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Decedent's Estate—Right of Spouse to Elect Against Will

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DECEDENTS ESTATE

Right of Spouse to Elect Against Will

Since 1930 when Section 18 of the Decedent Estate Law became effective, New York case law, in keeping with the recommendations of the Commission to Investigate Defects in the Laws of Estates,[1] has developed a fairly firm doctrine with respect to illusory transfers in trust to the surviving spouse. The statute was viewed as remedial legislation, to be construed liberally for the benefit of the surviving spouse.[2] One series of cases held trusts illusory where they failed to provide full life income to the surviving spouse because of mortmain dictates of the decedent, directing the trust to terminate on certain contingencies.[3] Other cases were directed to trusts in which the trustee was given discretion to invade the corpus on behalf of persons other than the surviving spouse.[4] The broad scope of powers given to a trustee led to the well-known *Curley*[5] decision in which the court granted a right of election to the widow because of the possible infringement of her beneficial share from the uncontrolled discretion of the trustee.[6] *In re Schrauth's Will*[7] and *In re Clark's Will*[8] involved questions of stock in family corporations which formed the major part of the trust corpus. In each case, the widow was allowed her elective share on the grounds that the trusts were not truly beneficial, but in both cases, it was shown that the corporations were in fact not producing any income.

If this case history is viewed liberally in the spirit of the Commission which proposed it, the possibility that the benefical enjoyment would be impaired would seem to warrant the granting of an elective right. On the other hand, where the

1. LEG. DOC. (1930) No. 69, p. 87: It does not seem to the Commission to be desirable that the right to take the intestate share should be given to the surviving spouse in every estate, regardless of its amount. But while immediate necessities should be provided for, there should be some limitation by way of permitting the income only upon the balance of the intestate share to be paid over during the life of the surviving spouse. Therefore, in the larger estates, the Commission proposes to preserve to the testator a right to create a trust, with income payable to the wife, upon a principal equal to or greater than her intestate share.

2. *In re Bommer's Estate,* 159 Misc. 511, 288 N. Y. Supp. 419 (Surr. Ct. 1936); *In re Ainsworth's Estate,* 160 Misc. 789, 291 N. Y. Supp. 825 (Surr. Ct. 1936).

3. *In re Byrnes' Estate,* 141 Misc. 346, 252 N. Y. Supp. 587 (Surr. Ct. 1931), *aff'd.,* 235 App. Div. 782, 257 N. Y. Supp. 884 (1st Dep't 1932), *aff'd.,* 260 N. Y. 465, 184 N. E. 56 (1933); *In re Bommer's Estate,* 159 Misc. 511, 288 N. Y. Supp. 419 (Surr. Ct. 1936).

4. *In re Matthew's Will,* 255 App. Div. 80, 5 N. Y. S. 2d 707 (2d Dep't 1938); *In re Sheppard's Estate,* 189 Misc. 367, 71 N. Y. S. 2d 340 (Surr. Ct. 1947).

5. *In re Curley's Estate,* 151 Misc. 664, 272 N. Y. Supp. 489 (Surr. Ct. 1934), *modified,* 245 App. Div. 255, 280 N. Y. Supp. 80 (2d Dep't 1935), *aff'd. mem.,* 269 N. Y. 548, 199 N. E. 665 (1935).

6. As a result of the *Curley* decision, the legislature enacted N. Y. DECEDENT ESTATE LAW §18(1)(h), giving the Surrogate Courts administrative control over trustees.

7. 249 App. Div. 846, 292 N. Y. Supp. 923 (2d Dep't 1937).

8. 1 A. D. 2d 567, 151 N. Y. S. 2d 911 (4th Dep't 1956).

impairment results only from the nature of the property without any design or intent to curtail the beneficial interest, there would not seem to be the same compelling reasons for such an election.

In re Shupack's Will[9] illustrates this situation and exemplifies two divergent interpretations of the scope of the elective right. The testator's property consisted primarily of six wholly-owned corporations which he placed in three separate and equal trusts, one for his widow and one each for his two children. The widow asserted a right of election against the testamentary provision made for her on the basis that the childrens' interests were necessarily antagonistic to her own and that their two-thirds control of the corporations could possibly result in a failure of income from her trust. This contention highlights the essential consideration as to the legislative intent; *i.e.,* was it to insure for the widow the substantial equivalent of her intestate share of the assets her husband held at death or was it to insure further that the trust would be substantially beneficial?

In denying the right of election, the Court indicated that the statute could not have been designed to guarantee any particular income. Rather, any possibility of income impairment resulted from the character of her husband's assets — a character which was unfortunate for the widow but one which did not form the basis for an expansion of Section 18's coverage. In contrast, the minority argued that it was this very possibility of impairment which the elective right was designed to remedy. Without a reasonable certainty of substantial benefit, the trust was illusory in fact and failed to meet the statutory test.

The principal case outlines one of the few real areas of contention which remains on the borderline. Depending on the breadth of the interpretation given it, Section 18 could embrace either the majority or the minority position. The widow may receive an entirely fair and ratable cross-section of her husband's assets in a trust which meets the literal statutory test but which suffers under the threat of impairment of income, resulting from the very nature of the assets. Only judicial balancing of current socio-economic factors can supply the key.

Precatory Language

Constructions of wills frequently have been required in New York because of the use of precatory or hortatory language, words which purport to express a desire or wish rather than a mandatory direction for the distribution of the estate. The applicable test to be applied is whether the testator meant simply to advise or influence a discretion vested in someone or to control and direct a certain dispo-

9. 1 N. Y. 2d 482, 136 N. E. 2d 513 (1956), *modifying* 1 A. D. 2d 841, 149 N. Y. S. 2d 20 (2d Dep't 1956).