Widow's and Children's Exemption in Pennsylvania

A.J. White Hutton
WIDOW’S AND CHILDREN’S EXEMPTION IN PENNSYLVANIA*

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This topic presents an interesting field of research to ascertain the appropriate principles of law and just how, through the judicial process, the statutes have been emendated, interpreted and interpolated. It is a trite observation that a statute cannot be understood finally until it has been explained and expounded by the courts and although some of the results of judicial reasoning may be startling, yet the statute in question must be read, followed and understood in the light of the judicial exposition.

Moreover, after the interpretation has been made and legislatures following have made no changes, then the further judicial conclusion is that the legislature by its silence has acquiesced in the court's interpretation. On this very point SIMPSON, J., in Bickley's Estate, 270 Pa. 101 (1921) 113 A. 68, referring to a certain interpretation of the Charities Act of 1855, and although not agreeing with that particular interpretation, nevertheless was constrained to observe:

"Despite the cogent reasons we have thus given, and our belief that the policy of the law as expressed in the Act of 1855 is a wise one, we cannot close our eyes to the fact that, because, since Schultz's App., 80 Pa. 396, was decided on January 31, 1876, twenty-five legislatures have met and adjourned without passing an amendatory act to correct the law as there stated, and because also, as previously said, the doctrine of that case prevails in nearly all other jurisdictions where like questions have arisen, it has become so established as a guide to the handling of property that any abandonment or alteration of the understood rule should be by those fixed with the responsibility of making the law, and not by us, whose only duty is to define and construe it. We are therefore driven by stare decisis to affirm this decree, recognizing with Lord Coke 'that the known certaintie of the law is the safetie of..."
all, and to leave to future legislatures to take such curative action in regard to the matters as to them shall seem wise'.”

In the course of the present article several interesting examples of this form of judicial legislation will be shown.

GENERAL REMARKS

By statutory enactment in most of the states of the Union, upon the death of the husband a portion of his estate may be awarded for the immediate support of the widow and children. This portion is called the widow's allowance or under our Pennsylvania law the widow's exemption, in analogy to the debtor's exemption under the Act of 1849. The exemption under the laws of some states consists of a certain quantity of provisions and a certain amount of property up to a limited value as may be fixed either by statute or by the probate court. Generally the allowance or exemption takes precedence over all debts and charges against the estate with certain exceptions to be noted hereafter. Some have essayed to trace the widow's allowance to the widow's quarantine at common law, described in 2 Blackstone 135, wherein it is stated that the widow shall remain in her husband's capital mansion house for forty days after his death during which time her dower in the lands of which her husband died seised shall be assigned. Said the Commentator:

"These forty days are called the widow's quarantine, a term made use of in law to signify the number of forty days whether applied to this occasion or any other."

This right of the widow was provided in Magna Charta and has been variously followed in the states of this country.

Tiffany on Real Property, 471.

However, as stated in Acor's Estate, 29 L. 1. 398 (1865), per CHAPMAN, P. J., a widow's right at common law to the quarantine period has no relation to the support of the widow and family out of the personal estate of the deceased husband and known as the widow's allowance or exemption. In this case it is questioned whether the widow's quarantine ever existed in Pennsylvania. Be that as it may, nevertheless the widow's quarantine is the only analogy which may be found as a base or origin of the present widow's exemption law in Pennsylvania, howbeit this is now completely governed by statutory enactment.

Viewing the matter in 1871 when he published his learned work on the Intestate System of Pennsylvania, Scott, page 61, said:

"In common honesty the acquisitions of the debtor belong to the creditor. But the demands of necessity and humanity are sometimes so imperative as to overbear questions of meum and tuum. The laws which exempt from execution articles necessary for the enjoyment of life, like those which oblige communities to provide
for persons who are unable to provide for themselves, rest upon this foundation. The law of our being, the nature of our climate, and our habits of life, render certain articles so indispensable to existence as intelligent beings, that the legislature have exempted them from execution, or, in the case of decedents, have secured them from the claims of creditors. In doing this they may have disregarded the claims of severe and exacting justice, but they certainly, at the same time, acted in obedience to the higher obligations of humanity and necessity. This was done, not that the recipient of this humane bounty might expend the proceeds for the gratification of desires which had no claim upon the humanity or the sympathies of the public; but, in order that the sum thus secured might be 'retained' and 'remain for the use of the widow and family.' Every attempt to convert this benevolent provision for the comfort of the widow and family into a claim for money, which may be expended without promoting that object, should be discountenanced as a perversion of those statutory provisions and safeguards we are now about to consider."

**Statutory Sources**

Scott, supra, refers to several early statutory enactments on this subject, particularly the Act of March 26, 1814, the Act of April 10, 1823, the 4th section of the Act of February 24th, 1834, the Act of April 26, 1850, and the Act of April 14, 1851.

In Reiff's Appeal, 2 Pa. 256 (1845), ROGERS, J., remarked:

"Whenever there is reason to believe that the estate of a deceased person is insufficient to pay his debts, exclusive of such articles as may be by law exempted from levy and sale, upon an execution against a debtor, it is the duty of the administrator or executor to keep a distinct and separate account of all such articles so exempted, and to suffer the same to remain for the use of the widow and children, in residing with the deceased at the time of his death; sect. 4, act of Feb. 24, 1834."

The present law is found in Section 12 of the Fiduciaries Act of June 7, 1917, P. L. 447, 20 PS 471 and following.

**Section 12 (a)**

As explained by the draftsmen of this clause, it is founded on Section 5 of the Act of April 14, 1851, P. L. 612, as amended by the Act of July 21, 1913, P. L. 877, and the salient features are that every widow of any decedent dying estate or intestate within this Commonwealth, or dying outside of this Commonwealth, but whose estate is settled in this Commonwealth may retain or claim
either real or personal property or the proceeds of either real or personal property belonging to the estate of the deceased husband to the value of $500. Likewise, if there is no widow competent to take, then the exemption right is accorded to the "children forming part of the family" of the decedent. The right of the widow is on the assumption that she is legally the widow of the decedent and in addition thereto was maintaining the family relationship with her husband at the time of his decease, or in the absence of this fact, failure so to maintain was not due to her assent or her fault.

It is the duty of the executor or administrator of the decedent to have appraised and set apart to the widow the personal property which she may select, but if cash is selected then no appraisement is necessary. The selection may be made from any form of personal property, including cash, or it may be made out of the real estate or the proceeds from the sale of real estate. Although the exemption right is derived from the debtor's exemption analogy, as set forth in the Act of 1849, nevertheless the right of exemption to the widow or children of a decedent does not depend upon the solvency of the estate or upon the actual economic necessities of the recipients. A widow may claim her exemption out of the estate of her deceased husband to the detriment of creditors whose claims by reason thereof cannot be paid, and it would make no difference if the widow had a separate estate of ample extent.

In Crawford's Estate, 81 Pa. Superior Ct. 222 (1923), the court observed per PORTER, J., that the Fiduciaries Act was a codification of earlier statutes and while it does not in Section 12 follow literally the Act of April 14, 1851, P. L. 612, the provisions are substantially the same.

**Family Relationship**

Assuming there has been a lawful marriage and the widow is the lawful widow of the decedent, nevertheless she may not be entitled to the exemption because at the time of the death of her husband the family relationship was not being maintained; in short, the claimant was not living with her husband. About two years after the passage of the Act of 1851, the case of Spier's Appeal, 26 Pa. 233 (1856), arose, the facts being that the intestate died on the 10th day of June, 1853, leaving a widow, Anna M. F. Spier, who at the time of his death was living in Germany. Spier had been in this country about five years and a short time before his death he had written to his wife to join him in this country which she promised by letter to do. Before this was accomplished Spier died and his property was taken possession of by an administrator and converted into cash, after which Mrs. Spier arrived in this country and before the Auditor claimed the exemption of $300 under the Act of 1851. The claim was disallowed and the fund distributed to the creditors of the intestate leaving a very small balance which was awarded to her. On exceptions filed to the report of the Auditor, the same were dismissed and THOMPSON, P. J., gave the following...
reasons which were later approved by the Supreme Court. Explained the learned Judge:

"The decision of the auditor upon the claim of the widow of the decedent, to an allowance of $300, under the provisions of the 5th section of the Act of April 14, 1851, is entirely correct. That act was designed to prevent the family of a decedent from being deprived of a home immediately upon his death, and the property which the law exempts is to be retained by the widow. Neither the intention nor the language of the act apply to the case of a wife who has lived in a foreign country for years, separated from her husband, and who never formed part of his family here."

In Fenyo's Est., 105 Pa. Superior Court 560 (1932) 161 A. 606, the decedent, an alien, died in Cambria County and left a widow, a resident of Czechoslovakia. The widow laid claim to her exemption and it was shown that she was living in her native country for four years while her husband was living in the United States. In affirming the decision of the Auditing Judge in disallowing the claim, BALDRIGE, J., said:

"The widow's right to an exemption of $500 is a gratuity under the law, based upon the existence of the family relation at the time of the decedent's death, and was not intended to apply where a wife has lived for years in a foreign country, separate from her husband, and not a part of the family, unless she was prevented from occupying that relation by the conduct of the husband. Spier's Appeal, 26 Pa. 233; Mallory's Estate, 300 Pa. 217, 150 A. 606; Finch's Estate, 86 Pa. Super. Ct. 240. She was, therefore, not entitled to the widow's exemption under the Fiduciaries Act of June 7, 1917, P. L. 447 (20 PS Section 321 et seq.)."

In these two cases an excellent illustration is afforded of the evolution of law through statute, judicial interpretation and statute. Section 5 of the Act of April 14, 1851, P. L. 612, which was the subject of interpretation in Spier's Appeal, supra, does not contain any reference whatsoever to the maintenance of the family relationship. On the contrary the language is very broad as follows:

"That hereafter, the widow or the children of any decedent dying within this Commonwealth, testate or intestate, may retain either real or personal property belonging to said estate to the value of $300, and the same shall not be sold, but suffered to remain for the use of the widow and family."

As interpreted in later cases the phrase "for the use of the widow and family" meant that the exemption was for the widow who was presumed to use it for the benefit of the family. If there was no family then the widow would
be the sole beneficiary, but under any hypothesis nothing is said in the section just quoted about the husband and wife living together at the time of the former's decease. The sole specification was that the claimant be the lawful widow of the decedent. Nevertheless, the requirement as interpolated into the section by Spier's Appeal became the rule of law as is witnessed by many cases following in the wake of the original decision.

Furthermore, in Fenyo's Estate, supra, we find the court following Spier's Appeal by interpreting, in so doing, the later enactment of Section 12 of the Fiduciaries Act, supra.

The exact language of Section 12 (a) on the point is as follows:

"The widow, if any, or if there be no widow, or if she has forfeited her rights, then the children forming part of the family of any decedent dying, etc."

Here it will be observed that the phrase "forming part of the family of any decedent" and which is an elaboration of the family relationship doctrine, is now inserted by the legislature in the present enactment but the phrase does not by construction modify or describe the widow but does describe the children. In contrast, Section 5 of the Act of 1851, as quoted supra, merely mentioned the widow and described the children as being those "of any decedent dying within this Commonwealth, testate or intestate."

Despite these animadversions, it is undoubted and hornbook law at the present time that the existence of the family relationship is the foundation of the widow's exemption, and the entire course of decisions upon the Act of 1851, as well as that of 1917, has laid emphasis upon this fact. In Crawford's Est., 81 Pa. Superior Ct. 222 (1923), it was declared that there was no indication in present legislation to depart from the established rule that the right to claim the widow's exemption depends upon the existence of the family relation, unless the separation occurred through the fault of the husband. Accordingly, it was further observed that authorities under the Act of 1851 are persuasive in the interpretation of Section 12, supra.

FORFEITURE

Section 12 (a) supra in its opening language of substantially a line and a half refers to three situations: (1) the existence of a widow, (2) the non-existence of a widow, and (3) a widow who "has forfeited her rights."

The entire clause is silent as to what constitutes acts of forfeiture but we have already discussed in the previous subdivision the requirement of the family relationship, and therefore the widow who fails to maintain that relationship, unless she is without fault, forfeits her right of exemption.

In addition the legislature may be presumed to have had in mind the enactment of Section 6 of the Intestate Act of 1917, 20 PS 42, stipulating that a wife who was guilty of wilful and malicious desertion for a period of one year or
upwards previous to the decease of her husband could claim no share in the estate of the husband deceased. This is the only known statutory forfeiture. In *Fenyo's Est.*, supra, the facts as developed showed that for a period of years before the death of the husband the wife in her native country was living in adultery. According to the evidence the testator was acquainted with the infidelity of his wife yet it was held there was not sufficient evidence to show condonation. The adultery as charged, per se, was not sufficient to work a forfeiture of the widow's share in the husband's estate, outside of her claim for exemption which was denied, but the adultery committed was held sufficient to characterize what otherwise might have been considered as a consentable separation into a wilful and malicious desertion, thus depriving the widow of the right to take against her husband's will according to the ruling in *Lodge's Est.*, 287 Pa. 184 (1926), 134 A. 472.

In *Fenyo's Est.*, supra, the widow made two claims, (1) for the exemption and (2) for her share of the husband's estate under the Intestate Laws and rejecting the provisions of the will. Both claims were denied, the first for the reason that desertion being established this involved obviously an absence of the family relationship, and the second by the establishment of desertion the provisions of Section 6 of the Intestate Act of 1917, supra, applied. However, the widow did take under the provisions of her husband's will. Even though adultery were shown during the continuance of the family relationship up to the death of the husband, this would not have precluded the widow from recovering on both claims, as adultery does not preclude the claim for exemption if, despite the infidelity, the family relationship is maintained.

In *Arnout's Estate*, 283 Pa. 49 (1925), 128 A. 661, it was held that under the facts a widow might be entitled to the surviving spouse's claim of $5,000 out of her husband's estate although the same facts would not entitle her to the exemption for the reason that the family relationship was not maintained at the time of the husband's death.

In *Crawford's Estate*, 81 Pa. Superior Ct. 222 (1923), it was stated that a widow who has forfeited her right to the exemption might still be entitled to participate in the distribution of her husband's estate under the Intestate Law as the widow's exemption is not an estate of inheritance but an independent bounty of which the widow may be deprived where the family relationship is shown not to exist. On the other hand, her claim under the Intestate Law is to an estate by inheritance and of which she cannot be deprived except by conduct falling within the terms of Section 6 of the Intestate Act, supra. See also *Braum's Est.*, 86 Pa. Superior Ct. 245 (1926), and *Stauffer's Est.*, 89 Pa. Superior Ct. 531 (1926).

To the same effect is *Mallory's Est.*, 300 Pa. 217 (1930), 150 A. 606, wherein is an opinion by MOSCHZISKER, C. J., reviewing the leading cases on
the topics of widow's exemption and the spouse's right to the $5,000 under the Intestate Act.

The family relationship may not be maintained by the respective spouses for a variety of reasons and our decisions, in analyzing the various situations, have allowed to the widow the exemption where the family relationship was not actually being maintained but the fault was that of the husband and the wife was, in the terms of divorce language, "the injured and innocent spouse."

In Johnson's Est., 80 Pa. Superior Ct. 232 (1922), a wife was wrongfully induced by her husband to leave their home and it was held that by such a separation she did not forfeit her right to her exemption at the death of the husband. To the same effect is Schwartz's Est., 10 D. & C. 674 (1928), and Burkett's Est., 5 C. C. 501 (1888), cited in Mallory's Est., supra.

In Mehaffey's Est., 102 Pa. Superior Ct. 228 (1931), 156 A. 746, it was stated per CUNNINGHAM, J., that "the fault of the husband in order to furnish a justification for separation must be a serious one such as deserting, maltreating, or abusing the wife, driving her away, or inducing her to leave the home," citing Stauffer's Est., 89 Pa. Superior Ct. 531 (1926), but in such instances and others which would constitute grounds of justification the widow will be allowed her exemption although the family relationship has not been actually maintained.

Where a divorce a mensa et thoro was granted, it is the law, as set forth in Hettrick v. Hettrick, 55 Pa. 290 (1867), that the widow in such an instance is not entitled to the exemption. Generally, the rule of law is that where there is a consentable separation the widow is not entitled to the exemption as the family relationship is not being maintained and there is no fault attributed to the deceased husband.

In Crawford's Est., 81 Pa. Superior Ct. 222 (1923), it was held that where a husband and wife separated by mutual agreement three years before the death of the former, in such a case the wife as widow was not entitled to have set apart to her, as against creditors of the estate, the widow's exemption of $500 allowable under the provisions of Section 12, supra.

In the course of an able opinion, PORTER, J., explained:

"The sole question is: Has the widow the right to take the exemption when, in the absence of any evidence of misconduct on the part of the decedent, she has been living apart from her husband for three years immediately prior to his death in pursuance of articles of separation voluntarily entered into upon her part? The law was well settled, prior to the legislation of 1917, that when a wife had been voluntarily living apart from her husband, without such reasonable cause as would entitle her to a divorce, she did not upon his death become entitled to the benefit of the exemption out of his estate: Nye's App., 126 Pa. 341. None could claim who did not stand in the family relation toward the decedent, unless the
separation was the fault of the husband: Henkel's Est., 13 Pa. Superior Ct. 337, and cases there cited. The language of the 12th section of the Fiduciaries Act of 1917 does not follow literally the Act of 1851, P. L. 612, but the provisions are substantially the same, although it is to be noticed that the Act of 1917 makes the right of the widow subject to the condition that she has not forfeited her rights, which words are not in the Act of 1851."

Continuing in an explanation of the Act of 1917 and stating that the construction was the same as that of the Act of 1851, the question before the Court was answered in the negative.

In accord, Stauffer's Estate, 89 Pa. Superior Ct. 531 (1926), per CUNNINGHAM, J. See also Arnout's Estate, supra.

In Mehaffey's Est., 102 Pa. Superior Ct. 228 (1931), 156 A. 746, the claim of the widow for the exemption was resisted by the children of the deceased husband and later rejected by the court. On appeal in explaining the law and Stauffer's Est., supra, CUNNINGHAM, J., observed:

"The forfeiture specified in Section 12 (a) of the Fiduciaries Act is 'the forfeiture of the widow's exemption established by a long line of judicial decisions,' to the effect that a wife who did not stand in the family relation toward the decedent at the time of his death, but had been voluntarily living apart from him without such reasonable cause as would entitle her to a divorce, had forfeited the right to her exemption. As expressed in some of the cases, the law granting the exemption contemplates the case of a wife who lives with her husband until his death and faithfully performs all her duties to his family, not one who voluntarily separates herself from him, 'unless the separation was the fault of the husband.' But the 'fault,' in order to furnish justification for the separation, must be a serious one—deserting, maltreating, or abusing her, driving her away, or inducing her to leave the home, and the like. Stauffer's Estate, supra. A careful reading of the testimony in this case fails to disclose any evidence which would support a finding that the separation, admittedly existing at the date of the death of the husband, was his fault within the meaning of the decided cases. The court below therefore properly held that appellant had forfeited her right to the exemption now granted by the Fiduciaries Act."

See also Braum's Estate, 86 Pa. Superior Ct. 245 (1926), per GAWTHROP, J.

As intimated in the cases just discussed, if the family relationship is not being maintained through the fault of the husband, such "fault" being a serious one as would justify the wife's withdrawal, under such facts the court will award
to the widow her exemption, although the family relationship is not actually maintained at the time of the death of the husband.

If, however, the separation is a consentable one the right to the exemption is generally barred, apparently upon the theory of waiver rather than the failure to maintain the family relationship. See remarks of PORTER, J., in Henkel's Est., 13 Pa. Superior Ct. 337 (1900).

If this conclusion is correct it would logically follow that where there is an agreement on the part of the spouses to live apart, but in the agreement the mutual rights as husband and wife in the estates of each other are specifically reserved, despite such a consentable separation the widow in case of the death of the husband would be entitled to her exemption.

Another aspect of the matter of actual separation and an agreement incident thereto is found in Sipel's Estate, 21 D. & C. 326 (1934), where there was an agreement to separate which was executed by the spouses in the presence of the husband's counsel and the wife did not have legal advice on the matter. At the husband's death she was held entitled to the exemption despite the separation agreement, where it was shown that the separation was due to the misconduct of the husband, which would have entitled the wife to a divorce, and the agreement was made to stop a criminal prosecution by her against the husband. It was shown, inter alia, that the decedent by his brutality inflicted on the wife serious physical injuries, blackening her eyes, knocking out her teeth and otherwise abusing her in repeated assaults upon her person.

Said APPEL, P. J., of the Orphans' Court of Lancaster County:

"The agreement nowhere contains or refers to a surrender of any claim she may have against the decedent's estate in case he predeceases her. Neither does it contain any stipulation that a separation which was occurring was or should be by agreement which would bar her right to the exemption now claimed by her. That there was never at any time such an agreement is amply sustained by the testimony. On the contrary, it shows that she repeatedly and consistently, both before the agreement was executed and afterwards, beseeched decedent to mend his conduct, leave his evil associations, and return to his home where she would receive him as her husband. This she hoped for up to the time of his unexpected death. He, however, never returned. We have no difficulty in finding, and we do so find, that the separation was entirely due to his misconduct, and that this misconduct was such as would have entitled her to a divorce. This case does not come, therefore, within the class of cases where there is an amicable separation with the result that the exemption may not be claimed by the widow: Crawford's Estate, 81 Pa. Superior Ct. 222; Stauffer's Estate, 89 Pa. Superior Ct. 531, and many others that might be cited."
It will be recalled that the Act of 1851 made no mention of a possible forfeiture of the widow's right of exemption but that the courts interpolated into the enactment the doctrine of the family relationship. In Section 12 (a) there was inserted in reference to the widow the qualifying clause "if she has forfeited her rights." In *Mehaffey's Estate*, supra, CUNNINGHAM, J., remarked, concerning the forfeiture clause in Section 12 (a) that the forfeiture as specified was established "by a long line of judicial decisions." Most of the cases have applied the family relation doctrine as developed, but in addition to this feature there are two other situations as evolved by the courts as causes for forfeiture and they will now be considered.

**Remarriage**

In *Heckman's Estate*, 17 D. & C. 761 (1932), DAVISON, P. J. of the Orphans' Court of Franklin County, inter alia, remarked:

"It cannot be denied that if a widow remarries and then claims her exemption from her husband's estate she is barred from receiving such exemption."

No authorities were cited by the learned judge to sustain this proposition as the remark was made obiter. However, a survey of the cases discloses many similar remarks and actual decisions characterizing remarriage of the widow as a cause of forfeiture.

The doctrine of exemption forfeiture by the remarriage of the widow is a curious and interesting illustration of legal reasoning and judicial interpolation of a statute. The logic runs in this wise: The statute accords to the widow certain exempt property of her deceased husband's estate, if the marriage relationship is maintained to the time of death; the statute accords the privilege to the widow and it must be exercised as widow. Upon remarriage the former widow is no longer widow; therefore, if the exemption is requested after the remarriage, the petitioner does not come within the terms of the statute. The right of exemption being a gratuity and a privilege, the rights under the statute only become such when exercised and do not relate back to the death of the husband.

The evolution of this matter as traced through the decisions affords comfort to the legal theorist whose explanation of decisions is by way of so-called "functional approach." In short, so runs the latter reasoning, the judges determine that remarried widows ought not to have the exemption and then proceed to establish a reason therefor. Furthermore, it is to be observed that the doctrine of forfeiture by remarriage is intertwined with the doctrine of forfeiture by delay to be discussed hereafter.

In *Burk v. Gleason*, 46 Pa. 297 (1863), the matter seems to have been mooted for the first time. A widow claimed her statutory allowance under the Act of 1851 but not until after the lapse of several years, meanwhile contracting...
a second marriage. The case was decided upon the lapse of time. Said WOODWARD, J.

"That act was passed for the benefit of the 'widow or children of any decedent.' Burk left no children. Was Mrs. Gleason his 'widow,' within the spirit and meaning of the act? We think she was not. If she meant to assert her rights of widowhood, she should have done it in a reasonable time after her husband's death —in the forms of a legal administration—and whilst she was a widow indeed. To delay her claim seven years, and then to prosecute it through a second husband, would be an application of the statute which was not intended, and cannot be permitted. If any widow could be permitted to come in under this statute, after a second marriage, the laches of this widow was gross enough to postpone her."

In Commonwealth v. Powell, 51 Pa. 438 (1866), THOMPSON, J., solved the interesting question as to when a widow was not a widow in determining that where a mother-in-law bequeathed the residue of her estate to her daughter-in-law, who was the widow of her son, and later the widow remarried in the lifetime of the testatrix and was still married at her death, the bequest was subject to the collateral inheritance tax as the legatee was no longer the widow of the son and therefore did not come within the provisions of the Act of 1849, exemption from the operation of the collateral inheritance tax law property "passing by will to, or in trust for, the wife or widow of a son of any person dying seised or possessed thereof."

In Shumate v. Mc赃ary, 83 Pa. 38 (1876), where the claim of a widow for exemption was rejected, inter alia, by reason of the lapse of time, fourteen years having passed from the time of her husband's death, GORDON J., made the comment relative to Burk v. Gleason, supra, and Commonwealth v. Powell, supra, that they stood for the proposition that a widow upon remarriage forfeited her right to the exemption.

However, a study of these cases reveals the facts that the remarriage question was never actually involved and the remarks of the judges were obiter dicta. Thus the matter stood when the case of Kerns' Appeal, 120 Pa. 523 (1888), 14 A. 435, came before the Supreme Court. The facts were that the petitioner delayed for over three years to assert her claim as widow under the Exemption Act of 1851, and the facts were clearly one of lapse of time, although in the meanwhile the widow had remarried. Nevertheless, GREEN, J., in reviewing Burk v. Gleason, Commonwealth v. Powell, and Shumate v. McGarity, supra, and commenting upon the same, drew the following conclusion:

"In the first of them the question did not arise, but we held in another connection that if a widow's rights, as widow, in her husband's
property, had once vested, they were not lost by the fact of a subsequent marriage. In the same case, however, we held that a widow is a woman who has lost her husband and remains unmarried."

In *Machemer's Estate*, 140 Pa. 544 (1891), 21 A. 441, the facts were that the widow had remarried and had died without having made claim to her exemption under the Act of 1851, whereupon her executor did make the claim which was denied, the court holding that the right under the statute is a privilege to retain and not an absolute transfer of a part of the estate.

Notwithstanding the lack of any satisfactory authority for the proposition of forfeiture by remarriage, in *Clark's Estate*, 275 Pa. 506 (1923, 119 A. 590, SIMPSON, J., opines:

"It may now be considered as established by Kern's App., 120 Pa. 523, and Machemer's Est., 140 Pa. 544,—that the earlier conflicting authorities being overruled therein,—that if there has been no sale of the property allotted to a widow, an award of exemption to her may be set aside, on due application, if she had remarried 'before her election was made,' or if there was a 'delay of a year in claiming her exemption'."

Apparently there are no clearcut decisions upon this question of forfeiture by remarriage to be found in the appellate court reports. In *Cramm's Est.*, 114 Pa. Superior Ct. 348 (1934), 174 A. 838, PARKER, J., cites *Clark's Estate*, supra, and repeats the quotation from SIMPSON, J., as already given, but here again the facts did not include remarriage, the contest being on the ground of lapse of time and the widow's delay.

In *Alfree's Est.*, 22 D. R. 486 (1913), LAMORELLE, J., of the Orphans' Court of Philadelphia County, on petition, answer and replication determined that a remarried widow was not entitled to the exemption, saying:

"A widow is defined to be an unmarried woman whose husband is dead; one who has lost her husband by death, and has not taken another: Words and Phrases, 7457, and cases there cited.

"As used in our act above referred to, it means the state and not the person. In the legal as well as the popular conception a widow is a woman in an unmarried state: Com. v. Powell, 51 Pa. 438. She ceases to be a widow when she remarries: Kern's Appeal, 120 Pa. 523. The right does not vest as of the date of the death of the husband; the widow must make the claim, and, at the time of making, she must fulfill the requirements of the act. The case of Cierlinski v. Rys, 225 Pa. 312, is not in point. It is an authority that a decree of a court having jurisdiction, even though erroneous, is
conclusive in a collateral proceeding. The present application is
ruled by our own decision in Seittenspinner's Estate, 6 Dist. R. 454,
where we squarely ruled that a widow's claim to the exemption is
barred if, at the time, she has remarried."

In Alfree's Est., supra, the husband died July 15, 1912; the widow re-
marrined November 27, 1912. It was not until March, 1913 that she filed her
petition for the exemption. The case more properly stands for forfeiture by
delay or lapse of time, to be considered infra. Likewise in Seittenspinner's Est.,
6 D. R. 454 (1897), the facts were the husband died January 4, 1890, his
widow later remarried, and on April 1, 1897, more than seven years thereafter,
presented her claim for the exemption. It is true that in this case the reason
for the delay in filing the claim was that at the time of the death of the husband
he apparently left no estate out of which her claim for exemption could be paid
and the claim was later made out of property which fell to the estate of the hus-
band by reason of the death of a life tenant. Nevertheless, as will be pointed
out in the discussion on DELAY OR LAPSE OF TIME, infra, these facts present-
ed no lawful excuse, but in the case the court seized the fact of remarriage to
justify the decision.

As far as can be ascertained the cases already discussed constitute the sole
authority for the proposition. Moreover, it is noteworthy to observe that Scott
in his work on the Intestate System of Pennsylvania, at page 175, written in
1871, takes the opposite view, wherein it is said:

"By the intestate laws of the State, the interest of the widow is fixed
the moment she becomes a widow, and is not divested by a subse-
quent marriage. So also is her right of election to take under the
will of her husband or the intestate laws. And for the same reason
it is, that the right to retain three hundred dollars, out of the estate
of her husband exists, although, before doing so, a second marriage
may have taken place. Whenever a right by law has attached by
reason of widowhood, there must be some law by which it is di-
vested, or it will remain."

In some of the cases the widow's exemption is referred to as a right, in
others as a privilege, and in still others as a gratuity.

It is undoubtedly a right in the general sense of that term which, inter alia,
denotes property, interest, power, prerogative, immunity, and privilege. It is
not an absolute right such as the widow's right of election and her right to inherit
or take under the Intestate Laws. It is a relative right in the sense that it must
be personally exercised, hence as stated in Machemer's Est., supra, it cannot be
exercised after the widow's death by her executor. Moreover, if the widow
does not ask for it, no one else can do so in her stead, and the children may
even be precluded by her neglect or refusal to exercise this right.
Nevertheless, the observation as made by Scott, supra, appears to be sound, viz, that the right of exemption attaches immediately upon the death of the husband and there is apparently no law by which this right is divested except such as is within the terms of the statute. And it is apparent that Section 12 of the Fiduciaries Act, supra, makes no reference to any forfeiture by the remarriage of the widow. Non constat the remarks of CUNNINGHAM, J., in Stauffer's Estate, supra.

**Delay or Lapse of Time**

Another cause of forfeiture of the widow's exemption, as interpolated into the statute by judicial decision, is that of delay or lapse of time.

In Clark's Estate, supra, SIMPSON, J., referring to Kerns' App., supra, and Mackemer's Est., supra, asserted that the established dogma was that a delay of a year in claiming her exemption was an effectual bar to the widow.

In Cramm's Estate, 114 Pa. Superior Ct. 463 (1934), 174 A. 838, the pontifical statement of SIMPSON, J., was quoted by PARKER, J., with approval, and in reversing the judgment of the lower court it was held that under the facts a widow's delay for more than nineteen months after her husband's death, and for more than thirteen months after letters testamentary were issued, before claiming the exemption was laches, constituting a waiver of the right notwithstanding the widow thought that the estate would be settled out of court. In this case the husband died testate May 5, 1931. Thereafter his will was admitted to probate and on October 31, 1931 letters testamentary were issued to the executrix, one Mary Cramm. December 1, 1931, the widow, Minnie Cramm, elected to take against the will of her husband. No other steps were taken until December 7, 1932 when the executrix presented a petition for the sale of the decedent's real estate for the payment of debts, and on December 22, 1932 the widow presented a petition praying to have the decedent's real estate set aside to her as her exemption. Appraisers were appointed and a return made to the court and exceptions filed by the residuary devisees. After taking testimony the exceptions were dismissed and the appraisal finally confirmed; whereupon the present appeal was taken.

PARKER, J., after reviewing the facts and some of the cases, concluded:

"No specific time was fixed by the statutes either of 1851 or of 1917 within which a demand for appraisement must be made. However, in the leading case of Kerns' Appeal, 120 Pa. 523, 530, 14 A. 435, 437, the Supreme Court very definitely said: 'While we do not mean to say that she should be allowed so much as one year in which to claim her $300 exemption, the analogy of the statute which subjects her to a compulsory citation to elect as against a will, at the expiration of 12 months from her husband's death, admonishes us that a delay of a year in claiming her exemption is gross
laches, and in itself evidence of a waiver of her right.' In that con-
nection the court there pointed out that there was no reason for any
serious delay in the exercise of a widow's right of exemption, for
she is entitled to it whether her husband died testate or intestate,
and while she needs time to inform herself as to the condition of
the estate before making an election to take against the will for
which she is allowed a period of one year, there is no occasion for
any such delay in the claim for exemption."

After referring to Clark's Estate, supra, and the kindred authorities, the
learned judge lays down the following rule:

"We are likewise of the opinion that the only logical point at which
the line may be drawn is after the period of one year. Having the
very definite statements by the Supreme Court, we hold that the
delay of the widow for nineteen months after her husband's death
and for more than thirteen months after letters testamentary were
issued on his estate is evidence of laches and amounts to a waiver."

Concerning the excuse of the widow for not presenting her claim sooner,
the learned judge thus explains:

"The appellee contends that there are special circumstances which
should be taken into account in determining whether there was a
waiver and relies upon the following question and answer: 'After
he died why did you wait until December, 1932, to claim your
widow's exemption? A. We thought it would be settled out of court.
I first hired legal counsel to protect my interest in December, 1932.
I am 58 years of age.' More than a year prior to the presentation
of the claim for exemption, the widow had elected to take against
the will, which would indicate that she had some knowledge of her
rights. She does not say that she had made any claim for her
exemption or that there were, in fact, any negotiations looking to a
settlement, but depends upon the mere bald statement that she
thought it would be settled out of court. This comes far short of
explaining the delay. If this were a good answer to such a delay,
it would nullify the rule."

A study of the cases enunciating the doctrine of laches or waiver of the
widow's exemption presents a parallelism in legal reasoning with the cases already
discussed under the doctrine of remarriage. Here, as in the latter doctrine, the
courts have read into the statute a stipulation not the product of the legislative
enactment. It is true that one may lose a right by laches, and the legislature in
the enacting of the several statutes of limitation has established a time limit to
certain actions. In equity the doctrine of laches is applied frequently. Section
12 of the Fiduciaries Act, supra, is silent as to the time in which the widow is to file her application for the exemption, and the decisions discussed under the general topic of the right of exemption emphasize the tenderness of the law towards the widow and the children. Furthermore, it is obvious that if the widow with a knowledge of her rights does not assert the same, meanwhile permitting the rights of third persons to intervene, in such cases the doctrine of laches is justly applied, but it is a far cry from this situation to that of a dogmatic rule laid down by the courts as a judicial statute of limitation within which the claim for exemption must be made or otherwise the widow is barred.

Reference has already been made to Clark's Estate, supra, wherein SIMPSON, J., laid down the rule in reference to forfeiture by remarriage, and it will be recalled that in the same quotation the learned justice declared in substance that a delay of a year in claiming the exemption was fatal. These remarks are of more than ordinary significance because in the cases referred to as substantiating this doctrine, the question under consideration was not the original granting of the application of the widow but the setting aside by the court of that which had already been decreed.

It is possible to trace the doctrine of a specific time limit on the widow's right of exemption to Kerns' Appeal, 120 Pa. 523 (1888), 14 A. 435. In Crider's Est., 20 D. & C. 113 (1933), DAVISON, P. J. of the Orphans' Court of Franklin County, having a similar question under consideration, observed that the leading case in reference to a delay by widow in making her claim for exemption was that of Kerns' Appeal, supra.

In the latter case the delay was over three years and in the meanwhile the widow had remarried.

In reversing the decree of the court below and ordering the confirmation of the widow's appraisement to be vacated and set aside and the appraisement and all proceedings adjudged null and void, GREEN, J., declared:

"In the present case the delay was for almost three and a half years. In the meantime, no election by the widow having been made, the appellant had brought her action of ejectment to recover the land devised, and, of course, had incurred expense in doing so. Nothing appeared of record to show that the widow intended to elect to take her exemption. Although the paper in which she declared her election bore date on September 8, 1883, two days before the writ of ejectment was issued by the appellant, it was a mere private paper in the possession of the widow, and was no notice to the appellant. Nor was any notice ever given to the appellant of the widow's election. The fact of her election first appeared upon the record of the Orphans' Court on September 24, 1883, more than three years and five months after her husband's death. We have no hesitation in deciding, as we now do, that this was gross laches"
on the part of the widow in exercising her right of election to take the benefit of her exemption, and operates as conclusive proof of a waiver of her right."

Kerns' Appeal, supra, was properly decided, particularly in view of the fact that the land which was the subject of appraisement had not passed into the hands of holders for value and without notice, but in the course of the opinion the learned justice made other observations which influenced later courts in the establishment of a specific time limit. Said GREEN, J.:

"There is no reason for any serious delay in the exercise of a widow's right of exemption, because she is entitled to it, whether her husband has died testate or intestate, and in this respect it differs from her election to take under his will. In the latter case she needs time enough to inform herself as to the condition of the estate, before making her election, and she is allowed one year in which to do so by the express provision of a statute. While we do not mean to say that she should be allowed so much as one year in which to claim her $300 exemption, the analogy of the statute which subjects her to a compulsory citation to elect as against a will, at the expiration of twelve months from her husband's death, admonishes us that a delay of a year in claiming her exemption is gross laches, and in itself evidence of a waiver of her right."

Despite the judicial suggestion, six years later STEWART, P. J. of the Orphans' Court of Franklin County, in Snider's Est., 4 D. R. 458 (1894), allowed the widow her exemption although there was a delay of two and a half years, pointing out that such a delay did not prejudice or disappoint anyone. However, it was observed by the learned judge that if the demand for appraisement had been delayed more than three years he would have been compelled under the authority of Kerns' Appeal, supra, to withhold confirmation. Commenting upon the case Judge Stewart, afterwards a justice of the Supreme Court, explained:

"That case decides that a delay of over three years on the part of a widow in exercising her right to take $300 in money or property of her deceased husband's estate, under the exemption law of 1851, is fatal to her right and conclusive evidence of a waiver. It affords no authority, however, for holding that such legal conclusion follows any shorter period of delay. There may be cases where continued delay, though short of the three years, will work a forfeiture of the right to the exemption but, whenever this results, there will be found other circumstances contributing. Here the delay was for two and a half years, but under circumstances which ought not to prejudice the widow's claim. Her delay disappoints no one. By
an arrangement between herself and the only other person interested in the estate—a son—legal administration of the estate was to be dispensed with, she retaining such articles of personal property as she desired, the balance to be sold. It is of no consequence to inquire what led to a change of purpose. It is enough to know that within three years of the death, letters of administration were granted to the widow; that the personal property which remained in her possession after her husband's death is still there, easily and certainly distinguishable; that no prejudice can come to any one, whether heir or creditor, by allowing her the benefit of an appraisement."

Likewise in the case where time did not affect the estate or those interested therein prejudicially, it was held in Reed's Est., 21 D. R. 906 (1912) by the late Judge GILLAN of Franklin County, that a delay of less than two years in making demand for the exemption was not a bar in view of the fact that no money had been paid to creditors and nothing had been done which could change the position of the parties. The learned judge commented on the fact that there was no time limit fixed by the Act and furthermore it was difficult to reconcile the various deliverances of our courts on this subject and that each case must necessarily be regulated by its own peculiar circumstances.

In the writing of this opinion Judge GILLAN had before him the opinion of his predecessor, Judge STEWART, in Lane's Est., 6 D. R. 618 (1897), wherein it was observed that the claim was sufficient in time if made before the situation with respect to the estate had been so changed as to involve expense and embarrassment from its allowance.

On the other hand in Crider's Est., supra, Judge DAVISON of the same court and the successor of Judge GILLAN, held that the widow was barred by laches from claiming her exemption where the claim was not made until more than five years after the husband's death. In this case in a valuable opinion reviewing the various cases, the learned judge remarked:

"Upon the argument in this case and in considering it at the time of that argument, we were much inclined to the opinion that the widow should be allowed her exemption as claimed, and that, as the rights of no other person had been in any way interfered with and as there was no change in the situation in this estate because of her delay in making this claim, she should not, because of her laches, be deprived of that claim, which is intended for the support of the widow upon the death of the husband and in regard to which the law has always been careful to make allowance, if possible. Upon examination of the authorities, however, we are of the opinion that, whatever our own thought of the case may be, we are bound by the opinions filed by the Supreme Court of this State,
and that we cannot allow this exemption after a delay of more than five years.

From a review of these cases it would appear that the doctrine of forfeiture of the exemption by delay is well established in the decisional law, but it is doubtful whether a specific time limit can be supported. What would be an unreasonable delay due to intervening rights, in one case might not be considered as an unreasonable delay in another case, where there were no intervening rights. Furthermore, in the latter case the period of time might even be longer. Until the legislature establishes by statute a specific time limit, it will not be extraordinary to continue to find, as Judge GILLAN observed, that many of the deliveries of the courts are irreconcilable on this topic. However, in the administration of an estate the widow should be advised of her rights and admonished to make her claim as soon as conveniently may be done following the filing of the inventory and appraisement.

CHILDREN'S EXEMPTION

Section 12 (e) of the Fiduciaries Act, supra, 20 PS 475, is as follows:

"In the case of any decedent leaving to survive him any minor child or children forming part of his family, and no widow, his administrator or executor, without request made to him by any one, shall have appraised and set aside, for the use and benefit of all such minor children of said decedent, property to the full value of five hundred dollars."

The draftsmen have appended to this clause the following explanatory note:

"Note—This is Section 1 of the Act of June 4, 1883, P. L. 74, 1 Purd. 1096, substituting 'five hundred dollars' for 'now allowed by law,' etc., and 'minor child or children forming part of his family' for 'child or children under the age of fourteen years'."

As indicated in the discussion of Section 12 (a) of the Fiduciaries Act, supra, the right to the exemption is given first, to the widow and second, to "the children forming part of the family of any decedent dying, testate or intestate, within this Commonwealth, or dying outside of this Commonwealth but whose estate is settled in this Commonwealth." In the latter case there is no widow or under the several situations already discussed, the widow, if any, has been eliminated.

The original language of the Act of 1851 was "that hereafter the widow or the children of any decedent dying within this Commonwealth, testate or intestate, may retain either real or personal property belonging to said estate to the value of $300."

The Act of June 4, 1883, P. L. 74, provided, inter alia, "that hereafter in the case of any decedent leaving to survive him any child or children under the
age of fourteen years, and no widow, his administrator or executor, without request made to him by anyone, shall have appraised and set aside, for the use and benefit of all the minor children of said decedent, property to the full value now allowed by law to the widow or children of decedents, upon demand made."

The Act of May 6, 1909, P. L. 459, provided the exemption to the classes mentioned out of the estates of decedents dying outside of the Commonwealth, but whose estates are settled in the Commonwealth.

It will be noted, therefore, that all of these provisions relative to both widows and children are embodied in Section 12 (a) and (e) 1, supra, eliminating, however, the age limit of fourteen years as stipulated in the Act of 1883.

A recapitulation of the matter results in the following classes of children as entitled to the exemption where there is no widow involved, and as these classes are distinguished by the courts in the decisions construing and interpreting the statutory law:

1. children forming part of the family of any decedent and irrespective of age;
2. any minor child or children forming part of the family;
3. both of the above classes may claim the exemption out of either the estate of the father, or, the father being dead and the mother dying, out of the latter's estate.

The classes as above delineated will now be discussed in their order.

In Lane's Est., 6 D. R. 618 (1897), there was rendered by STEWART, P. J., of the Orphans' Court of Franklin County, an important decision construing the Act of 1851. This case became the leading one on the construction of the Act and was repeatedly followed by other orphans' courts of the Commonwealth, and its reasoning was approved by the Supreme Court. Its interpretative features were later embodied in the specific language of Section 12 (a), supra. The facts were: the decedent was a retired clergyman. He had been a widower for a number of years before his death. He left surviving him two daughters, his only children, both adults; one married and residing with her husband in their own home; the other—this claimant—unmarried and residing with her father. At the time of Mr. Lane's death, the only two members of his family and household were himself and this unmarried daughter. The estate was ample, not encumbered with any debt, and, under the will, it was divided between the two daughters. Jane F. Lane, the claimant, had an estate derived through her mother which was estimated at between $5000 and $6000.

It was held that an adult daughter was entitled to the exemption where she was the only child living with the testator at the time of his death and there was no widow to take it. Furthermore, the fact that the claimant had a separate estate of her own and was not dependent upon the testator did not preclude her claim, if she was a bona fide member of the decedent's family at the time of
his death. The family relation and residence with the decedent and not the
dependence of the daughter is the criterion of her right.

Jane Lane was an adult, unmarried daughter, but at the time of her father’s
death she was a part of his family and that was the ruling factor. The contrary
situation on the facts of the family relationship and the condition of the claimant
appear in Hook’s Est., 3 D. & C. 692 (1923), wherein it appeared that for
seventeen years before his death decedent divided his time between the resi-
dence of the claimant, his married daughter, and her husband in Philadelphia
and a farm he owned in New Jersey. Until within a year of his death he con-
ducted a tailoring business on the ground floor of the Philadelphia property.
One year before his death he gave this business to his daughter. Until a year
before he died decedent paid the rent; claimant and her husband all other ex-
penses. During the last year of his life he paid nothing and lived with claimant
as her guest when in Philadelphia: Held, that the family relationship did not
exist and the claim by the daughter for the exemption of $500 should be dis-
allowed.

Furthermore, it was observed, per GEST, J., citing inter alia, Lane’s Estate,
supra, that under Section 12 (a) of the Fiduciaries Act of June 7, 1917, P. L.
447, it is not necessary that the children of the decedent, to obtain the exemption
of $500, should be minors or should have been dependent upon their father, but
it is necessary that they should form part of his family.

The ruling factor in Hook’s Estate, supra, was that the claimant daughter
did not constitute a part of the father’s family at the time of the latter’s death.
The fact that the claimant is single or married is not a determinent factor except
as it may throw light upon the fact of the family relation. This is illustrated
in Stevenson’s Est., 23 D. R. 747 (1912), where the facts were the decedent was
within a few days of 74 years of age when he died. His daughter, Margaret,
the claimant, was then married and, together with her husband, lived in the home
provided by the father. The family relation was maintained by these parties
until the date of the father’s death. The claimant was a child of the second
marriage, but none of the decedent’s other children or grandchildren lived with
the father or grandfather for a long time prior to the decedent’s death. The
daughter was not dependent upon her father. Nevertheless, it was held by
TRIMBLE, J., of the Orphans’ Court of Allegheny County, that claimant was
entitled to the exemption.

Said the learned judge:

"But this claimant was married and not dependent upon her father
and there is no appellate decision which sustains any claim of this
character. The correct view of the act is set forth in the opinion of
Judge Penrose in Palethorp’s Estate, 3 Dist. R. 145, as follows:

"'The Acts of assembly which confer upon the widow of a decedent
her right to exemption are not dependent for their operation upon her
necessities. She may have unlimited means of her own, her husband's will may make the most ample provision for her support; but whether he died testate or intestate, solvent or insolvent, rich or poor, is immaterial. The Act of April 14, 1851, P. L. 612, is 'the widow or children of any decedent dying within this Commonwealth, testate or intestate, may retain, etc.'

"In Lane's Estate, 6 Dist. R. 618, decided by Judge Stewart, it was held that the criterion for recovery by an adult daughter is not dependence, but the maintenance of the family and residence with the testator. If it is the law that a widow who is financially independent of her husband may retain the exempted property when she has maintained the family relation with her husband, then the only reasonable construction of the act is to say that a daughter may likewise retain it when she is independent of her father, if she maintains the family residence and relation with him, even though she may be married."

See also Hettrick v. Hettrick, 55 Pa. 290 (1867).

From the above authorities the law is well established that an adult child living with the father as a part of his family at the time of his death is entitled to the exemption, there being no widow, under the provisions of Section 12 (a), supra, being in the class of children "forming part of the family of any decedent." The emphasis is to be placed upon the fact that the child is living with the father, not the father with the child. "The family" stipulated in the law is the family of the decedent. If this relationship is established by the claimant with the father, then neither age nor marriage are relevant facts. Furthermore, neither dependency nor actual need are relevant.

However, in this particular class of claimants the exemption must be claimed.

On the other hand, viewing the terms of Section 12 (e) 1, supra, it appears that the provisions apply to a minor child or children of the decedent "forming part of his family" and there being no widow. In such a case the law imposes upon the administrator or executor of the decedent the duty of having appraised and set aside for the use and benefit of all such minor children the exemption stipulated, "without request to him made by anyone."

Unlike the provisions of the Act of 1883, supra, there is no specification of minority age. The requisite is that the child or children shall be minors, that is below the legal age of 21 years and they must form a part of the decedent's family.

If there is only one minor child the full value of $500 is set aside for the benefit of this particular child, but if there are two or more minor children forming part of the decedent's family then the exempted property is applied for the use evenly and equally of the several minor children.
Another situation which has arisen is exemplified in *Gheringer's Est.*, 10 D. & C. 279 (1928), wherein the family of the decedent consisted of one adult child and one minor child. It was held per LAMORELLE, P. J., of the Orphans' Court of Philadelphia County, that each was entitled to his pro rata interest in the exemption. Even where the application is made by the executor or administrator to set aside the exemption in favor of the minor, the minor is entitled only to such part of the $500 as, taken with the interest of the other children forming part of the family at the time of his death, makes the total sum. Referring to Section 12 (e) 1, supra, the learned judge explained:

"Standing alone and because of the wording 'property to the full value of five hundred dollars,' it would exclude the adult child. It must, however, be read in connection with Section 12 (a), in which circumstances not $500, but such part alone thereof as makes up the total exemption is to be set apart for the minor. The widow or children who have attained their majority must act of their own accord; failing to act, no duty devolves on the executor or administrator. When, however, the rights of minors are concerned, a duty is imposed upon the fiduciary; with him is the laboring oar, and this for obvious reasons; and what he is called upon to claim is the minor's share of the $500. In the present case, acting upon a mistaken interpretation of section 12, and despite the fact that there was a guardian, he claimed everything."

Both clauses of Section 12 (a) and (e) 1, refer to there being no widow standing in the way of the claim of the children. The widow may be eliminated in various ways as already indicated, although actually living. Another phase of the latter situation may be due to either divorce absolute or a mensa et thoro or it may be by legal separation.


In *Henkel's Est.*, 13 Pa. Superior Ct. 337 (1900), the widow survived her husband but the family relationship was not sustained by reason of an agreement of separation. It was held that although the latter would defeat the claim of the widow for exemption, nevertheless her existence would not defeat the claim of the minor children. It is not the mere existence of a widow but the existence of her right which defeats the right of the children. Hence, if there be no widow capable of claiming the provision, the dependent family is not to be defeated because there is living a widow who is not capable of taking.

Another angle of the minor children's right arose in the case of *McGovern's Est.*, 9 D. & C. 532 (1927), wherein the decedent died leaving to survive him no widow but five minor children. The maternal grandmother had the care
and custody of these minor children and kept them together as a family before and after the death of the father. The grandmother supported and maintained the children receiving from the father for that purpose the sum of $10 per week. At the request of the grandmother there was appraised and set aside as the children's exemption the sum of $500 in cash. This appraisement was confirmed by the court. Later the grandmother presented her petition setting forth the essential facts and praying for an order that the exemption as allowed the children should be paid to her in order to continue the support and maintenance of the minors and to reimburse the grandmother for the support and care already expended by her in behalf of these children. This order was made per MARX, P. J. of the Orphans' Court of Berks County, saying:

"Since the $500 set aside to the use and benefit of these minors was intended for the care and maintenance of said minors during the settlement of the estate, and petitioner now asks that the same be decreed to her, the right thereto in said minors having been established, equity impels us to grant the petition, make the decree as prayed, and do directly what we would do were the fund to be first paid to a guardian or trustee."

In Bryan's Est., 22 D. & C. 713 (1935), the question was presented to the Orphans' Court of Lawrence County on a petition to set aside a minor's exemption as to whether a minor child duly adopted under the Act of April 4, 1925, P. L. 127, and forming a part of decedent's family and household at the time of his death was entitled to the exemption under Section 12 (e) 1, supra. CHAMBERS, J., answered this question in the affirmative observing that so far as the court was able to discover this question has not hitherto been decided. Reviewing the inheritance rights of the child, the learned court observed:

"It appears to us that it would be foolish to say that, under this language, a child could inherit property from its adoptive parents but would be barred from claiming an exemption in the same estate. Surely its rights in one respect would be just as great as in the other."

Quere, under a set of facts similar to McGovern's Estate, supra, but where the grandmother dies leaving an estate but no husband, would the grandchildren forming a part of her family be entitled to the exemption?

The remaining class of claimants to be considered appear where the father is dead and the mother as his widow dies leaving children as a part of the family. Are such children within the scope of the clauses of Section 12 (a) and (e) 1 of the Fiduciaries Act, supra? A similar question was presented under the Act of 1851 in King's Appeal, 84 Pa. 345 (1877), wherein the father died leaving his widow and three minor children. Later the widow remarried K and in turn died leaving K and the aforesaid children surviving. The children did not make
their home with the stepfather but lived elsewhere under arrangements made by their guardian. K administered the estate of the mother and to him the guardian applied to have appraised and set apart for the use of the children $300 under the Act of 1851. K refused, and the guardian obtained a rule upon him to show cause why the property should not be appraised and set aside for the use of his wards. K in his answer denied that petitioner was in law entitled to have the property so appraised and set aside. The court made the rule absolute and an appeal was taken. In reversing the decree of the court below, MERCUR, J., inter alia, said:

"The main purpose of the act is to provide for the widow. Its meaning and spirit limit its operation to the property left by the husband or father. It was not intended to apply to the property of a wife. This view is in harmony with all our decisions giving construction to the statute. The learned judge therefore erred in making the rule absolute."

The question whether the word decedent as used in the Act of 1851 embraced the mother and whether in case of her death $300 worth of her property could be taken by her children in like manner as property set apart in case of the death of the husband and father, arose for the first time in King's Appeal, supra. However, despite the opinion of MERCUR, J., placing the rule squarely upon the interpretation of the Act as not including the mother in the word decedent, the facts of the case show that the mother upon her decease had a husband surviving, and furthermore it was apparent that the children constituted a part of her family at the time of her death. The question next arose in Himes's App., 94 Pa. 381 (1880), and it was held that where a widow died leaving real and personal property, her only surviving child was entitled to the exemption under the act of 1851. It is true that in this case the husband was not found to have actually died but had deserted his wife and remained unheard of for more than seven years previous to her death, and apparently the court applied the presumption of death rule. In distinguishing King's Appeal, supra, it was said by the Supreme Court per curiam:

"In seeking to ascertain the true ruling in any case, due regard must be had to the facts on which it was decided. The contention there was between the husband of the deceased wife and her children. The children of the wife sought to claim it against the rights of her surviving husband. Here there was neither husband nor wife. It was the property of a widow, and the contention is between a creditor and her only child. No marital rights of a husband are invoked, and the child does not claim property derived from a wife, but from a widow. The facts are so essentially different that the rule declared in King's Appeal does not apply. We adhere to the
correctness of that ruling whenever applicable. To strain the
principle there declared so as to control the present case, would do
violence to its spirit and defeat the humane provisions of the statute.
The learned judge was clearly right in distinguishing that case from
the present, and committed no error in ordering the property to be
set off to the minor child."

In Wanger's Appeal, 105 Pa. 346 (1884), King's Appeal, supra, and
Himes' Appeal, supra, were distinguished in a case where the widow acquired
land by devise from her husband, the land being subject to the lien of certain
debts of the deceased husband. Later the widow died leaving a minor child
who claimed the $300 exemption out of the land as the property of his mother.
In a per curiam opinion the Supreme Court thus explained:

"The learned judge made the proper distinction between King's
Appeal, 3 Norris, 345, and Himes' Appeal, 13 Id. 381. In the
former case the contention was between the surviving husband on
the one side, and the children of his deceased wife on the other
side. The attempt was to take from him property of his wife which
the statute expressly gave him. We declared the Act did not intend
to apply to the property of a wife. In the latter case the question
did not relate to the distribution of the property of a wife, but to
the property of a widow. The rights of a husband did not arise.
It follows so far as that part of the case is presented this decree is
right, and the court was also right in holding that the land passed to
the mother encumbered by the liens with which it was charged
when she acquired it. There was error in allowing any interest on
the judgment in favor of the appellee, Peirce. The auditor al-
lowed none. No exception was taken to this decision. The court
gives no reason for the allowance. It was evidently inadvertently
made. To the extent of the sum allowed for interest the decree
must be modified."

In McKeen v. Ehret, 31 C. C. 142 (1905), SCHUYLER, P. J. of the
Orphans' Court of Northampton County, held that the minor child of a deceased
mother, whose husband had signed articles of separation releasing any rights in
his wife's estate, was entitled to claim the exemption under the Act of April 14,
1851, the learned court thus commenting:

"We think the point raised by the case-stated is ruled by Himes'
Ap., 94 Pa. 381. True, in that case the decedent was a widow,
while in the case at bar she was a wife. It is also true that in King's
Ap., 84 Pa. 345, it is decided that the children of a deceased wife
are not entitled to an exemption out of her estate, on the ground
that to allow the exemption would be in contravention of the hus-
band's rights under the intestate laws. But here the husband parted with all his said rights by a release to his wife which leaves the present case in principle on all fours with Himes' Appeal."

On the other hand in the *Estate of Ella M. Goetz, deceased, Vol. 32, page 527* of the Orphans' Court Records of Franklin County (1906), Judge GILLAN decided that a minor child of a deceased mother was not entitled to the exemption where she left surviving as her heirs at law her husband, with whom she was living at the time of her death, and five children, four of whom were married and one unmarried. It was the unmarried daughter, Harriet, who was a minor living with her mother at the time of the latter's death and the claimant for the exemption. Said the learned judge:

"It must not be forgotten that the minor who claims the benefit of the Act of Assembly is the only one of these children of whom the surviving husband is the father. He is legally bound for her support. While it is true that if this appraisement is confirmed it will reduce the amount which the father would receive from his wife's estate; it is equally true that it will help his child to the detriment of those children of whom he is not the father. If the property left by the wife was real estate it vests in all the children in equal proportions subject to the father's life estate. If it was personal property it vests in the husband and the children in equal proportions. If the property is now allowed to go to his minor child it may benefit him more than he will be benefited by depriving the child of it and allowing him to have his portion under the Intestate laws. Again, he is not bound to appear in Court and protect his interests. It nowhere appears that he has any notice of this proceeding and he has a right to expect his wife's estate to be distributed according to law without his presence in Court. Moreover, no authority has been brought to our notice which holds that a child of a wife living with her husband has ever been allowed the benefits of the Act of Assembly, or that the doctrine of King's Appeal, above cited, has ever been departed from. While it is true that in Himes' Appeal, above cited, there was no evidence of the husband's actual death; yet he had been absent and not heard of for more than seven years, and the Court all through the opinion speaks of the decedent as a widow.

"Again in Wanger's Appeal, 105 Pa. St. 349, the Supreme Court, in speaking of King's Appeal, says: 'We declared the Act did not intend to apply to the property of a wife.'

"There is nothing in McKean vs. Ehret in conflict with this, and if
there were we could not, in face of what the Supreme Court has said on the subject, allow it to guide us in reaching a conclusion.

"It follows, therefore, that the exceptions must be sustained."

It appears from the above authorities to be settled law that children of a deceased mother may, if they are otherwise qualified by law to take, be entitled to the exemption out of the deceased mother's estate provided there is no husband and father surviving. As to *McKeen v. Ehret*, supra, the reasoning contained therein is at variance with that of Judge GILLAN in the *Estate of Ella M. Goetz*. It would appear that these two cases are in conflict and that the reasoning of Judge Gillan presents the better line of thought in this class of cases.

Concerning the status of grandchildren living with the grandparents and where there are no children of the grandparents involved, the question has been mooted whether the words "child or children" in the exemption provision may be interpreted under the above facts to include grandchildren. The matter is not touched upon in the Statutory Construction Act of 1937, P. L. 1019, but in the decisions on testamentary interpretations it has been usually determined that the words "child or children" do not include grandchildren unless the broader meaning can be gathered from the context. *Grubb's Est.*, 263 Pa. 468 (1919) 106 A. 787. See also Words and Phrases, sub nomine.

Chambersburg, Pa.  
A. J. White Hutton