

Likewise, the Court has overlooked the following testimony of Candace R. Bohnke:

PARTIAL DIRECT EXAMINATION OF CANDACE HOOVER BOHNKE BY ATTORNEY JAMES R. GROSSMAN

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.

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PARTIAL CROSS EXAMINATION OF CANDACE HOOVER BOHNKE BY ATTORNEY ROBERT G. SMITH.

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Q. Now, Mrs. Witness, prior to your commencing to live with Frank E. Bohnke, did you ever have any discussion with him, as to your property, your income? Or your estate?

MR. JAMES R. GROSSMAN: To which we shall object, Your Honor. That is immaterial relative to the renunciation of the election.

COURT: OVERRULED. YOU MAY ANSWER.

MRS. CANDACE R. HOOVER BOHNKE: Would you please give it again?

COURT REPORTER: Prior to your commencing to live with Frank E. Bohnke, did you ever have any discussion with him, as to your property, your income, or your estate?

Q. Did Frank ever tell you how much income he had?

A. No, he did not.

Q. Did he ever tell you what property he had?

A. He didn't have any property, when I first knew him. He had sold it all.

Q. Did you ever tell him what your income was?

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Q. Did you and Frank E. Bohnke ever discuss what would happen to the property of either of you upon the death of one of you?

A. No, we didn't talk about death. We did not. Either one of us. We didn't talk about death.

* * * * *

Q. So, did you have any agreement between the two of you ... what would happen to your property upon the death of one of you?

A. No.

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Q. Mrs. Witness, was it, as I recall, your previous testimony ... it was to the effect that you and Frank Bohnke did not have any agreement as to what happens to your property upon the death of one of you. . .

A. No. We did not.

Q. Is that a correct statement?

A. We didn't make no agreement

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Q. I will ask you whether or not if the fact that on many occasions, both you and Frank Bohnke said that each of you wanted nothing of the property of the other?

A. No, I never said that.

Q. All right...

A. I never in my life said it...

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Q. I will ask you whether or not both of you, you and Frank Bohnke on several occasions stated that everything that each of you had on the death of one of you would go to your separate children?

A. I don't think we talked about it. I don't think we ever talked about that ... about our deaths ... We were happy. We didn't talk about death.

* * * * *

The Court stated that the testimony indicated that Frank E. Bohnke felt that a written antenuptial agreement was not necessary as a "man's word is his bond." When the Court reviews the testimony of Candace R. Bohnke, it will become apparent that no form of antenuptial agreement existed. Mrs. Bohnke's testimony on direct, as well as cross examination, was very clear on this point. For the Court to conclude otherwise would require the Court to completely ignore and to discredit her testimony. It is inconceivable that the Court would or could do this. The proper conclusion is that there was no antenuptial agreement of any kind. Nor was there any form of written agreement. Had Mr. Bohnke desired to do so, he could have requested that the parties enter into a written agreement. The fact that none exists demonstrates that none was intended. For the Court to create a contract out of thin air is erroneous.

The Court in its findings indicated that the parties apparently agreed that the waiver was signed by Candace Bohnke at the suggestion of her daughter Beth Young. This finding is erroneous and the following testimony of Beth Young should be reviewed by the Court:

PARTIAL DIRECT EXAMINATION OF BETH HOOVER YOUNG, BY ATTORNEY JAMES R. GROSSMAN.

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

A. Beth Hoover Young.

Q. And where do you reside?

A. 6101 Landsdawn Drive, Fort Wayne, Indiana.

COURT: 6101 LANDSDAWN DRIVE, FORT WAYNE, INDIANA?

Q. And what is your relationship to Candace R. Hoover Bohnke?

A. She is my mother.

Q. Calling your attention to the date of February 5, 1982, were you with your mother when an instrument was brought out to her by Donald Bohnke?

A. Yes, sir.

Q. And when, on that day, did you see your mother?

A. At the Bank.

Q. And what time of the day was that?

A. Oh, it must have been around five or five thirty, in the afternoon.

COURT: EXCUSE ME, COUNSEL, COULD I FIND OUT THE NAME OF THIS BANK, I AM SO CURIOUS, AS TO WHERE WE ARE, ARE WE IN FORT WAYNE, OR ARE WE IN DECATUR? OR WHERE ARE WE?

A. It's the Anthony Wayne Bank on South Anthony.

COURT: WELL, WE KEEP TALKING ABOUT THE BANK, I DON'T KNOW JUST WHERE WE ARE.

A. I am not sure of the address.

Q. And what Bank is that?

A. Anthony Wayne Bank.

Q. And is it located on South Anthony Blvd.?

A. That is correct.

Q. Okay. Approximately what time of day was it?

A. Oh, about five or five thirty o'clock.

Q. And how did you happen to be at the Bank on that occasion?

A. My mother told me that she was going to meet Mr. Bohnke at the Bank and she asked me if I could be there.

Q. Okay, did you take your mother to the Bank?

A. No, sir.

Q. Do you know how she got there?

A. She went with Mr. Bohnke and Virginia.

Q. Did you observe what took place after your mother got to the Bank?

A. Yes, sir.

Q. And what were your observations?

A. Well, I thought that she was having some trouble understanding the document, and I really didn't think that she was being given enough time to examine it, like she should have had.

Q. Did you...

A. The Bank was about ready to close, before long and everybody seemed to be in such a big hurry.

Q. What were the actions of Mr. Donald Bohnke on that occasion? If you remember?

A. Well, I only ... the only thing that I know, is that she came over to me, where my husband and I were and she told me what they were talking about, and she said ... to him what would happen if I don't sign it? And he said, well, I asked my lawyer that, and he said you would have to pay all of the bills.

Q. Okay, did you observe anything more than that?

A. No, sir.

Q. Did your mother appear to understand the instrument?

A. Well, I don't really think so. How could she?

MR. ROBERT G. SMITH: I am going to object to that, Your Honor.

That calls for a conclusion that this witness is not qualified to make.

COURT: SUSTAINED, SUSTAINED. YOU CAN TESTIFY AS TO WHAT YOU OBSERVED AND WHAT YOU HEARD AND WHAT YOU RECALL, BUT AS FAR AS I THINK THAT THAT IS A LEGAL CONCLUSION.

Q. How much time do you think elapsed from the time that your mother got there until the time she left?

A. Oh, I don't think it was more than ten or fifteen minutes, at the most.

Q. Did you observe anything more than you just testified to?

A. No, but I know she was pretty upset.

Q. Was she in a separate area with Mr. Donald Bohnke?

A. Well, yes, they were up at the teller's counter and we were sitting back at the back of the...

Q. Were you invited to come back and assist her? Assist her in any way?

A. No.

Q. So she was back there alone with Mr. Bohnke?

A. Yes, sir. That is right.

Q. So all of the things that took place took place between her and Mr. Bohnke?

A. Yes.

Q. We have nothing more of this witness, Your Honor.

CROSS EXAMINATION OF MRS. ELIZABETH YOUNG BY ATTORNEY ROBERT G. SMITH.

Q. Mrs. Young, who else was present at the occasion at the Bank?

A. My husband and Virginia Bohnke.

Q. And of course, Donald Bohnke and...

A. That is right.

Q. Now, do you recall any conversations other than that you have already related? Between Mr. Bohnke and your mother?

A. No, I didn't hear anything else, I don't know what else was said. I don't know what else went on.

Q. Did you have an opportunity to read the waiver?

A. No, sir.

Q. Did you offer your mother any advice or any recommendations?

A. Well, she told me after what was said, I said, well, it doesn't look like it leaves you much choice, but to sign.

Q. You told her to go ahead and sign?

A. Yes, sir. I didn't tell her to sign. I said it's up to you but it doesn't look like you have much choice.

Q. I have nothing more, Your Honor.

RE-DIRECT EXAMINATION OF ELIZABETH YOUNG BY ATTORNEY JAMES R. GROSSMAN.

Q. In your remarks that you didn't have much choice, meant that she would have to pay the bills in the estate?

A. That is right.

Q. We have no other questions, Your Honor.

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Beth Young's testimony affirms the testimony of Mrs. Bohnke regarding the tactics employed by Donald Bohnke when the election was signed. Again, Donald Bohnke stated that if Mrs. Bohnke did not sign the waiver that she (Mrs. Bohnke) would have to pay all of the bills of the estate.

The only manner in which a surviving spouse can waive the right of expectancy or the right of election to take under the law is by written contract, agreement or waiver signed by the party waiving the right and further provided that there has been a full disclosure of the nature and extent of such right and further provided that the thing or promise given such party is a fair consideration under all of the circumstances.

In this case, no pre-nuptial or post-nuptial contract was entered into by the parties. Therefore, Mrs. Bohnke did not waive her right of expectancy or her right of election.

Three exhibits were introduced into evidence by the estate. Basically, these exhibits constituted rent agreements between the Bohnkes and Concord Village. None of these constituted a pre-

nuptial or post-nuptial contract. The "rent agreement" offered as an exhibit was vague and indefinite. The final paragraph of said "rent agreement" was as follows:

"Whereas we request that the death of either of us or the termination of this agreement, each balance as shown above minus \$50.00 a month be deducted as each one's share of reent (sic) deducted by Concord Village from the deposit to apply on the rent of the Apt. 211S and the remaining balance of each individual share of the Deposit to be paid to the survivor and to the Estate of the deceased as the case may be."

In either event, the balance of the rent deposit account was to be paid to the survivor, or to the estate of the survivor. If the proceeds were to be paid directly to the survivor, then Candace R. Bohnke would be entitled to the entire balance on account at Concord Village. On the other hand, if the balance was to be paid to the estate of Frank E. Bohnke, deceased, then Candace R. Bohnke would be entitled to share in the estate under her election to take her share under the law.

X. THE SURVIVING SPOUSE OF A DECEDENT WHO WAS DOMICILED IN INDIANA AT THE TIME OF HIS DEATH IS ENTITLED FROM THE ESTATE TO AN ALLOWANCE OF \$8,500.00.

Under the provisions of I.C. 29-1-4-1, Candace R. Bohnke, as the surviving spouse of Frank E. Bohnke, deceased, is entitled to a widow's allowance of \$8,500.00. Under no circumstances can this statutory share be taken away from her. Under the provisions of I.C. 29-1-3-7 it is provided that even if the surviving spouse takes under the Will, that she does not waive her right to the allowance, unless it clearly appears from the Will that the provision therein made for the surviving spouse was intended to be in lieu of the allowance. In the instant case, there is no provision whatsoever for Candace R. Bohnke under the decedent's Will so there can be no provision for her which was intended to be in lieu of the allowance. Under such circumstances, Mrs.

Bohnke is automatically entitled to the widow's allowance of \$8,500.00 under the provisions of I.C. 29-1-4-1. The Court's attention is specifically called to that portion of I.C. 29-1-3-7 which provides as follows:

". . . 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."

WHEREFORE, Petitioner prays that this Motion to Correct Error be granted.

GROSSMAN, BOEGLIN, GEHRING & HOOD

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CERTIFICATE OF SERVICE

This will certify that on the 11th day of August, 1982, a copy of the above and foregoing Motion to Correct Error was served upon Robert G. Smith of Smith, Burry and Herman, Attorneys for Estate, 113 North Second Street, Decatur, Indiana 46733, by mailing a copy thereof to said attorney at the aforesaid address, postage prepaid, by United States mail.

James R. Grossman
James R. Grossman

ACKNOWLEDGEMENT OF SERVICE

The undersigned being the Judge who rendered the judgment to which this Motion to Correct Error is addressed, hereby acknowledges receipt and service of said Motion to Correct Error on this 11th day of August, 1982.

Robert S. Anderson
Robert S. Anderson, Judge
Adams Circuit Court

The hearing on the Motion to Correct Error is hereby set for hearing and determination at 2:30 p.m., on September 13, 1982, in the Court Room of the Adams Circuit Court, and the attorneys are requested to be present at said time for said hearing.

The Clerk of the Adams Circuit Court is hereby ordered and directed to mail a certified copy of this Entry to James R. Grossman, % Grossman, Boeglin, Gehring & Hood, 1600 Lincoln Bank Tower, Fort Wayne, Indiana 46802; to Donald D. Bohnke, R.R.#1, Sunnybrook Acres, Decatur, Indiana 46733; to Harold W. Bohnke, DDS, 528 Limberlost Trail, Decatur, Indiana 46733; to Candace R. Hoover Bohnke, 6723 South Anthony Blvd., Apt. S-211, Fort Wayne, Indiana 46816; and to Robert G. Smith, Smith, Burry & Herman, 113 N. 2nd Street, Decatur, Indiana 46733, by first class United States mail, for their information and appropriate action.

S/ Robert S. Anderson
Robert S. Anderson, Judge Adams Circuit Court
