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Decedents' Estates and Trusts—Granting of Counsel Fees under Section 278 of Surrogate's Court Act

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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.

claiming that the provisions in her behalf were inadequate in that they were subject to diminution in favor of other beneficiaries, and that she was, therefore, entitled to elect under Section 18 of the Decedent Estate Law.⁶⁶ In order to answer this question, it was necessary for the Court to construe the husband's will. Having been denied the right to elect under Section 18, plaintiff then proceeded to petition for attorney's fees to be paid out of the estate. The Surrogate's Court of New York County allowed the petition. The Appellate Division reversed, but the Court of Appeals reinstated the Surrogate's decision.

Although a Section 18 proceeding usually does not come within the bounds of Section 278,⁶⁷ as those actions generally involve issues of status,⁶⁸ the Court held that where the question of the right of election turns upon the construction of the will, Section 278 will apply. In other words, the nature, rather than the caption of the proceeding, shall be the controlling factor. A lower court, on the same facts, has come to a like result.⁶⁹ It should also be noted that the Court handed down another decision on the same day as the present case was decided,⁷⁰ allowing Section 278 to apply where the original action was brought under a section not intended as will construction section, but in which a construction was needed for a determination of the issues.

The Court's holding is sound in the present case, for to hold otherwise might result in a multiplicity of suits. A party in plaintiff's position would first have to bring an action pursuant to Section 145 of the Surrogate's Court Act,⁷¹ and after having the will construed, would then have to institute another action under Section 145-a for a determination of the validity of plaintiff's right of election.⁷² Surely such a result was not the intention of the legislature.

EVIDENCE

EVIDENCE OBTAINED BY WIRETAPPING ADMISSIBLE IN NEW YORK COURTS

The defendant in *People v. Variano*¹ was convicted of bookmaking in the Village of Tarrytown after the interception of certain telephone conversations by police officers acting with a court order issued pursuant to section 813-a of the Code of Criminal Procedure.² The Westchester County Court, reversing

66. Section 18 of the New York Decedent Estate Law provides, generally, that where the surviving spouse is to receive less, under the will, than his intestate share, that spouse has the right to elect to take the difference between the amount bequeathed and the intestate share.

67. In re Curley's Estate, 161 Misc. 391, 293 N.Y. Supp. 370 (Surr. Ct. 1936).

68. In re Zweig's Estate, 145 Misc. 839, 261 N.Y. Supp. 400 (Surr. Ct. 1932).

69. In re Schnitzer's Will, 14 Misc. 2d 895, 125 N.Y.S.2d 578 (Surr. Ct. 1953).

70. In re Folsom's Estate, 6 N.Y.2d 886, 190 N.Y.S.2d 381 (1959).

71. *Supra*, note 62.

72. *Supra*, note 65.

1. 5 N.Y.2d 391, 185 N.Y.S.2d 1 (1959).

2. The conviction was under § 986, New York Penal Law. The Code of Criminal Procedure provides that a justice of the Supreme Court or judge of a county court or of the Court of General Sessions of the County of New York may issue an *ex parte*