

# Points of Law

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## WHY ANOTHER NEWSLETTER?

This one page newsletter is intended to provide professionals with an occasional thought on the way we approach our client related tasks. It will draw ideas from news articles, court cases, and personal experience. Citations will be given for those who wish to probe further, and credit will be given to those who contribute. It will be published more or less quarterly. Comments are invited. The focus will be on issues of estate planning and administration, real property law, and small business. With that, here is our first offering.

## STATUTORY FAMILY ALLOWANCES

Statutory family allowances allow a decedent's surviving spouse a family allowance of thirty thousand dollars (\$30,000) and to a value, not exceeding fifteen thousand dollars (\$15,000) in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, the rights fall to minor and dependent children of the decedent. The allowance is exempt from and has priority over all claims against the estate. It is in addition to any share passing to the surviving spouse or minor or dependent children by intestate succession or by the decedent's will, unless otherwise provided by the decedent.

Until the case In The Matter of the Estate of Jewell, New Mexico Court of Appeals Advance No.

20,545, January 10, 2001 was decided, some attorneys felt that the allowances could be defeated by a will. In 1984, Angela Jewell provided by will that her husband Robert was to receive \$10 and A...not receive or be entitled to any family allowance or personal property allowance from my estate...@ Her reputed reason was to protect her assets after her death from Robert's creditors. The couple was later divorced, but remarried before Angela's death in 1998.

The court looked to various cases interpreting the Uniform Probate Code, upon which New Mexico's probate code is based, and found that such allowances general supercede the decedent's intent. It also found support under NMSA 1978, Section 45-3-101(C)(1975) which generally provides that devolution of community property and decedent's separate property is subject to the two allowances. Then by reverse reasoning it looked to NMSA 1978, Section 45-2-407(1995). That section sets forth procedures by which a surviving spouse may waive the allowances. It declared the legislature has provided that the surviving spouse, not the decedent, has control over the statutory allowances. It should also be noted that the legislature also granted equitable protections which give the courts considerable control over the circumstances of the waiver.

The decision of the court does not deal with assets held in trust or otherwise contractually encumbered. Contractually encumbered assets or assets held in irrevocable trusts should generally be

immune from the allowances but need to be reviewed on a case by case basis. It appears that revocable trust assets escape the language of the statute, but a different case will have to be decided before we can be certain. The courts' grant of equitable power may also be the cause of unintended results. If a waiver is declared unenforceable, a constructive trust might be imposed on such assets for the benefit of the family member(s) entitled to the allowances.

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