

<b>Bohnke, Frank E</b>	<b>Case #</b>	<b>Date</b>	
	E-82-9	8/11/1982	Motion to correct errors
Bohnke, Candace R Hoover			Petitioner/Heir

WEDNESDAY, AUGUST 11, 1982

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ESTATE OF )  
FRANK E. BOHNKE, DECEASED )

ESTATE NO. E-82-9

Comes now the petitioner, Candace R. Hoover Bohnke, by her attorneys, Grossman, Boeglin, Gehring & Hood, by James R. Grossman and now files Motion to Correct Errors, which Motion to Correct Error is in the following words and figures, to wit;

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STATE OF INDIANA )  
 ) SS:  
COUNTY OF ADAMS )

IN THE ADAMS CIRCUIT COURT  
CAUSE NO. E-82-9

IN THE MATTER OF THE ESTATE )  
 )  
OF )  
 )  
FRANK E. BOHNKE, DECEASED )

MOTION TO CORRECT ERROR

Petitioner, Candace R. Hoover Bohnke, moves the Court to correct error for the following reason:

1. The decision of the Court rendered on June 16, 1982, is contrary to law. (Trial Rule 59(A)(8), Indiana Rules of Procedure.)

Petitioner, Candace R. Hoover Bohnke, further moves the Court to take such action as will cure the error, including without limitation the following, as provided in Trial Rule 59(J), Indiana Rules of Procedure:

1. Grant a new trial;
2. Enter a final judgment in favor of the Petitioner;
3. Alter, amend, modify or correct the judgment to provide the Petitioner with appropriate relief;
4. Grant any other appropriate relief.

In support of Petitioner's Motion to Correct Error, the following statements and memoranda separately state the errors which are claimed. The statements and memoranda include a statement of the facts and grounds upon which the errors are based. The statements and memoranda are incorporated herein by reference as a part of Petitioner's Motions.

I. STATEMENT OF THE CASE.

This is a proceeding instituted by Candace R. Hoover Bohnke to take her legal share in the estate of her deceased husband, Frank E. Bohnke, and to renounce the provisions in his Will.

II. PRELIMINARY STATEMENT OF PERTINENT FACTS.

The following preliminary statement of pertinent facts apply in this case:

1. Frank E. Bohnke executed his Last Will and Testament on January 10, 1968.
2. Frank E. Bohnke and Candace R. Bohnke were married on July 5, 1980.
3. Frank E. Bohnke died on January 29, 1982.
4. Frank E. Bohnke's Last Will and Testament was probated in this Court on February 4, 1982.
5. Candace R. Bohnke executed an instrument entitled "Waiver of Right to Elect to Take Against Will" on February 5, 1982, which instrument was filed with the Court on February 9, 1982.
6. Candace R. Bohnke executed an instrument entitled "Withdrawal and Renunciation of Waiver of Right to Take Against Will" on February 24, 1982, which instrument was filed with the Court on February 26, 1982.
7. Candace R. Bohnke executed an instrument entitled "Election to Take Against the Will of Deceased Spouse" on February 24, 1982, which instrument was filed with the Clerk of Adams County on February 26, 1982.

III. COURSE OF THE PROCEEDINGS.

The Court heard evidence in this matter on April 14, 1982, and June 11, 1982. The Court rendered a final judgment on June 16, 1982.

IV. STATEMENT OF ERRORS CLAIMED BY PETITIONER.

1. That the Court erred in denying Candace R. Bohnke the right to withdraw and renounce her waiver of right to elect to take against the Will of her husband.
2. That the Court erred in refusing to allow Candace R. Bohnke a widow's allowance in the sum of \$8,500.00 pursuant to the provisions of I.C. 29-1-4-1.
3. The Court erred in denying Candace R. Bohnke the right of election to take against the Will of her deceased husband, Frank E. Bohnke, pursuant to the provisions of I.C. 29-1-3-1.
4. That the Court erred in finding that a valid antenuptial agreement existed between Candace R. Bohnke and Frank E. Bohnke.

V. APPLICABLE STATUTES.

The following statutes are applicable to the subject matter of these proceedings.

## (1) 29-1-2-13 Waiver of Expectancy.

The intestate share or other expectancy which the spouse or any other heir may be entitled to may be waived at any time by a written contract, agreement or waiver signed by the party waiving such share or expectancy. The promise of marriage, in the absence of fraud, shall be a sufficient consideration in the case of an agreement made before marriage. In all other cases such contract, agreement or waiver shall be binding upon the parties thereto if executed after a full disclosure of the nature and extent of such right, and if the thing or promise given to such party is a fair consideration under all the circumstances. Except as otherwise provided therein, such waiver executed by the decedent's spouse shall be deemed a waiver of the right to elect to take against the decedent's will and the written contract, agreement or waiver may be filed in the same manner as is provided in this article for the filing of an election.

## (2) I.C. 29-1-3-1 Limitations and conditions.

Sec. 1. When a married person dies testate as to any part of his estate, the surviving spouse shall have a right of election to take against the Will under the limitations and conditions hereinafter stated.

(a) The surviving spouse, upon election to take against the Will, shall be entitled to one-third (1/3) of the net personal and real estate of the testator; provided, that if the surviving spouse be a second or other subsequent spouse who did not at any time have children by the decedent and the decedent left surviving him a child or children or the descendants of a child or children by a previous spouse, such surviving second or subsequent childless spouse shall upon such election take one-third (1/3) of the net personal estate of the testator plus a life estate in one-third (1/3) of the lands of the testator.

In determining the net estate of a deceased spouse for the purpose of computing the amount due the surviving spouse electing to take against the Will, the Court shall consider only such property as would have passed under the laws of descent and distribution.

(b) When the value of the property given the surviving spouse under the Will is less than the amount he would receive by electing to take against the Will, such surviving spouse may elect to retain any or all specific bequests or devises given him in the Will at their fair market value as of the time of such election and receive the balance due him in cash or property.

(c) In electing to take against the Will, the surviving spouse is deemed to renounce all rights and interest of every kind and character in the personal and real property of the deceased spouse, and to accept such elected award in lieu thereof.

(d) When a surviving spouse elects to take against the Will, he shall be deemed to take by descent, as a modified share, such part of the net estate as does not come to him by the terms of the Will. Where by virtue of an election pursuant to this article it is determined that such spouse has renounced his rights in any devise, either in trust or otherwise, the Will shall be construed with respect to the property so devised to him as if such surviving spouse had predeceased the testator.

(3) I.C. 29-1-3-2 Time.

Sec. 2. The election by a surviving spouse to take the share hereinbefore provided must be made not later than ten (10) days after the expiration of the time limited for the filing of claims; provided that if, at the expiration of such period for making the election, litigation is pending to test the validity or to determine the effect or construction of the Will, or to determine the existence of issue surviving the deceased, or to determine any other matter of law or fact which would affect the amount of the share to be received by the surviving spouse, the right of such surviving spouse to make an election shall not be barred until the expiration of thirty (30) days after the final determination of the litigation.

(4) I.C. 29-1-3-3 Forms; record; service.

Sec. 3. (a) The election to take the share hereinbefore provided shall be in writing, signed and acknowledged by the surviving spouse or by the guardian of his estate and shall be filed in the office of the clerk of the court. It may be in the following form:

I, A.B., surviving wife (or husband) of C.D., late of the county of \_\_\_\_\_ and state of \_\_\_\_\_, do hereby elect to take my legal share in the estate of the said C.D. and I do hereby renounce provisions in the Will of the said C.D. inconsistent herewith.

Signed,

(Signature)

(Acknowledgement)

(b) Said election shall be recorded by such clerk in the record of Wills, marginal reference being made from such record to the book and page in which such Will is recorded, and from the record of such Will to the book and page where such election is recorded.

(c) The clerk shall cause a copy of said election to be served upon the personal representative and his attorney of record by United States mail addressed to such persons at their respective addresses as shown by the petition for probate of Will and appointment of personal representative.

(5) I.C. 29-1-3-5 Binding effect; change.

Sec. 5. An election by or on behalf of a surviving spouse to take the share provided in section 301 hereof once made shall be binding and shall not be subject to change except for such causes as would justify an equitable decree for the rescission of a deed.



## (6) I.C. 29-1-3-5 Waiver of right.

Sec. 6. The right of election of a surviving spouse hereinbefore given may be waived before or after marriage by a written contract, agreement or waiver, signed by the party waiving the right of election, after full disclosure of the nature and extent of such right, provided the thing or the promise given such party is a fair consideration under all the circumstances. The promise of marriage, in the absence of fraud, shall be a sufficient consideration in the case of an agreement made before marriage. This written contract, agreement or waiver may be filed in the same manner as hereinbefore provided for the filing of an election.

## (7) I.C. 29-1-3-7 Failure to elect; intestate succession.

Sec. 7. When a surviving spouse makes no election to take against the Will, he shall receive the benefit of all provisions in his favor in the Will, if any, and shall share as heir, in accordance with I.C. 29-1-2-1 and I.C. 29-1-2-2, in any estate undisposed of by the Will. The surviving spouse is not entitled to take any share against the Will by virtue of the fact that the testator made no provisions for him therein, except as he shall elect pursuant to I.C. 29-1. By taking under the Will or consenting thereto, he does not waive his right to the allowance, unless it clearly appears from the Will that the provisions therein made for him was intended to be in lieu of that right. As amended by Acts 1977, P.L. 296, SEC. 1.

## (8) I.C. 29-1-4-1 Surviving spouse and family allowances.

Sec. 1. The surviving spouse of a decedent who was domiciled in Indiana at his death is entitled from the estate to an allowance of eight thousand five hundred dollars (\$8,500.00) in personal property. If there is no surviving spouse, the decedent's children who are under eighteen (18) years of age at the time of the decedent's death are entitled to the same allowance to be divided equally among them. If there is less than eight thousand five hundred dollars (\$8,500.00) in personal property in the estate, the spouse or decedent's children who are under eighteen (18) years of age at the time of the decedent's death, as the case may be, are entitled to any real estate of the estate to the extent necessary to make up the difference between the value of the personal property and eight thousand five hundred dollars (\$8,500.00). The amount of that difference is a lien on the real estate. An allowance under this section is not chargeable against the distributive shares of either the surviving spouse or the children. As amended by Acts 1978, P.L. 132, SEC. 1.

VI. STATUTORY REQUIREMENTS.

The following are the applicable statutory requirements in this matter:

- (1) The surviving spouse has an absolute right of election to take against the Will of the deceased spouse. (I.C. 20-1-3-1)
- (2) The election shall be made not later than ten (10) days after the expiration of time limited for filing of claims. (I.C. 29-1-3-2)
- (3) The election shall be in writing, signed, and acknowledged by the surviving spouse and filed in the Office of the Clerk of the Court. (I.C. 29-1-3-3)
- (4) The election shall be recorded by the Clerk in the record of Wills. (I.C. 29-1-3-3)
- (5) The Clerk shall cause a copy of the election to be served upon the personal representative and his attorney. (I.C. 29-1-3-3)

These are the applicable statutory requirements for the proper election of Candace R. Bohnke to take against the Will of her deceased husband. She complied with each and every one of these requirements. Therefore, her election is proper and valid and must be acknowledged by the Court.

VII. THE EXECUTION OF THE INSTRUMENT ENTITLED "WAIVER OF RIGHT TO ELECT TO TAKE AGAINST WILL" DID NOT PREVENT CANDACE R. BOHNKE FROM FILING HER WITHDRAWAL AND RENUNCIATION OF THAT INSTRUMENT.

By the weight of authority, an election to take under or against a Will may be revoked or set aside where it was made through ignorance or mistake as to material facts affecting the rights of the party electing, and where the rights of innocent third persons will not be injuriously affected by the revocation. 81 ALR 747.

It is generally recognized that when the widow's election to take under or against the husband's Will was made through ignorance or mistake of material facts affecting the right of the party electing, or by undue influence, she may revoke or withdraw the election. Fraud or duress in procuring an election is also recognized as a ground for revocation of the election, at least where innocent third parties will not be prejudiced. 25 Am Jur 2d Dower and Courtesy, Section 165.



Where no time was fixed by statute within which a widow is required to elect whether to take under her deceased husband's Will or under the statute of descent and distribution, it was held in Leach v. Prebster (1872) 39 Ind. 492, that a widow who had accepted and receipted for personal property bequeathed to her by her husband, without having been fully informed as to the provisions of the Will or her rights thereunder, might revoke her election and elect again.

The Indiana Supreme Court has decided this exact question in Garn v. Garn (1893) 35 N.E. 394. In the Garn case, Lydia Garn executed an instrument by which she declared the acceptance of the provisions of the Will of her deceased husband. Subsequently, she executed an election to take under the law and to renounce the provisions of the Will. The question presented was the right of the widow to revoke her election to accept the provisions of her deceased husband's Will.

The Court stated:

". . . The policy of the laws of this State has ever been to deal liberally with the widow in the distribution of her husband's estate."

The Court further stated that:

". . . (i) It is certain that the legislature and the Courts have never departed from this policy."

The Court wisely observed:

"It should not be overlooked that an election to take under the Will is not required. An affirmative election to accept the provisions of the Will adds nothing to the force of the statute. Therefore, any act which will preclude the exercise of that privilege which is given expressly by the statute must be of such force and effect as to constitute an estoppel."