

2010 -- H 7619

LC01198

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2010

A N A C T

RELATING TO PROBATE PRACTICE AND PROCEDURE

Introduced By: Representatives Jackson, JP O'Neill, A Rice, and Melo

Date Introduced: February 25, 2010

Referred To: House Judiciary

It is enacted by the General Assembly as follows:

1 SECTION 1. Sections 33-1-1, 33-1-2, 33-1-3, 33-1-5, 33-1-6, 33-1-7 and 33-1-11 of the
2 General Laws in Chapter 33-1 entitled "Rules of Descent" are hereby amended to read as follows:

3 **33-1-1. Real estate descending by intestacy to children or descendants, parents, or**
4 **brothers and sisters.** -- Whenever any person having title to any real estate of inheritance shall
5 die intestate as to such estate, it shall descend and pass in equal portions to his or her kindred, in
6 the following course:

7 (1) First to ~~his~~ the intestate's children or their descendants, if there are any.

8 (2) Second if there be no children nor their descendants, then to the intestate's parents in
9 equal shares, or to the surviving parent ~~of such intestate~~.

10 (3) Third if there is no parent, then to the intestate's brothers and sisters ~~of the intestate~~,
11 and their descendants.

12 **33-1-2. Descent of real estate to paternal or maternal kindred.** -- If ~~there is no~~ the
13 intestate has no surviving parent, nor brother, nor sister, nor their descendants, the inheritance
14 shall go in equal moieties to the intestate's paternal and maternal kindred, each in the following
15 course:

16 (1) First to the grandparents, in equal shares, if any there be.

17 (2) Second if there be no grandparent, then to the uncles and aunts, or their descendants
18 by representation, or such of them as there be.

19 (3) Third if there be no grandparent, nor uncle, nor aunt, nor their descendants, then to

1 the great grandparents in equal shares, if any there be.

2 (4) Fourth if there be no great grandparent, then to the great uncles and great aunts or
3 their descendants by representation, or such of them as there be; and so on, in other cases, without
4 end, passing to the nearest lineal ancestors and their descendants or such of them as there be.

5 **33-1-3. Descent when no paternal or maternal kindred survive.** -- When in this
6 chapter the inheritance is directed to go by moieties to the intestate's paternal and maternal
7 kindred, if there are no such kindred on the one part, the whole shall go to the other part; and if
8 there are no kindred either on the one part or the other the whole shall go to the ~~husband or wife~~
9 ~~of the intestate, and~~ intestate's surviving spouse or if the ~~husband or wife is dead~~ spouse did not
10 survive the intestate, it shall go to ~~his or her~~ the spouse's kindred in the like course as if ~~such~~
11 ~~husband or wife~~ he or she had survived the intestate and then died entitled to the estate.

12 **33-1-5. Life estate descending to spouse.** -- Whenever the intestate dies ~~without issue~~
13 and leaves a ~~husband or wife~~ surviving spouse, the real estate of the intestate shall descend and
14 pass to the ~~husband or wife~~ surviving spouse for his or her natural life. The provisions of sections
15 33-1-1 and 33-1-2 shall be subject to the provisions of this section and section 33-1-6.

16 **33-1-6. Widow's or husband's allowance of real estate in fee.** -- The probate court
17 having jurisdiction of the estate of the intestate, if a resident of this state, or the probate court of
18 any city or town in which the real estate of the intestate is situated if not a resident of this state,
19 may also, in its discretion ~~if there is no issue as aforesaid~~, upon petition filed within six (6)
20 months from the date of the first publication of notice of the qualification of the administrator of
21 the estate of the intestate, allow and set off to the ~~widow or husband~~ intestate's surviving spouse
22 in fee real estate of the ~~decedent~~ intestate situated in this state to an amount not exceeding
23 ~~seventy five thousand dollars (\$75,000)~~ one hundred fifty thousand dollars (\$150,000) in value,
24 over and above all incumbrances, if not required for the payment of the debts of the ~~decedent~~
25 intestate; provided that if the real estate shall be in a single parcel of greater value over and above
26 incumbrances than ~~seventy five thousand dollars (\$75,000)~~ one hundred fifty thousand dollars
27 (\$150,000) and shall be deemed by the court, because of such condition and value, to be
28 incapable of being allowed and set off hereunder, either as a whole or by partition, without
29 unreasonable diminution in the value thereof, the court may order the parcel to be sold by the
30 administrator, the administrator giving bond as in other cases of the sale of real estate, and from
31 the proceeds of such sale may allow and set off the sum of ~~seventy five thousand dollars~~
32 ~~(\$75,000)~~ one hundred fifty thousand dollars (\$150,000) to the ~~widow or surviving husband~~
33 intestate's surviving spouse for his or her own use and any surplus of the proceeds of sale shall be
34 deemed to be real estate for the purposes of descent and distribution; provided, however, that title

1 to real estate situated in any town or city of this state shall not pass by the decree of the probate
2 court setting off and allowing such real estate, for the purpose of conveyance by the ~~widow or~~
3 ~~surviving husband~~ intestate's surviving spouse until a copy of such decree as entered, duly
4 certified by the probate clerk, is recorded in the records of land evidence in the town or city
5 where the land is situated. The allowance and set off under this section shall be in addition to the
6 life estate pursuant to section 33-1-5.

7 **33-1-7. Descendants of deceased heirs.** -- The descendants of any person deceased shall
8 inherit the real and personal estate which the person would have inherited had the person survived
9 the intestate, subject to the express provisions of these canons of descent and distribution.

10 **33-1-11. Advancements and debts of decedent.** -- ~~If real estate shall be~~
11 ~~conveyed by deed of gift, or personal estate shall be delivered to a child or grandchild, and~~
12 ~~charged, or a memorandum made thereof in writing by the intestate or by his or her order, or shall~~
13 ~~be delivered expressly for that purpose in the presence of two (2) witnesses, who were requested~~
14 ~~to take notice thereof, the real estate or personal estate shall be deemed an advancement to the~~
15 ~~child to the value of the real or personal estate.~~ (a) If a person dies intestate as to all or a portion
16 of the decedent's estate, any property given by the decedent during his or her lifetime to an
17 individual who, at decedent's death, is an heir shall be treated as an advancement against the heir's
18 intestate share only if:

19 (1) The decedent declared in a contemporaneous writing or the heir acknowledged in
20 writing that the gift is an advancement; or

21 (2) The decedent's contemporaneous writing or the heir's written acknowledgment
22 otherwise indicates that the gift is to be taken into account in computing the division and
23 distribution of the decedent's intestate estate.

24 (b) For purposes of subsection (a), property advanced is valued as of the time the heir
25 came into possession or enjoyment of the property or as of the time of the decedent's death,
26 whichever first occurs.

27 (c) If the recipient of the property fails to survive the decedent, the property is not taken
28 into account in computing the division and distribution of the decedent's intestate estate, unless
29 the decedent's contemporaneous writing provides otherwise.

30 (d) A debt owed to decedent is not charged against the intestate share of any individual
31 except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in
32 computing the intestate share of the debtor's descendants.

33 SECTION 2. Sections 33-10-1, 33-10-2 and 33-10-3 of the General Laws in Chapter 33-
34 10 entitled "Allowances to Families of Decedents" are hereby amended to read as follows:

1 **33-10-1. Wearing apparel and exempt personal property allowed to widow or**
2 **widower and children.** -- The wearing apparel of the ~~widow or widower~~ surviving spouse and
3 minor children of a ~~deceased person~~ decendent shall belong to them, respectively. The ~~widow or~~
4 ~~widower~~ surviving spouse shall be entitled, ~~for herself or himself~~ individually and for the family
5 under her or his care, to such furniture, furnishings, household effects, supplies, and, in addition
6 thereto, such other personal property of the ~~husband or wife~~ decendent exempt from attachment by
7 law, as the probate court shall deem necessary, having regard to all the circumstances of the case;
8 or, if there is no ~~widow or widower~~ surviving spouse, the minor children shall be entitled to the
9 furniture, furnishings, household effects, or the use thereof, in such manner as the court shall
10 direct.

11 **33-10-2. Property allowed not assets in hands of executor or administrator.** -- Such
12 part of the decendent's personal property as the court shall allow to the ~~widow, widower~~ decendent's
13 surviving spouse or family ~~of the deceased~~, although inventoried, shall not be assets in the hands
14 of the ~~executor or administrator~~ decendent's personal representative.

15 **33-10-3. Allowances for temporary support of family.** -- The probate court shall make
16 reasonable allowance out of the decendent's probate estate ~~of the deceased~~ for the support of his or
17 her family, until the support can otherwise be provided for, for a period not exceeding six (6)
18 months from the date of the death, having regard to the situation of the family and the value and
19 circumstances of the estate. The allowance may be fixed at any time upon application of the
20 ~~executor or administrator~~ personal representative or of any party in interest, filed within six (6)
21 months after the first publication of notice of the qualification of the ~~executor or administrator~~
22 personal representative. The court may, in its discretion, provided a final account has not been
23 allowed, make an additional allowance under like conditions for the support of the family for a
24 second period not exceeding six (6) months, the allowance to be fixed at any time after the first
25 six (6) months period has passed and within one year after the first publication of notice of the
26 qualification of the ~~executor or administrator~~ personal representative upon ~~his or her~~ application,
27 ~~or upon the application of~~ the personal representative or of any party in interest. After exhausting
28 the personal property, real estate may be sold to provide the amount of allowance decreed in the
29 same manner as for the payment of debts. An appeal from a decree granting letters testamentary
30 or of administration shall not prevent the allowance being made by the probate court or the
31 payment thereof. An appeal from a decree making any allowance shall not prevent the payment of
32 the allowance if a bond in such amount as may be fixed by the court but no less than the amount
33 of the allowance be given to the court by a ~~widow or widower~~ surviving spouse, if any, or by a
34 guardian of the minor children in case there be no ~~widow or widower~~ surviving spouse, with

1 surety or sureties approved by the court, and conditioned to repay all in excess of what is finally
2 determined to be a reasonable allowance or to return all of the allowance in case the decree
3 granting the allowance is finally reversed in the full amount. The bond required by the provisions
4 of this section and the remedies thereon shall be governed by the provisions of chapter 17 of this
5 title as far as the context thereof permits.

6 SECTION 3. Chapter 33-1 of the General Laws entitled "Rules of Descent" is hereby
7 amended by adding thereto the following sections:

8 **33-1-12. Intestate estate.** – (a) Any part of a decedent's estate not effectively disposed of
9 by will passes by intestate succession to the decedent's heirs as prescribed in this chapter, except
10 as modified by the decedent's will.

11 (b) A decedent may by will expressly exclude or limit the right of an individual or class
12 to succeed to property of the decedent passing by intestate succession. If that individual or a
13 member of that class survives the decedent, the share of the decedent's intestate estate to which
14 that individual or class would have succeeded passes as if that individual or each member of that
15 class has disclaimed an intestate share.

16 **33-1-13. Survivorship.** – An individual who fails to survive the decedent by one hundred
17 twenty (120) hours is considered to have predeceased the decedent for purposes of homestead
18 allowance, exempt property, and intestate succession, and the decedent's heirs are determined
19 accordingly. If it is not established by clear and convincing evidence that an individual who
20 would otherwise be an heir survived the decedent by one hundred twenty (120) hours, it is
21 considered that the individual failed to survive for the required period. This section is not to be
22 applied if its application would result in escheat of intestate estate to the state.

23 SECTION 4. Title 33 of the General Laws entitled "PROBATE PRACTICE AND
24 PROCEDURE" is hereby amended by adding thereto the following chapter:

25 CHAPTER 28

26 ELECTIVE SHARE

27 **33-28-1. Elective share.** – (a) The surviving spouse of a decedent who dies domiciled in
28 this state has a right of election, under the limitations and conditions stated in this chapter, to take
29 an elective-share equal to the life estate and allowance of an intestate's real estate pursuant to
30 sections 33-1-5 and 33-1-6 and share of an intestate's personal estate pursuant to section 33-1-10.
31 The elective share may be taken in kind or the value thereof.

32 (b) If the right of election is exercised by or on behalf of the surviving spouse, the
33 surviving spouse's allowances pursuant to chapter 33-10, if any, are not charged against but are in
34 addition to the elective share.

1 (c) The right, if any, of the surviving spouse of a decedent who dies domiciled outside
2 this state to take an elective share in property in this state is governed by the law of the decedent's
3 domicile at death.

4 **33-28-2. Right of election personal to surviving spouse – Incapacitated surviving**
5 **spouse. – (a) The right of election may be exercised only by a surviving spouse who is living**
6 **when the petition for the elective share is filed in the probate court pursuant to subsection 33-27-**
7 **4(a). If the election is not exercised by the surviving spouse personally, it may be exercised on**
8 **the surviving spouse's behalf by the surviving spouse's conservator, guardian or agent under the**
9 **authority of a power of attorney.**

10 (b) If the election is exercised on behalf of a surviving spouse who is an incapacitated
11 person, the probate court may authorize transfer of property in kind or payment of the value
12 thereof to the spouse's personal representative upon such terms and conditions as the court
13 determines to be in the spouse's best interest.

14 **33-28-3. Waiver of right to elect and of other rights. – (a) The right of election of a**
15 **surviving spouse and the rights of the surviving spouse to allowances pursuant to chapter 33-10**
16 **may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or**
17 **waiver signed by the surviving spouse. The written contract, agreement, or waiver is enforceable**
18 **without consideration.**

19 (b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that: (1)
20 The surviving spouse did not execute the waiver voluntarily; or (2) The waiver was
21 unconscionable when it was executed and, before execution of the waiver, the surviving spouse:
22 (i) Was not provided a fair and reasonable disclosure of the property or financial obligations of
23 the decedent; (ii) Did not voluntarily and expressly waive, in writing, any right to disclosure of
24 the property or financial obligations of the decedent beyond the disclosure provided; and (iii) Did
25 not have or reasonably could not have had an adequate knowledge of the property or financial
26 obligations of the decedent.

27 (c) An issue of unconscionability of a waiver is for decision by the probate court or other
28 court of competent jurisdiction as a matter of law.

29 (d) Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in
30 the property or estate of a present or prospective spouse or a complete property settlement entered
31 into after or in anticipation of separation or divorce is a waiver of all rights to elective share and
32 allowances pursuant to chapter 33-10 by each spouse in the property of the other and a
33 renunciation by each of all benefits that would otherwise pass to that spouse from the other by
34 intestate succession or by virtue of any will executed before the waiver or property settlement.

1 **33-28-4. Proceeding for elective share – Time limit.** – (a) If any estate, real or personal,
2 be devised or bequeathed to a surviving spouse, the devise or bequest shall bar the elective share
3 unless the surviving spouse shall, within six (6) months after the date of the first publication of
4 the qualifications of the fiduciary of the estate of the deceased spouse, file in the probate court a
5 written statement waiving and renouncing the devise and bequest and petitioning for the elective
6 share. If any of the deceased spouse's real estate is located in any city or town other than that in
7 which the will of the decedent is probated, the waiver and petition shall also be filed in the
8 records of deeds in each city and town where the real estate is located. The surviving spouse
9 shall give notice of the time and place set for hearing to persons interested in the estate and to
10 those whose interests will be adversely affected by the taking of the elective share.

11 (b) Within six (6) months after the date of the first publication of the qualifications of the
12 fiduciary of the estate of the deceased spouse, the surviving spouse may petition the probate court
13 for an extension of time for making an election not to exceed nine (9) months after the decedent's
14 death, upon notice of the time and place set for hearing to persons interested in the estate and to
15 those whose interests will be adversely affected by the taking of the elective share.

16 (c) The surviving spouse may withdraw a waiver and petition for an elective share at any
17 time before entry of a final determination by the probate court.

18 (d) The order or judgment of the probate court may be enforced as necessary in suit for
19 contribution or payment in other courts of this state or other jurisdictions.

20 SECTION 5. This act shall take effect upon passage.

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EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF
A N A C T
RELATING TO PROBATE PRACTICE AND PROCEDURE

1 This act would make several amendments to the statutes regarding rules of descent and
2 would also provide for an elective share to the surviving spouse of a decedent domiciled in this
3 state.

4 This act would take effect upon passage.

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