

## Wills and Succession, 1989-90

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### I. INTRODUCTION

DURING THIS PERIOD there were two major statutes enacted, namely *The Intestate Succession Act*<sup>1</sup> and *The Dependants Relief Act*,<sup>2</sup> and three noteworthy cases were decided: *Blunt v. Blunt Estate*,<sup>3</sup> *Ritchot v. Ritchot Estate*,<sup>4</sup> and *Proctor Estate v. Proctor*.<sup>5</sup>

### II. THE INTESTATE SUCCESSION ACT

IN 1984 THE LAW REFORM COMMISSION of Manitoba, in a report on *Intestate Succession*,<sup>6</sup> recommended several amendments to *The Devolution of Estates Act*<sup>7</sup> (hereinafter the D.E.A.), including an increase in the preferential share of a surviving spouse to \$100,000.00, a switch to the parentelic system for determining successors when the deceased is not survived by a spouse or issue, the addition of a fifteen day survivorship proviso, a change to the advancement section to focus on express advancements rather than advancements by portion, and a bar to succession beyond great-grandparents and their issue. The amendments recommended by the Law Reform Commission would have brought the law of Manitoba in line, generally speaking, with the

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<sup>1</sup> *Intestate Succession and Consequential Amendments Act*, S.M., 1989-90, c.43 - Cap.I85.

<sup>2</sup> *Dependants Relief Act*, S.M. 1989-90, c.42 - Cap.D37.

<sup>3</sup> (1989), 56 Man. R. (2d) 306 (Q.B.).

<sup>4</sup> (1989), 57 Man. R. (2d) 186 (Q.B.).

<sup>5</sup> (1989), 59 Man. R. (2d) 199 (Q.B.).

<sup>6</sup> Law Reform Commission of Manitoba, *Report on Intestate Succession* (Winnipeg: Law Reform Commission, 1985).

<sup>7</sup> *The Devolution of Estates Act*, R.S.M. 1987, c.D70.

*Uniform Intestate Succession Act* proposed by the Uniform Law Conference of Canada, and the *American Uniform Probate Code*.

In March, 1990, the Manitoba Legislature enacted *The Intestate Succession Act*<sup>8</sup> (hereinafter the I.S.A.). It came into force on July 1, 1990. It repeals the D.E.A., implements some of the Law Reform Commission's recommendations, and otherwise significantly changes the intestate succession law of Manitoba.

Under the D.E.A., the intestate succession legislation in all other Canadian provinces, the *Uniform Intestate Succession Act*, and the *American Uniform Probate Code*, when there is surviving the deceased a spouse and a child or children the spouse is entitled to a preferential share plus some fraction of the remaining estate, with the balance going to the child or children. Under the I.S.A. a surviving spouse is entitled to the entire estate unless the surviving child is not (or the children are not all) issue of the surviving spouse. In other words, when there is a surviving spouse, a child or children of the deceased is entitled to a share of the estate if the child or one of the children is not a child of the surviving spouse. When there is a surviving child who is not (or children who are not all) issue of the surviving spouse, the spouse is entitled to a preferential share of \$50,000.00 or one half of the intestate estate, whichever is greater, plus one half of any remaining estate, with the balance going to the child (or all the children). In this respect Manitoba's law is unique.

Beyond the immediate family, including parents, siblings, nephews and nieces, succession under the D.E.A. was based upon proximity of blood relationship. The second major change to the law of Manitoba that is provided in the I.S.A. is its adoption of the parentelic system for determining succession entitlement beyond a surviving spouse and issue. Under the parentelic system if there is no spouse or issue of the deceased, entitlement is in turn in the surviving parent(s) of the deceased, issue of the parents, the surviving grandparent(s), issue of the grandparents, great grandparents, and so on. Under the parentelic system there is no counting of degrees of consanguinity. Bearing in mind the columns below

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<sup>8</sup> *Supra*, note 1.

Parents	Grandparents	Great Grandparents
Brothers, Sisters	Uncles, Aunts	Great Uncles, Aunts
Nephews, Nieces	First Cousins	First Cousins Once Removed
Grand Nephews, Nieces	First Cousins Once Removed	Second Cousins
Great-Grand Nephews, Nieces	First Cousins Twice Removed	Second Cousins Once Removed
	First Cousins Thrice Removed	Second Cousins Twice Removed
		Second Cousins Thrice Removed

to determine succession entitlement, you go column by column, top to bottom, until you come to the first surviving category. Once you are considering the columns of grandparents or great grandparents the estate is divided into halves, one half available to each of the maternal and paternal survivors; thus, if the two closest surviving blood relatives are a maternal uncle and a paternal first cousin they would each be entitled to one half the estate (whereas under the D.E.A. the maternal uncle is the sole heir, being more closely related than the paternal first cousin to the deceased).

After issue of the deceased, under the D.E.A., parents, siblings, and nephews and nieces, in turn were entitled to succeed. In terms of proximity of blood relationship, siblings, and nephews and nieces were entitled ahead of grandparents, and uncles and aunts. Under the parentelic system in the I.S.A. this state of affairs is not changed.

As well as implementing the parentelic system recommendation of the Law Reform Commission, the I.S.A. implements the fifteen day survivorship and express advancement recommendations. Regarding advancements, under the I.S.A., different from the D.E.A., issue of an advanced person who predeceases are not affected by the advancement unless the advancement was expressly made on that basis.

Under the D.E.A. there was no limitation on succession entitlement, thus allowing for the so-called "laughing heir" to step forward. The Law Reform Commission's recommendation of a bar to succession beyond great-grandparents and their issue is not expressly implemented in the I.S.A. However, the I.S.A. only deals expressly with

succession up to and including great-grandparents and their issue; therefore it is arguable that implicitly persons more remotely related to the deceased are barred.

In the D.E.A., s.14(2) dealt with the distribution of assets when the anti-lapse section of *The Wills Act*,<sup>9</sup> s.34 (concerning gifts to predeceasing children, issue, and siblings) is involved. There is no comparable section in the I.S.A. because the Legislature amended s.34 to provide that such assets are to be distributed solely to surviving issue of the predeceasing beneficiary. Under the former wording of s.34 such assets were to be distributed to a surviving spouse, taking into account what the spouse had received from the predeceasing beneficiary's estate and the spouse's preferential share, and the issue of the predeceasing beneficiary. Deleting the spouse from the distribution of such assets eliminates the need for a section in the I.S.A. with regard to such situations. In addition to revising the wording of s.34, the section is renumbered to s.25.2.

Finally, as in the D.E.A., there is no provision in the I.S.A. for *de facto* spouses of a deceased. But, different from the D.E.A., the I.S.A. contains special provisions respecting separated spouses.

### III. THE DEPENDANTS RELIEF ACT

THE *DEPENDANTS RELIEF ACT*<sup>10</sup> (hereinafter the D.R.A.) came into force July 1, 1990. It repeals the *Testators Family Maintenance Act*<sup>11</sup> (hereinafter the T.F.M.A.). The D.R.A. largely reflects the 1985 Report of the Manitoba Law Reform Commission.<sup>12</sup> In so doing the D.R.A. makes a fundamental change to the law of Manitoba.

The empowering section of the T.F.M.A. and the comparable sections of the legislation of all the other common law provinces, with the exception of Saskatchewan, contain the words "adequate and proper"; Saskatchewan's section uses only the word "adequate". Over the years, the T.F.M.A. and the comparable legislation in the other Canadian provinces have been implemented by the courts to enforce two spousal-parental obligations, namely a financial obligation to provide for a spouse or child and a moral obligation to give a reason-

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<sup>9</sup> *The Wills Act*, R.S.M. 1988, c.W150.

<sup>10</sup> *Supra*, note 2.

<sup>11</sup> *Testator's Family Maintenance Act*, R.S.M. 1988, c.T50.

<sup>12</sup> Law Reform Commission of Manitoba, *Report on "The Testator's Family Maintenance Act"* (Winnipeg: Law Reform Commission, 1985).

able amount of one's estate to one's spouse and children. The moral obligation is based upon the word "proper". In recent years, as *Barr v. Barr*<sup>13</sup> indicates, the moral obligation has become the predominant focus of the courts, to the chagrin of some commentators. The courts' use of dependants relief legislation to impose a moral obligation in the nature of fixed shares for the immediate family seems to critics to be an unnecessary reduction of the basic tenet of testamentary freedom. The Law Reform Commission of Manitoba expressed concern "that the emphasis on the moral duty ... obscures the basic function of the statute".<sup>14</sup> The Commission advocated that the intervention of the court be based solely on the question whether the deceased made adequate provision in the economic sense alone for certain statutorily defined dependants. The D.R.A. appears to adopt this point of view in s.2(1):

2(1) If it appears to the court that a dependant is in financial need, the court, on application by or on behalf of the dependant, may order that reasonable provision be made out of the estate of the deceased for the maintenance and support of the dependant.

and the opening wording of s.8(1):

In determining the amount and duration, if any, of maintenance and support, the court shall have regard primarily to the financial needs of the dependant...

The express focus of the sections on financial need makes the Act unique in Canada.

Under the T.F.M.A. dependants comprised the spouse, children, some *de facto* spouses, and former spouses in whose favour a maintenance order or agreement was subsisting at the time of the deceased's death. The D.R.A. adds to the list of dependants children to whom the deceased stood *in loco parentis* at the time of the deceased's death,<sup>15</sup> and grandchildren, parents, grandparents and siblings, if they were "substantially dependent on the deceased at the time of the deceased's death".<sup>16</sup> Children 18 years of age or older at the time of the deceased's death are only dependants if for some reason they cannot provide for themselves or they were "substantially

<sup>13</sup> [1972] 2 W.W.R. 346 (Man. C.A.).

<sup>14</sup> *Supra*, note 12.

<sup>15</sup> This addition supersedes *Kennedy v. McIntyre Estate* (1987) 26 E.T.R. 128 (Man. Q.B.).

<sup>16</sup> *Supra*, note 2, s.1(d), (e), (f) and (g).

dependent on the deceased". These are welcome changes, although it seems to me that in principle the term dependant could and should be given a simple, financial definition to make the D.R.A. available to anyone who was financially dependent on the deceased.

Although it is clear that a person can contract out of or release their rights under intestate succession legislation and fixed shares legislation, such as *The Dower Act*,<sup>17</sup> it is not so clear what the situation is with dependants relief legislation. The pro and con arguments are set out in the various reasons for judgment in *Lieberman v. Morris*.<sup>18</sup> *Re Rist Estate*<sup>19</sup> reflects the predominant view that an agreement or promise not to make an application under dependants relief legislation is not a bar to such an application, but merely one of the circumstances to be considered by the court. The Law Reform Commission recommended an express section to codify this view. Unfortunately, the Legislature did not oblige.

Speaking of the circumstances that the court is to take into account in considering an application, *Re Lawther*<sup>20</sup> was the leading Manitoba case. Now s.8(1) contains an open-ended list of circumstances. One of the listed circumstances is "(d) the age and the physical and mental health of the dependant". It will be interesting to see the fate of *Re Pfrimmer*<sup>21</sup> in the court's treatment of applications by institutionalized dependants, particularly those who must prove that they were "substantially dependent" on the deceased. On a related matter, before final reading, a section of the Bill was deleted which would have entitled the government to make applications on behalf of qualified dependants to whom the government was providing a social allowance.

I note two circumstances not listed in s.8(1). First, there is the existence of an agreement or promise not to apply, usually made in consideration of an *inter vivos* provision. Second, the T.F.M.A. contained a section dealing with disentiing character of or conduct by an applicant. There is no comparable section in the D.R.A. and s.8(1) does not make reference to it. Surely, such character or conduct continues

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<sup>17</sup> *Dower Act*, R.S.M. 1988, c.D100.

<sup>18</sup> (1944), 69 C.L.R. 69 (H.C. Aust.).

<sup>19</sup> [1939] 1 W.W.R. 518 (Alta. C.A.).

<sup>20</sup> [1947] 2 D.L.R. 510 (Man. K.B.).

<sup>21</sup> (1969), 2 D.L.R. (3d) 525 (Man. C.A.).

to be a relevant circumstance, of which *Re Shirley Estate*<sup>22</sup> is a classic example.

The focus of the Act on financial need renders obsolete some of the leading cases respecting the T.F.M.A., such as *Walker v. McDermott*,<sup>23</sup> *Barr v. Barr*,<sup>24</sup> and *Sloane v. Bartley*.<sup>25</sup> Decisions in favour of estranged and non-needy children, such as *Re Steinberg*<sup>26</sup> and *Re Bartel Estate*<sup>27</sup> will no longer occur. Curiously, the D.R.A. reinstates the case of *Re Day Estate*<sup>28</sup> in which Mr. Justice Maybank said that "it is a *sine qua non* for an applicant to show actual need before the court will" make a money order in favour of the applicant. The *Day* case has always been an excellent example of the use by the court of the suspensory order, now provided in s.3.<sup>29</sup>

The D.R.A. codifies a couple of Manitoba decisions. In *Re Martin Estate*<sup>30</sup> the Court of Appeal held that the circumstances to be considered are those at the time of the hearing, not those at the time of death. This is now stipulated in s.2(3). In *Re Mazur and Mazur*<sup>31</sup> the Court of Appeal held that personal representatives who make a distribution prior to the expiration of the limitation period for applications under the Act are personally liable. This is now stipulated in s.7(3).

The T.F.M.A. contained a simple appeal section, without the additional provision contained in some statutes, such as s.2(2) of *The Widows Relief Act*<sup>32</sup> of Alberta:

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<sup>22</sup> (1966), 55 W.W.R. 56 (Sask. Q.B.).

<sup>23</sup> [1931] S.C.R. 94.

<sup>24</sup> *Supra*, note 13.

<sup>25</sup> (1980), 4 Man. R. (2d) 41 (Q.B.).

<sup>26</sup> (1969), 3 D.L.R. (3d) 565 (Man. Q.B.).

<sup>27</sup> (1982), 16 Man. R. (2d) 29 (Q.B.).

<sup>28</sup> (1953), 61 Man. R. 198 (Q.B.).

<sup>29</sup> Cf. *Bowie v. Royal Trust Co.* (1984), 30 Man. R. (2d) 128 (Q.B.).

<sup>30</sup> (1962), 40 W.W.R. 513 (Man. C.A.).

<sup>31</sup> (1980), 109 D.L.R. (3d) 211 (Man. C.A.).

<sup>32</sup> R.S.A. 1922, c. 145.

(2) The Appellate Division...may affirm, annul, or vary the order in such manner as in its discretion it deems proper.

Nonetheless, in *Pope v. Stevens*<sup>33</sup>, in the face of a submission that it "should not interfere with an award made in his discretion by the trial judge", Montague J.A. for the Manitoba Court of Appeal quoted with approval McGillivray J.A. of the Alberta Court of Appeal in *Re Anderson Estate*.<sup>34</sup>

...it is not only the right but the duty of this Court to consider the undisputed facts...and to come to its own conclusion as to what is just and equitable in all the circumstances.

The Court has consistently taken this position. A recent example is *Sloane v. Bartley*.<sup>35</sup> However, Mr. Justice Huband vigorously dissented. The D.R.A. contains no appeal section at all. Of course, there is the usual right of appeal to the Court of Appeal from decisions of the Court of Queen's Bench. Presumably, the Court of Appeal will continue to exercise the special appellate jurisdiction.

Another section that has not been continued from the T.F.M.A. is the section which exempted from the legislation property which the deceased had contractually promised to bequeath or devise. The absence of this section in the D.R.A. is likely of no consequence, for the section was merely a codification of well-established common law, although not from cases decided by Manitoba courts.

Finally, the D.R.A. contains a conflict of laws section, which reflects existing common law.

#### IV. *BLUNT V. BLUNT ESTATE*<sup>36</sup> AND *RITCHOT V. RITCHOT ESTATE*<sup>37</sup>

THE *RITCHOT* AND *BLUNT* CASES have to do with *The Dower Act*.<sup>38</sup> The judges in both cases expressed their agreement with Mr. Justice

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<sup>33</sup> (1955), 14 W.W.R. 71 (Man. C.A.).

<sup>34</sup> [1934] 1 W.W.R. 430, 439 (Alta. C.A.).

<sup>35</sup> (1980), 7 Man. R. (2d) 222 (C.A.).

<sup>36</sup> *Supra*, note 3.

<sup>37</sup> *Supra*, note 4.

<sup>38</sup> *Supra*, note 17.

Cameron in *Re Lenius*<sup>39</sup> and Mr. Justice Morse in *Menrad v. Blowers*<sup>40</sup> that *The Dower Act* should be given a large and liberal interpretation favouring the surviving spouse. In connection with s.15 this opinion is not one which the courts have always expressed. Mr. Justice Adamson in *Re Morice Estate*,<sup>41</sup> who was quoted with approval by the Supreme Court of Canada, said:

...in ascertaining...and computing the value of the net real and personal property of the testator and making the payments to the testator's widow, the values of the unrealized assets and securities should be very conservative. No payments should be made on the basis of doubtful assets. The executor must ... [take] every precaution to guard and preserve the interests of the other beneficiaries.<sup>42</sup>

The *Blunt* case had to do with the situation where the deceased spouse purchased something during the marriage, either paid the whole purchase price, or more than one half, and title was taken in the names of the spouses in joint tenancy. *The Dower Act*, s.15(1) provides:

15(1) Notwithstanding anything contained in The Wills Act, the widow of every testator who by his will has not left her property or otherwise provided for her to the value of at least one-half of the value of his net real and personal property, is entitled to receive from his executor such share of his net real and personal property as, together with all moneys paid or payable under or by virtue of any insurance policies on the life of the testator to her or for her benefit and for her own use, and together with any property owned at the time of the testator's death by her for her own use or then held in trust of her, and which is property (or the proceeds or investments of property) which the testator had during his life after marriage conveyed to her or for her benefit as a gift or by way of advancement and together with any benefit that the widow had received from the testator during his life under The Marital Property Act, or had become entitled to receive from the testator by virtue of a division of assets made during his life under The Marital Property Act, shall equal in value one-half of the testator's net estate, and in addition, is entitled to the life estate in her husband's homestead under the provisions of the Act hereinbefore set out.

The question is whether the thing comes within the emphasized wording.

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<sup>39</sup> (1922), 32 Man. R. 558 (C.A.).

<sup>40</sup> (1982), 28 R.F.L. (2d) 289 (Man. Q.B.).

<sup>41</sup> [1939] 3 W.W.R. 618 (Man. Q.B.).

<sup>42</sup> *Ibid.* at p. 620.

Chief Justice Williams in *Re Lawther*<sup>43</sup> thought that it does. *Re Lawther* had to do with a T.F.M.A. application. There is a section in the T.F.M.A. (and a comparable section in the D.R.A.) which guarantees a surviving spouse at least the s.15 *Dower Act* entitlement. In this regard in *Re Lawther* Chief Justice Williams did a s.15 (at that time s.13) calculation. Clearly, he considered two assets purchased by the deceased spouse with titles taken in joint tenancy with the surviving spouse to be within the underlined wording. Unfortunately, he did not disclose his reasoning. In *Re Bergen's Estate*<sup>44</sup> Judge Dureault was of the opposite view:

...it has always been my understanding, that the right accruing by virtue of survivorship crystallizes only at death. So that chronologically speaking death precedes the transmission of ownership.

It cannot therefore be said that the sole ownership of the principal residence transmitted to the widow by virtue of her right of survivorship is property 'conveyed to her or her benefit as a gift or by way of advancement' by the testator during his life after marriage.<sup>45</sup>

In *Blunt* Mr. Justice Coleman agreed with his colleague Mr. Justice Dureault:

The key words...refer to "any property owned at the time of the testator's death by the wife for her own use" and "which is property that the testator had during his life after marriage conveyed to the wife or for her benefit as a gift". The properties [in question]...were not held by the applicant at the time of the testator's death - they were held jointly and not solely by her. As to such properties having been "conveyed to the wife or for her benefit as a gift", that did not take place. What did happen was that the testator, in his lifetime, created a joint ownership in such items with the right of survivorship and which each of them jointly owned and neither could say that same was his or hers alone.<sup>46</sup>

Neither judge referred to *Re Lawther*.

The gist of the reasoning of both judges is that by the underlined wording a surviving spouse has to account only for gifts from the deceased spouse which confer sole ownership prior to the death of the donor spouse. This derives from their equation of the word "own" in

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<sup>43</sup> *Supra*, note 20.

<sup>44</sup> (1982), 24 Man. R. (2d) 249 (Sur. Ct.).

<sup>45</sup> *Ibid.* at p. 252.

<sup>46</sup> *Supra*, note 3 at p. 312.

the phrase "for her own use" with the word "sole", which prevents joint tenancy creations from coming within the underlined wording. Perhaps they are correct, but can Chief Justice Williams' opposite conclusion be rationalized?

If X purchases something and takes title with Y in joint tenancy, there are plenty of cases<sup>47</sup> indicating that X has given Y something, although not necessarily in terms of the wording of s.15. During the joint tenancy X and Y are entitled to their own, albeit not sole, use of the thing: Each is entitled to use the thing; each can change the joint tenancy to a tenancy in common; each can apply for a partition or sale. Therefore, it is arguable that joint tenancy creations do come within the underlined wording of s.15, including the phrase "for her own use".

Even if one equates the word "own" in the phrase for "her own use" to the word "sole", it is arguable that the phrase "at the time of the testator's death" directs one to look at the situation immediately after the testator's death, at which time by survivorship the donee spouse is the sole owner of property, the original conveyance of which included during the marriage an inchoate right of survivorship? The situation awaits a fully considered decision of the Court of Appeal.

The *Ritchot*<sup>48</sup> case had to do with s.16 of *The Dower Act*, which provides for a number of exceptions to s.15, including s.16(a):

16. Section 15 does not apply to any of the following cases:

(a) where the testator has provided an annual income for his wife during her life of not less than \$15,000.00,

In his will Noel Ritchot made a residuary gift to his wife:

6(a) I HEREBY DIRECT that all the rest and residue of my estate of whatsoever kind and wheresoever situate shall be held by my trustees in trust and kept invested and to pay the net income derived therefrom to my wife and to pay such income to her until her death, provided my Trustees shall, as in their uncontrolled discretion deem advisable, encroach upon the capital of the trust set aside herein for my wife for her benefit so that she shall enjoy following my death the standard of living which she enjoyed prior to my death and further in the event of her illness or other extreme situation which may require additional funds to be paid to her. Such income shall be paid to my wife not less than quarterly in each year.

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<sup>47</sup> See, for example, *Cole v. Cole*, [1943] 3 W.W.R. 532 (B.C.C.A.), *Randall v. Nat'l. Trust Co. Ltd. and Guyot* (1954), 11 W.W.R. 385 (Man. Q.B.), and *Klemkowich v. Klemkowich* (1955), 14 W.W.R. 418 (Man. Q.B.).

<sup>48</sup> *Supra*, note 4.

At his death the residue of his estate was capable of producing an income of more than \$15,000.00, but Mr. Justice Kroft observed that "the income...will be less than \$15,000.00 if rates of return drop by any significant degree".<sup>49</sup> Notwithstanding the power of encroachment, in Mr. Justice Kroft's opinion there was "nothing in the will that can be interpreted as an intent on the part of the testator that his widow was to receive a minimum of \$15,000.00 a year".<sup>50</sup> The *Ritchot* decision sends a clear drafting message in respect of s.16. If s.15 is to be avoided, gifts of income must be certainly worded to provide that the surviving spouse is to receive at least the minimum amounts stipulated in the various subsections of s.16.

#### V. *PROCTOR ESTATE V. PROCTOR*<sup>51</sup>

*PROCTOR ESTATE V. PROCTOR* had to do with the proprietary ramifications of the murder of a woman by her husband. Except for a couple of aspects, the case is an unremarkable application of the law relating to the denial of benefits to wrongdoers. The noteworthy aspects were the Court's appointment of the administrator of the deceased's estate as the trustees of property which had been jointly owned by the deceased and her husband and the Court's refusal to order the administrators to pay the husband's one half of the proceeds of sale of the jointly owned property into court pending the outcome of the estate's action on behalf of a surviving child against the husband for the wrongful death of the deceased. The Court refused the order because it would "entitle the administrators to enjoy the fruits of their action before any judgment against [the husband] ... is obtained".<sup>52</sup>

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<sup>49</sup> *Ibid.* at p. 191.

<sup>60</sup> *Ibid.* at p. 191.

<sup>61</sup> *Supra*, note 5.

<sup>62</sup> *Ibid.* at p. 204.