

The Garn case stands for the proposition that in the absence of elements of an estoppel, a widow should be permitted on petition filed within the statutory period for making an original election, to revoke the election to take under her husband's Will, made in ignorance of her rights and of the value of the estate and under the mistaken belief that the formal election to take under the Will was unnecessary.

In the Garn case, the Court made the following observations regarding the act of a widow in electing to take under the Will:

- (1) The act was induced by the estate;
- (2) The doing of the act did not mislead anyone;
- (3) No interest attached on the faith of the act;
- (4) Nothing was parted with by those who would receive benefits from the act;
- (5) Innocent parties were not made to suffer because of the act;
- (6) No advantage was received or retained by the widow as a result of the act.

Each and all of these apply equally in the proceedings regarding Candace R. Bohnke.

#### VIII. APPLICATION OF THE GARN CASE TO THE BOHNKE CASE.

It is significant that the facts of the Garn case are strikingly similar to the facts of the Bohnke case. It is appropriate to review these:

- (1) In Garn, the widow was 72 years of age. In Bohnke, the widow was 84 years of age.
- (2) In Garn, the election to take under the Will was signed 12 days after the decedent's death. In Bohnke, the waiver was signed 6 days after the decedent's death.
- (3) In Garn, as in Bohnke, the widow revoked her election within the statutory period.
- (4) In Garn, as in Bohnke, the decedent's heirs were responsible for the widow signing the election.

- (5) In Garn, as in Bohnke, the widow did not know the value and extent of the property of her husband's estate.
- (6) In Garn, as in Bohnke, the widow did not know what proportion of the husband's estate she was entitled to receive under the law.
- (7) In Garn, as in Bohnke, the widow had no counsel when she signed the election.
- (8) In Garn, as in Bohnke, it was falsely represented that it was necessary for the widow to make the election.
- (9) In Garn, as in Bohnke, the widow was greatly grieved over the loss of her deceased husband.
- (10) In Garn, as in Bohnke, the heirs procured the attorney to prepare the election.
- (11) In Garn, as in Bohnke, the widow did not comprehend what was being done.
- (12) In Garn, as in Bohnke, it was in the interest of the widow to take the provisions made for her as the surviving spouse under the law.

The facts are so close that it is impossible for this Court to ignore the holding in the Garn case. The case of Bower v. Bower (1894) 38 N.E. 326, supports the decision in Garn in holding that the execution of an election by a widow to take under a Will, and the filing of the same with the Clerk, would not estop her from afterwards making an election to take under the law on discovering what her legal rights are, if she acted within the time allowed by the statute.

The testimony following this paragraph clearly shows that Mrs. Bohnke was 84 years of age; that the waiver was signed six days after the decedent's death; that the decedent's heirs were responsible for Mrs. Bohnke signing the election; that Mrs. Bohnke did not know the value and extent of the property of her husband's estate; that Mrs. Bohnke did not know what proportion of the husband's estate she was entitled to receive under the law; that Mrs. Bohnke had no counsel when she signed the election;

that it was falsely represented to Mrs. Bohnke that it was necessary for her to make the election; that Mrs. Bohnke was greatly grieved over the loss of her deceased husband; that the heirs-at-law in the estate procured the attorney to prepare the election; that Mrs. Bohnke did not comprehend what was being done; and that it was in the interest of Mrs. Bohnke to take the provisions made for her as the surviving spouse under the law; that Mrs. Bohnke received no consideration for the execution of said waiver:

DIRECT EXAMINATION OF CANDACE HOOVER BOHNKE BY MR. JAMES R. GROSSMAN.

Q. Will you state your name for the Court, please?

A. Candace R. Hoover Bohnke.

Q. Where do you reside, Mrs. Bohnke?

A. I reside at 6723 South Anthony Blvd. Apartment S-2, Fort Wayne, Indiana.

Q. What is your age, Mrs. Bohnke?

A. 84, and I am proud of it.

Q. Now, Mrs. Bohnke, are you acquainted with Frank E. Bohnke?

A. Yes, sir, I married him, I certainly am.

Q. When did you meet Frank E. Bohnke?

A. Well, he came there the 2nd of June, and I don't know when I first saw him.

Q. And, was there a time, when. . .

COURT: EXCUSE ME JUST A SECOND, THAT WOULD BE JUNE OF WHAT YEAR?

MRS. CANDACE HOOVER BOHNKE: In 1979.

COURT: THANK YOU.

MRS. CANDACE HOOVER BOHNKE: Yes, sir.

CONTINUED DIRECT EXAMINATION OF CANDACE HOOVER BOHNKE BY ATTORNEY

JAMES R. GROSSMAN.

Q. And when did you and Mr. Bohnke become married?

A. July 5, 1980.

Q. And where did that marriage take place?

A. At my church.

Q. And what church is that?

A. The Church of the Brethren.

Q. And what city is that?

A. Fort Wayne, Beacon Street.

Q. All right.

A. Pastor Guy Wampler.

Q. And so you were married on July 5, of 1980?

A. Yes, sir.

Q. And did you and Mr. Bohnke then live together as husband and wife?

A. Yes, sir.

Q. And did you live together as husband and wife until the time of his death?

A. Only when he was in the hospital, which was quite a few times. And I would go and see him there.

Q. And at the time of his death, were you then his widow?

A. Yes.

Q. Mrs. Bohnke, on or about February 5, 1982, you executed an instrument that has been called Waiver of Right to Elect to Take Against Will, do you recall that instrument? By name.

A. Yes.

Q. When did you first become acquainted with that instrument?

A. On the 5th of .. February, .. is that the one that you mean?

Q. Yes.

A. On the 5th of February, when Donald came and had .. asked me to get a Notary Public so that I could sign a paper so he could start proceedings and when I did that, then he came and put this here thing, under my nose, I had .. I had not.. seen..

MR. ROBERT G. SMITH: I am going to object, Your Honor. I don't want to seem unreasonable but I have .. I think she should respond to questions rather than making a . . .

COURT: YES, I THINK THAT THAT IS TRUE.

MR. JAMES R. GROSSMAN: Now, Mrs. Bohnke, you will get an opportunity to explain all of the things, but you have to do it in response to certain questions.

A. Right.

Q. So you became acquainted with this instrument on February 5, 1982?

A. No, I didn't get to look at it. It was just put there ... and he said sign...

Q. Now that was the first time that you saw the instrument?

A. The first time?

Q. How long after the death of Mr. Bohnke was that?

A. Just a week to the night. One week.

Q. And how is it that this instrument was brought to your attention?

A. By Donald Bohnke.

Q. And how did he bring it to your attention?

A. He asked if I would sign a small paper so that he could get started on the estate, and I said I would.

Q. Did he explain to you what the instrument was?

A. No, not a word.

Q. Did you have an opportunity to examine the instrument?

A. No. I glanced at it, but when you get a paper like that, how can you read it.

- Q. Where was the instrument signed?
- A. Right there at the bank.
- Q. Was there a Notary Public there, at that time?
- A. Yes.
- Q. Were you sworn by the Notary Public?
- A. I was not.
- Q. Was there a conversation with Mr. Bohnke regarding this instrument?
- A. Yes, Sir.
- Q. And what did Mr. Bohnke say to you about this instrument?
- A. He said I had to sign it or else he would send me all of the bills and I would have to pay them. And there wasn't but a little bit of money in the treasury, he said.
- Q. Did Mr. Bohnke tell you how large the estate was?
- A. Oh, no. No.
- Q. Did Mr. Bohnke inform you of your rights to take against the will?
- A. No.
- Q. Did Mr. Bohnke inform you of your rights to file an election to take against the Will, with the Court.
- A. No. No.
- Q. Did Mr. Bohnke advise you that the estate consisted of approximately \$20,000.00?
- A. No, he didn't, he did not.
- Q. Did you prepare this instrument?
- A. No, sir. My attorney did.
- Q. Do you know ... the one that you signed ... that Mr. Bohnke brought out to your house?
- A. No, he had it ... fixed here, at the Court House. He said he just got it that day at noon, he had it made out ... himself.

Q. Was any money, or any other consideration given to you?  
Before you signed that paper?

A. No, sir. No money, no nothing.

Q. When you signed the paper what were the circumstances re-  
garding the urgency of the matter?

A. Well, I just signed it, I guess or else I would have to pay  
the bills. He wanted to get it signed, pretty blamed quick.

Q. Did you have an attorney present when you signed it?

A. No. I didn't know it was going to be anything like that.  
Or I sure would have.

Q. Were you advised by anybody prior to the time that you signed  
it, as to what your rights were as a surviving widow?

A. No, sir.

Q. But you were told that if you didn't sign it, you would have  
to pay the bills? Of the estate?

A. Right. Not one time, but more than one. I was  
threatened ... and harrassed.

Q. And you were also told, if I understand your testimony,  
that you had to sign this paper so that Mr. Bohnke could  
start the administration of the estate.

A. That is what he said.

Q. Were you aware of what the paper was when you signed it?

A. No. I had not seen it. And I had not seen the Will, either.

Q. All right. When did you first get a copy of this paper  
and a copy of the Will?

A. Not until I asked for it about a week later. I said I have  
to have it now. And he sent it to me.

Q. So you were not given a copy of this paper before you  
signed it?

A. No.

Q. And you were not given a copy of the Will?



- A. No.
- Q. And you did not prepare it.
- A. No, sir.
- Q. And you did not understand what the paper was?
- A. No, Sir, I didn't.
- Q. Now, Mrs. Bohnke, after you received the copy from Mr. Bohnke, about a week later, what did you then do?
- A. I called my son, who lives in Toledo, and read it to him, and he said you get that to your attorney, right now. And that is what I did.
- Q. And then after that conversation, with your son, did you take this instrument to your attorney?
- A. My pastors, one of my pastors brought it to you.
- Q. And then after your attorney had this paper in his hands, you ultimately filed your withdrawal and your renunciation of the prior papers?
- A. I did.
- Q. Were you then advised as to what had happened? By the prior signing? Did your attorney explain that?
- A. Yes, my attorney told me then what I had done.
- Q. And did you then also file an election to take against the Will?
- A. Yes, sir. Made by my attorney.
- Q. Now, Mrs. Bohnke, at this time, are you asking the Court to withdraw the waiver that you previously filed that Mr. Bohnke brought out to your house?
- A. Yes.
- Q. And are you saying to the Court that you are renouncing that prior instrument?
- A. Yes. I am not renouncing the Will, I have nothing against my husband, it is that paper.



Q. But with regards to the Will, you are now electing to take whatever you are entitled to take under the law.

A. I am.

Q. Now, you were married once before, were you not? Mrs. Bohnke?

A. Yes, sir.

Q. And how long were you married previously?

A. We were married in 1920 and my husband died in 1971. That is over 50 years.

Q. And so you were married over 50 years?

A. Yes, sir.

Q. And what was your first husband's occupation or profession?

A. He was a minister in the Church of the Brethren, also a high school teacher, for a good many years. And all of my life... and I am 84...

MR. ROBERT G. SMITH: Objection, Your Honor, isn't responsive to the question...

COURT: SUSTAINED.

MR. GROSSMAN: Was there ever a time when you had any agreements with Mr. Bohnke that you would not file anything to take your share of the estate?

MRS. CANDACE HOOVER BOHNKE: No, we never talked of that.

MR. JAMES R. GROSSMAN: We have no further questions, Your Honor.

IX. WAIVER OF EXPECTANCY, ANTENUPTIAL AGREEMENT AND RIGHT OF ELECTION.

The applicable statute regarding waiver of expectancy is as follows:

I.C. 29-1-2-13 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.

This section is a codification of the case law of Indiana and an affirmation of the public policy of this State to favor antenuptial agreements. This section is applicable to and must be considered in determining the validity of the premarriage settlement agreement. McClain's Estate v. McClain (1962) 183 N.E. 2d 842.

It is clear from this statute that the intestate share or other expectancy which a spouse may be entitled may be waived only by a written contract, agreement or waiver signed by the party waiving such share or expectancy.

The Court in its findings has found that there was a valid antenuptial oral agreement between the parties. This is evident from page 4 of the Court's opinion where the Court stated the following:

"The Court is of the opinion and does by this judgment find that there was a valid antenuptial oral agreement between the decedent, Frank E. Bohnke, and the said Candace R. Hoover Bohnke, in that neither would claim any property of the other, and that what property Frank E. Bohnke owned, after paying his own bills, would go to his children pursuant to his Last Will and Testament and whatever property or money that the said Candace R. Hoover Bohnke owned after the paying of her own bills would go to her own children and that neither Frank or Candace would claim any right to take any property from the other either through an election or the Will or any other proceedings.

Likewise, on page 5 of the Court's opinion, the Court stated the following:

"In other words, the antenuptial agreement can be oral, and no particular formality is required and therefore, the antenuptial agreement is valid and the consideration would be the joint and mutual promises of the parties and the subsequent marriage of the parties.

The Court is in error on this point. There can be no valid oral antenuptial agreement in Indiana that is not reduced to a written contract pursuant to I.C. 29-1-2-13.

It is clear from the Court's findings that there was no written antenuptial agreement between the parties. The Court's conclusion that there was a valid oral antenuptial agreement disregards the evidence and the law.

It is also clear from the Court's findings that the parties did not enter into any form of a post-nuptial agreement.

The reason that the Court could find no form of pre-nuptial or post-nuptial agreement is because none existed.

Bearing directly upon the subject are the provisions of I.C. 29-1-3-6, which provide as follows:

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.

Again, this statute clearly provides for a written contract, but adds the following requirements as well:

- (1) That there must be a full disclosure of the value and extent of such right;
- (2) That the thing or the promise given to such party is a fair consideration;
- (3) That the promise of marriage in the absence of fraud shall be a sufficient consideration in the case of an agreement made before the marriage.