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Decedents' Estates and Trusts—Withdrawal of Section 18 Election

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asserts it.[48] The second was enunciated in *In re Ruef*,[49] wherein the Court said that an inference of undue influence cannot be drawn from evidence that is not inconsistent with an inference that it was decedent's voluntary intent. Aside from the mental condition of the testatrix, it is difficult to say that the evidence was inconsistent with an inference of voluntary disposition by the testatrix.

The two dissenting justices rendered no opinion, but it can be surmised that their thinking was affected by the mental condition of the testatrix. It is generally accepted that a mind impaired by age or infirmity is much more susceptible to domination than one which is strong and vigorous.[50] It would appear that where this condition exists the dissenting justices would sustain a jury finding of undue influence on evidence of a less substantial nature than is required in the normal case.

There are probably two factors that make this a most difficult area of law. The first of these is the indefinable nature of the concept itself, and the second is the jury element. Of these two, the latter has rendered the law more uncertain. A jury often times attempts to rewrite a will merely because it disagrees with the disposition made by the testator.[51] Therefore, the courts are obliged to require evidence of a very substantial nature before they will sustain a jury finding of undue influence.

WITHDRAWAL OF SECTION 18 ELECTION

In affirming an Appellate Division order dismissing objections to the accounting of husband's executors,[52] the majority of the Court of Appeals in *In re Allan* held that a notice of election under Section 18, Decedent Estate Law, may be withdrawn after the expiration of the statutory period for filing such an election.[53] In reaching its decision, the Court quoted *In re Clark's Estate*[54] to the effect that the purpose of the statutory limitation on filing a notice of election is, ". . . to assure timely notice to those charged with the administration of the estate that the surviving spouse is dissatisfied with the terms of the will and asserts the additional right accorded by the statute, thus enabling them to be on guard against any method of dealing with the assets in their charge which does not take into consideration the statutory rights of the elector." In the matter of the withdrawal, however, the court reasoned that the same effect on the executor's account would be occasioned

48. In re Schillinger, 258 N.Y. 186, 179 N.E. 380 (1932); In re Kindberg, 207 N.Y. 220, 100 N.E. 789 (1912).

49. 180 App. Div. 203, 167 N.Y. Supp. 498 (2d Dep't 1917), *aff'd* 223 N.Y. 582, 119 N.E. 1075 (1918).

50. *Ibid.*; Atkinson, *op. cit. supra* note 43, § 54.

51. For an analysis of the problem see Note, 50 MICH. L. REV. 748 (1952).
748 (1952).

52. The widow died, and her executors were substituted in this action.

53. 5 N.Y.2d 333 184 N.Y.S.2d 613 (1959); Judges Desmond and Dye dissented in part; Judge Van Voorhis dissented.

54. 166 Misc. 909, 3 N.Y.S.2d 364 (Surr. Ct. 1938). The *Clark* opinion was written by Surrogate Wingate, a member of the Decedent Estate Commission which wrote Section 18.

if the elector assigned the difference gained by election to the original beneficiaries of the will.[55]

Although the majority agreed with the Surrogate that the second ground of appellant's objection, involuntariness of the withdrawal, was insufficient,[56] it granted leave to replead on that issue, holding that the Surrogate had misapplied precedent in not granting such leave below.[57] In allowing this repleading, the Court stated that the very purpose of Section 18 would be defeated if the Surrogate could not guard the spouse against the involuntary surrender of what the statute has said should be hers.[58]

It is clear that Section 18 contains no express time limitation on the withdrawal of an election filed under its terms. The Court refused to imply such a limitation,[59] and here followed an established line of decisions holding that one may waive the benefits of a statute designed for his protection, at any time, without prior court approval, where no public policy or estoppel circumstances intervene.[60] Similarly, although the appellants' pleadings were insufficient to raise the issue of the voluntariness of the withdrawal, the granting of leave to replead that issue does not appear to prejudice the respondents, since at least two of them have also urged objections, concerning the facts of the withdrawal, which remain to be tried.[61]

GRANTING OF COUNSEL FEES UNDER SECTION 278 OF SURROGATE'S COURT ACT:

Section 278 of the Surrogate's Court Act allows the Surrogate, at his discretion, to award reasonable counsel fees to any party involved in a proceeding to construe a will.[62] The question that plaintiff brought before the Court in *In re Liberman's Estate*[63] is whether if a proceeding is brought for a purpose other than the construction of a will, but in which the will had to be construed, the plaintiff's action falls within the ambit of Section 278 so that reasonable attorney's fees may be allowed.

In the original action,[64] brought under Section 145-a of the Surrogate's Court Act,[65] plaintiff asserted her right to elect under the will of her husband,

55. 184 N.Y.S.2d 613, 620.

56. *Id.* at 621. The allegation was that the withdrawal was involuntary, "as the result of unreasonable pressure, possibly constituting duress."

57. 184 N.Y.S.2d 613, 620.

58. *Ibid.*

59. See McKuskie v. Hendrickson, 128 N.Y. 555 (1891); Lawrence Construction Corporation v. State, 293 N.Y. 634, 59 N.E.2d 630 (1944).

60. See Selzer v. Baker, 295 N.Y. 145, 65 N.E.2d 752 (1946), right of statutory redemption waived; Sentenis v. Ladew, 140 N.Y. 463, 35 N.E. 650 (1893), waiver by submitting to jurisdiction of court; Conde v. City of Schenectady, 164 N.Y. 258, 58 N.E. 130 (1900), right to object to Constitutionality of statute waived.

61. 184 N.Y.S.2d 613, 616.

62. A construction proceeding is brought under Section 145 of the New York Surrogate's Court Act.

63. 6 N.Y.2d 525, 190 N.Y.S.2d 672 (1959).

64. 5 N.Y.2d 719, 177 N.Y.S.2d 707 (1958).

65. Section 145-a of the New York Surrogate's Court Act allows a surviving spouse to petition the Surrogate's Court to determine the validity or effect of an election to take his intestate share against the provision of the will.