] the Iowa Supreme Court reversed an earlier decision[35] based on the "minority view." In *Kees' Estate,* the court admitted that a life estate

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P.2d 897 (Okla. 1953); Hamilton Nat. Bank v. Haynes, 180 Tenn. 247, 174 S.W.2d 39 (1943).

26. Turner v. First Nat. Bank and Trust Co., 262 P.2d 897 (Okla. 1953); *In re* Haack's Estate, 29 Pa. Dist. 535, 33 York Leg. Rec. 137 (1919).

27. Edwards v. Edwards, 106 So. 2d 558 (Fla. 1948); *In re* Morton's Estate, 6 Ohio Op. 343, 21 Ohio L. Abs. 438 (1936); *In re* Brook's Estate, 279 Pa. 341, 123 A. 786 (1924).

28. Edwards v. Edwards, 106 So. 2d 558 (Fla. 1958); Kernan v. Carter, 132 Md. 577, 104 A. 530 (1918); Carey v. Brown, 194 Minn. 127, 260 N.W. 320 (1935); *In re* Connor, 254 Mo. 65, 162 S.W. 252 (1914); Turner v. First Nat. Bank and Trust Co., 262 P.2d 897 (Okla. 1953).

29. The United States Court of Appeals for the District of Columbia reasoned that the common law rights of dower and "thirds" in personal property depended not only on the widow's welfare, but of her children's as well. "The interest of a widow in the welfare of her heirs or other dependents . . . is as much to be considered as her own bodily comforts." Mead v. Phillips, 135 F.2d 819, 829 (D.D.C. 1943). *See generally, In re* Stevens' Estate, 163 Ia. 364, 144 N.W. 644 (1913); Dougherty v. Federal Nat. Bank and Trust Co., 377 P.2d 963 (Okla. 1964).

30. Emmert v. Hill, 226 Ill. App. 1 (1922).

31. *Id.*

32. 25 Ill. 2d 600, 185 N.E.2d 888 (1962).

33. *Id.* at —, 185 N.E.2d at 890.

34. 239 Ia. 287, 31 N.W.2d 380 (1948).

35. *In re* Stevens' Estate, 163 Ia. 364, 144 N.W. 644 (1913).

given by the will would ordinarily be less valuable than a fee in the same property. Nevertheless, the Iowa court declared that "the best interests of an insane spouse do not depend entirely on which provision, statutory or testamentary, is the more valuable."[36]

Two legal principles conflict in these cases. Those courts adopting the "majority view" [which rejects the strict view that a spouse should be awarded the greater monetary alternative regardless of other considerations] emphasize the right of a testator to dispose of his property as he pleases and the importance of preserving estate plans.[37] Courts endorsing the "minority view" emphasize the major exception to that legal principal, i.e., that a widow is entitled by law to a share of her husband's estate.[38] Where the choice for the incompetent widow is made only on the basis of pecuniary value, the husband may be "penalized"[39] because his wife is incompetent. Where the choice is made strictly on the basis of what adequately supplies her needs, the widow may be "penalized" for her own incompetency.[40]

THE COURT'S REASONING IN CLARKSON

Recognizing that there was no dollar difference between the widow's statutory share and the amount in trust for her under the provisions of the will, the Nebraska Supreme Court awarded Mrs. Clarkson the statutory share of her husband's estate. Admonished by section 30-108(2)[41] of the Nebraska statutes to elect in the incompetent's "best interests," the Nebraska Supreme Court adopted

36. *In re* Kees' Estate, 239 Ia. 257, —, 31 N.W.2d 380, 392 (1948).

37. *In re* Brooke's Estate, 279 Pa. 341, 123 A. 786 (1924). *See generally*, First Nat. Bank v. MacDonald, 100 Fla. 675, 130 So. 596 (1930); Carey v. Brown, 194 Minn. 127, 260 N.W. 320 (1935); *In re* Connors Estate, 254 Mo. 65, 162 S.W. 252 (1914); *In re* Harris Estate, 351 Pa. 368, 41 A.2d 715 (1945).

38. Miller v. Keown, 176 Ky. 117, 195 S.W. 430 (1917); Hardy v. Richards, 98 Miss. 625, 54 So. 76 (1911); *In re* Callan's Estate, 101 Ohio App. 114, 135 N.E.2d 464 (1956).

39. Penalized in the sense that his wishes as to the disposition of his property may not be adhered to even though his widow previously approved of the plan or probably would have favored the will had she been competent. *See generally*, Emmert v. Hill, 226 Ill. App. 1 (1922); Morse v. Trentine, 100 N.H. 153, 121 A.2d 563 (1956).

40. If competent, the widow has a free choice and may choose to enlarge her estate beyond her needs if she wishes. For cases demonstrating this idea, *see*, Fidelity-Philadelphia Trust Co. v. Wilmington Trust, 159 A.2d 292 (Del. Ch. 1900); *In re* Brooke's Estate, 279 Pa. 341, 123 A. 786 (1924); *In re* Bringhurst, 250 Pa. 9, 95 A. 320 (1915).

41. NEB. REV. STAT. § 30-108(2) (Reissue 1964).

the "minority view."[42] With the exception of *Kinnett*[43] (with which it disagreed) the court cited no cases to support its decision.

The Nebraska court admitted that factors other than money may promote the surviving spouse's best interests in some instances, but declined to establish guidelines based on such other factors, when it concluded that:

> [i]t is impractical to delineate factors which should be given to such other possible considerations.[44]

Disagreeing with the county judge, a majority of the court agreed that the husband's testamentary desires have "little or no importance in relation to the best interests of the surviving spouse."[45] A testator is presumed to have known that his spouse has the legal right to elect against his will. As to other beneficiaries, the will would be enforced as nearly as possible in accordance with the testator's intent.[46]

The *Clarkson* court addressed two criticisms of the "minority view."[47] Responding to the criticism that the "minority view" cases sanction consideration of the interests of the incompetent's heirs, the court agreed that "the interests of possible heirs of the incompetent should play no part in the decision."[48] However, the court rejected criticism of the "minority view" for its attempting to determine which choice a surviving spouse would have made had she been competent to elect for herself. The Nebraska Supreme Court simply assumed that a competent surviving spouse "would make the election which was in her best interests."[49]

Finally, the Nebraska court refused to adopt any "needs" test[50] as inserting an inappropriate judicial restriction into the

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42. *Clarkson* at 206, 226 N.W.2d at 338.
43. 25 Ill. 2d 600, 185 N.E.2d 888 (1962).
44. *Clarkson* at 206, 226 N.W.2d at 337.
45. *Id.*
46. *Id.* at 206, 226 N.W.2d at 337-38.
47. *Id.* at 205-07, 226 N.W.2d at 337-38. Cases raising these criticisms include: Payne v. Newton, 118 App. D.C. 319, 323 F.2d 621 (1963); First Nat. Bank v. MacDonald, 100 Fla. 675, 130 So. 597 (1930); Penhallow v. Kimball, 61 N.H. 596 (1882); *In re* Callan's Estate, 101 Ohio App. 114, 135 N.E.2d 464 (1956). *See generally*, Annot. 3 A.L.R.3d 1 (1965).
48. *Clarkson* at 206, 226 N.W.2d at 338.
49. *Id.*
50. For the purposes of this paper the "needs" test requires the court to reject the will only if necessary to provide for the widow's needs. In all cases where, from one source or another, the widow's needs are met, the court must elect in her behalf, to take the provision made in the will. *See generally, In re* Kees' Estate, 239 Iowa 287, 31 N.W.2d 380 (1948); *In re* Harris' Estate, 351 Pa. 368, 41 A.2d 715 (1945); Van Steenwyck v. Washburn, 59 Wis. 483, 17 N.W. 289 (1883).

Nebraska statute. As the statute requires that the election be made in an incompetent's "best interests," the court felt that the decision should be made without reference to whether other provisions have been made for her.[51]

Finding monetary value to be the only consideration in the *Clarkson* case and finding an estate in fee to be of greater monetary value than a beneficial interest in a trust, the court adopted the "minority view." The Nebraska Supreme Court agreed with the district court that an election should be made for Mrs. Clarkson by electing on her behalf to take her statutory share.[52]

DISSENT

The dissent recognized the impact of the restrictive *Clarkson* decision on future cases.[53] In particular it criticized the decision for placing too much emphasis on the right of an incompetent surviving spouse to leave an estate on her own, and for failing to adopt a broader and sounder basis to guide future elections.[54] The basing of an election for an incompetent upon purely monetary considerations, the dissenting judges anticipated, might be detrimental to the incompetent surviving spouse.[55]

If there is any reasonable prospect that an incompetent widow will recover, fee title may be more beneficial. In *Clarkson*, however, the value of the trust provisions in the will were at least equal to the statutory provisions, and the widow was regarded as permanently incompetent. For these reasons the dissenting judges felt that the property should have been permitted to pass by the trust provided in the will.[56]

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51. *Clarkson* at 207, 226 N.W.2d at 338. Other provisions presumably include trusts, joint property, insurance, etc.

52. *Id.*

53. *Id.* at 209, 226 N.W.2d at 339.

54. *Id.* at 210, 226 N.W.2d at 339.

55. *Id.* at 210, 226 N.W.2d at 340. Professor Friedman referred to the valuation method used by most "minority view" courts as a fallacy in their reasoning. They compute the present value of the trust income right by multiplying the present yearly income by the widow's probable life expectancy. However, where the trust provides a power to invade the corpus, the widow really has more money to draw on if she absolutely needs it under the trust than if she takes a smaller share in fee. The trust in those cases provides what Friedman calls the "deepest reservoir" for meeting the needs of the incompetent spouse. *Friedman* at 414.

56. The dissent also discusses possible future problems in estate planning as far as the marital deduction and federal estate tax laws are concerned. *Clarkson* at 209, 226 N.W.2d at 339. This discussion is misplaced because Rev. Rul. 55-519 allows the deduction where the trust meets qualifications, (*see* INT. REV. CODE OF 1954, § 2056(b)(5) even if the widow is

ANALYSIS

The Nebraska Supreme Court's statement that "an estate fee is of much greater value than a beneficial interest in a trust"[57] may not always be true. There are at least two problems with this conclusion of the court. First, where the fee and the corpus of the trust are of equal pecuniary value, the fee is obviously "more valuable." However, what if the corpus of the trust is of considerably greater value and there is a power to invade the principal? In such cases the widow would have more cash at her disposal by electing to take the benefits of the trust. If the court is in fact disregarding the interests of third parties, the provisions of the will would be in the widow's best interests in such circumstances.[58]

Secondly, a well drafted will may grant powers to a trustee that would be unavailable to a guardian. Although the two are both fiduciaries, the powers of a guardian are limited by statute,[59] while those of a trustee may be expanded at the testator's direction.[60] The increased powers given to a trustee may make the trust more valuable to the *incompetent* widow.[61]

The Nebraska Supreme Court also failed to consider whether a coordinated estate plan, executed before the wife became incompetent, should be upset by pushing the absolute right of election this far (best interest means highest pecuniary value) in an incompetency situation. At the very minimum the court should consider evidence, in the form of joint and mutual wills, gifts, the beneficiaries of the widow's will, or other manifestations of her wishes,

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incompetent. Furthermore, the deduction is allowed when the property passes by statute as well as when it passes under a properly drawn testamentary trust. *Cf.* Starrett v. Comm'r, 223 F.2d 163 (1st Cir. 1955).

57. *Id.* at 207, 226 N.W.2d at 338.

58. *See* Copeland v. Turner, 273 Ala. 609, 143 So. 2d 625 (1962); Percy v. Hunt, 88 Minn. 404, 93 N.W. 314 (1903); *In re* Peden's Estate, 408 Pa. 194, 185 A.2d 794 (1962); Van Steenwyck v. Washburn, 59 Wis. 483, 17 N.W. 289 (1883).

59. For example, a guardian must obtain approval from the county court before investing his ward's funds. Morris Guardianship v. Cusack, 145 Neb. 319, 16 N.W.2d 442 (1944). A guardian can not sell personal property of his ward except under order of the county court and after due notice. Coe v. Nebraska Bldg. & Inv., 110 Neb. 322, 193 N.W. 708 (1923). *See generally*, NEB. REV. STAT. Chapter 38.

60. Stevenson, *Expanding Powers of Trustees*, 26 FORDHAM L. REV. 50 (1957). It should be noted the court recognized the limitations on the guardian, but for some unexplained reason did not consider them important. Perhaps the powers given to the trustee in Mr. Clarkson's will were not as broad as they could have been.

61. The dissent recognized that value to a competent widow may be very different from value to an incompetent widow. *Clarkson* at 208, 226 N.W.2d at 339.

which indicate that she approved of her husband's will or preferred his heirs to hers before she became incompetent.[62]

Although election against the will was probably in the best interests of the surviving incompetent spouse in *Clarkson*, the reasoning of the Nebraska Supreme Court raises a number of estate planning problems. The opinion of the court leaves doors open so that other factors may influence future decisions, but gives little guidance as to what may be considered important.[63] It appears that the court has substituted largest pecuniary value for "best interests."

It is arguable that the Nebraska Supreme Court could have reached the same ultimate result in the *Clarkson* case by adopting the "majority view" which analyzes a variety of factors in each situation. First, since the corpus of the testamentary trust in *Clarkson* was equal in value to the statutory share, the power to invade did not have the "deepest reservoir" effect [the widow did not have more money to draw on if she absolutely needed it] as discussed by Professor Friedman.[64] Second, Mr. Clarkson's will was executed after his wife became incompetent, therefore there can be no evidence of her prior approval.[65] Finally, apparently no other provision had been made for Mrs. Clarkson, and she had very few assets of her own.[66] Under these circumstances it would not be unreasonable to conclude that a court espousing the "majority view" would, in electing for the surviving incompetent spouse, renounce the will and take the statutory share. By adopting the "majority view," the Nebraska Supreme Court could have established a broader, sounder, and more flexible basis for making the appropriate election on her behalf.[67] The "majority view" would have permitted a more equitable approach on a case by case basis and would have given more guidance for similar difficult decisions in the future.

Possible Solutions

With *Clarkson* as the only guidance for estate planners attempting to deal with potential problems of incompetency there are

62. *See generally* cases cited at footnotes 19, 20 and 21 *supra*.
63. *Clarkson* at 206, 226 N.W.2d at 337.
64. *See* note 55 *supra*.
65. *Clarkson* at 202, 226 N.W.2d at 335.
66. The guardian ad litem reported Mrs. Clarkson's personal estate to be valued at approximately $12,000. Investigation and recommendation of Guardian ad litem, County Court, Douglas County, Nebraska, Book 111, Page 320 (April 25, 1973).
67. *Clarkson* at 210, 226 N.W.2d at 339 (dissenting opinion).

a few possible solutions. One means of preventing problems in this area is the execution of an antenuptial agreement.[68] Such a document, executed when both parties are of sound mind, would be strong legal evidence of the parties' intentions. In a case decided less than two months after *Clarkson*, the Nebraska Supreme Court has indicated a very liberal attitude towards antenuptial agreements.[69]

Where the parties are already married and anticipate possible problems because of the two sets of heirs involved, either because of previous marriages or because there are no children, evidence of coordinated estate plans could be established. These documents would be strong evidence of intent and would present a persuasive argument on behalf of their testamentary plans should subsequent incompetency lead to litigation.

In cases where no will has been executed before a spouse becomes incompetent, the testator's options are limited by the language of the *Clarkson* case. He must devise to his spouse at least her statutory share. If he establishes a testamentary trust, he must make her heirs the beneficiaries of the corpus remaining at her death. Any other disposition may force the court, under the rule of *Clarkson*, to renounce the will and upset his testamentary plan.

Furthermore, in the situation where the decedent establishes a testamentary trust granting a life estate with a power of appointment to the surviving spouse, a problem may exist as to the marital deduction. Since the incompetent spouse will be unable to actually exercise the power of appointment, the power may not be determined exercisable as required by the Internal Revenue Code.[70]

Unfortunately, the Uniform Probate Code, as adopted by the Nebraska legislature,[71] does not provide a solution to the problem of election. The Uniform Probate Code provides that the right of election against the will may be exercised only "after finding that exercise is necessary to provide adequate support for the protected

68. *See* Comment, *The Modern Theory and Practice of Antenuptial Agreement*, 5 JOHN MARSHALL JOURNAL OF PRACTICE AND PROCEDURE 179 (1971).

69. Anderl v. Willsey, 193 Neb. 698, 704, 229 N.W.2d 46, 49 (1975).

70. INT. REV. CODE of 1954 § 2056(b)(5). *But see* Rev. Rul. 75-350, 1975— C.B. —. Although the spouse was incompetent and unable to exercise her power of appointment, the marital deduction was allowed. *See also* Rev. Rul. 55-518, 1955-2 C.B. 384. The spouse was incompetent but the power of appointment was determined to be exercisable and a marital deduction was allowed. *See* note 56, *supra*.

71. NEB. REV. STAT. §§ 30-2201 to -2902 (Cum. Supp. 1974) (effective January 1, 1977).

person during his probable life expectancy."[72] The language of this section clearly indicates that factors other than highest pecuniary value should be considered. However, the Nebraska legislature has reworded the provision in drafting section 30-2315 of the statutes.[73] That statute provides for an election "after finding that exercise is in the *best interests* of the protected person during his probable life expectancy."[74] The phrase "during his probable life expectancy" apparently eliminates any consideration of the incompetent's estate. Nevertheless, leaving the phrase "best interests" in the Nebraska statutory scheme only confuses the issue. Since the Nebraska Supreme Court has interpreted "best interests" to mean highect pecuniary value, the new statute appears to be a statutory enactment of the "minority view."

CONCLUSION

Clarkson provides an inadequate solution to the problem of electing for an incompetent surviving spouse under the present Nebraska statute. The Nebraska Supreme Court has substituted "highest pecuniary value" for "best interests" without fully resolving all the issues involved. By adopting the "minority view," now discredited by many courts previously cited as authority for it, the Nebraska court places too much emphasis on the incompetent's estate without full consideration of other surrounding circumstances.

Although the Uniform Probate Code provides a statutory solution to the problem, changes made by the Nebraska legislature in adopting the Code only add to the confusion. In fact, the new Nebraska statute, when read in light of *Clarkson*, appears to be a statutory enactment of the restrictive so-called minority view.

Thus, persons engaged in estate planning should anticipate the problems which will result from a testator's failure to provide for the possibility that his spouse may become incompetent and survive him. In Nebraska, a court is likely to reject the testator's provisions for an incompetent widow and elect to award her the statutory distributive share if, by such election, she would receive a greater monetary value.

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72. UNIFORM PROBATE CODE § 2-203.

73. NEB. REV. STAT. § 30-2315 (Cum. Supp. 1974) (effective January 15, 1974).

74. (Emphasis added). No comment is provided to explain the language change made by the Nebraska legislature. It is possible that the phrase "best interests" was used, without considering the implications, only because it appeared in the statute presently in force.