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## Overview

Surviving spouses who receive little to no property from their deceased spouse under the terms of the will can choose to take an elective share of the deceased spouse's estate. Typically, the spouse can receive one-third of the decedent's real property, all exempt personal property held as head of the family, and one-third of other personal property not necessary for payment of debts and other charges. The Iowa Supreme Court in *Sieh v. Sieh*,<sup>1</sup> previously reviewed the issue of whether additional property could be included within this designation because of the decedent's control over the property. In the current case, the Court held that the 2005 legislative amendment to the spousal elective share statute was specific in its description of the type of assets included in the spousal share and that funds contained in a payable-on-death (POD) account were not within the statutory language.

### *In re Estate of Myers*<sup>2</sup>

Under the facts of the case, the wife passed away in 2009 with almost \$500,000 in assets. Her husband took ownership of some real estate as the surviving joint tenant. She, however, left no property to him under the terms of her will. All of her property went to her children and a stepson. She also owned three assets designated as "pay on death"

(POD). The beneficiaries of these accounts were her children. The husband filed for an elective share of the estate, but later assigned his interest in his wife's estate and his right to the elective share to some creditors. [The executor did not object to the assignment or argue that the surviving spouse's interest is not assignable in the lower court, so the court did not address this issue.] The assignees requested that the POD accounts be included in the elective share.

The probate court, relying on the Iowa Supreme Court's holding in *Sieh*, held that the wife's complete control over the POD accounts before death caused them to be included in the elective share. The court pointed out that the *Sieh* decision adopted Restatement (Third) of Property § 9.1(c) (2003) which specifies that "property owned or owned in substance by the decedent immediately before death that passed outside of probate at the decedent's death to donees other than the surviving spouse" should be included in the spouse's elective share. Because the Iowa Supreme Court in *Sieh* explicitly stated it was adopting the view of the Restatement, the probate court held that the POD accounts were analogous to a revocable trust in determining the elective share. Because the wife had complete control over the POD accounts at the time of death, they were to be included

in the elective share. The estate appealed and the Iowa Supreme Court took the case.

After *Sieh*, two trial courts had reached opposite conclusions concerning the inclusion of POD accounts in the spousal elective share computation.<sup>3</sup> Also, during its 2009 session, the Iowa legislature amended the spousal elective share statute (Iowa Code § 633.238) to include specific limiting language as follows: “The elective share of the surviving spouse shall be limited to all of the following: ...One-third in value of the property held in trust not necessary for the payment of debts and charges over which the decedent was a grantor and retained at the time of death the power to alter, amend, or revoke the trust,...” That amended language did not apply in the *Sieh* case, but was relevant in this case.

On review of the probate court’s ruling, the Iowa Supreme Court concluded that the amended statutory language specifically limited the property included within the surviving spouse’s elective share to the categories of property identified in the statute. Because the statute, as amended, does not include non-probate assets other than for assets contained in a revocable trust, the POD accounts could not be included in the spousal elective share regardless of the decedent’s control before death. The Court did not mention, however (apparently the issue was not raised below), that POD accounts are also referred to as “Totten Trusts.”<sup>4</sup> Thus, a POD account is a type of tentative trust similar to a revocable trust. That would seem to bring POD accounts within the amended statutory construct of the elective share statute. However, the Iowa Trust Code in §633A.1102(18)(a) specifically excludes Totten Trust accounts from the definition of a trust. Thus, POD accounts would not be included as trust property within the elective share provision.

But, is a POD account sufficiently similar to a revocable trust? The Court did not address that question. That’s an important point because the probate court specifically found that the POD accounts at issue “are analogous to a revocable trust” for purposes of the elective share statute. Instead, the Supreme Court simply determined that POD accounts were not specifically mentioned in the statutory amendment and were thereby excluded.

While the Court recognized the public policy concern that an elective share right could be defeated through the use of POD accounts, the Court determined that the statutory language was clear regarding the limitation of assets to be included in the spousal elective share. That result is consistent with the longstanding view in the United States that the right of a spouse to take a share of an estate in contravention of a will is entirely statutory. Apparently the creditors seeking to include the POD accounts in the elective share did not argue that the decedent’s use of POD accounts constituted a fraud on the surviving spouse’s marital rights. The purpose of the doctrine of fraud on marital rights is to balance the free alienation of personal property against the desire to protect the share of the surviving spouse. In a 1974 case, the Court determined that under the facts of that case a spouse’s pre-death acts that had the effect of diminishing the surviving spouse’s share did not constitute fraud.<sup>5</sup> The issue of marital fraud also came up in a 2008 case where the Iowa Court of Appeals, but the surviving spouse failed to claim that the deceased spouse’s inter vivos transfers constituted fraud.<sup>6</sup> Instead, the surviving spouse focused on whether a stepson had acted improperly.

## Conclusion

The Court's ruling points out that the legislature will need to determine whether another amendment to the elective share statute is necessary if public policy is to more fully protect the spousal share rights of a surviving spouse. Until the legislature takes some action to fix this loophole, however, individuals hoping to "disinherit" a surviving spouse by negating or limiting the elective share of the surviving spouse can transfer as many assets as feasible to non-probate assets other than revocable trusts to accomplish this objective. That has implications in several planning areas, including Medicaid asset transfer strategies. For instance, it is fairly standard practice in the realm of Medicaid asset preservation planning to advise clients with a spouse in a nursing home that is receiving Medicaid benefits to either gift assets away before death to persons other than the spouse in the nursing home, or leave the assets at death in a form that won't be subject to the elective share statute – such as in a POD account. That is still a prudent strategy for the present time.

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<sup>4</sup> Totten Trusts are named after the case *In re Totten*, 179 N.Y. 112 (1907).

<sup>5</sup> *Gunsaulis v. Tingler*, 218 N.W.2d 575 (Iowa 1974).

<sup>6</sup> *Borgus v. Borgus*, No. 8-370/07-2011, 2008 Iowa App. LEXIS 1133 (Iowa Ct. App. Oct. 1, 2008).

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<sup>1</sup> 713 N.W.2d 194 (Iowa 2006).

<sup>2</sup> *In re Estate of Myers*, No. 11-1378, 2012 Iowa Sup. LEXIS 99 (Iowa Sup. Ct. Nov. 2, 2012).

<sup>3</sup> Compare *Rich v. Rich*, No. EQCV141699 (Woodbury Cnty. Dist. Ct., Sept. 14, 2011)(POD accounts are included in elective share) with *In re Estate of Albers*, No. ESPR039413 (Pottawattamie Cnty. Dist. Ct., Dec. 2, 2009)(POD accounts are not included in the spousal elective share).