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Wills—Life Insurance Sufficient Settlement Under Decedent Estate Law § 26

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WILLS—LIFE INSURANCE SUFFICIENT SETTLEMENT UNDER DECEDENT ESTATE LAW § 26

Deceased executed a will three years prior to the birth of his second daughter, the plaintiff in this action. The plaintiff was neither mentioned nor provided for in the will but was subsequently made a co-beneficiary of several life insurance policies. She seeks to take her intestate share as against the will under New York Decedent Estate Law §26. *Held:* (3-2) The child has no right to take against the will. Proceeds from life insurance policies provided by the testator are within the definition of "settlement" as used in §26. In re *Faber's Will,* 280 App. Div. 394, 144 N. Y. S. 2d 119 (4th Dept. 1952).

Decedent Estate Law §26 reads: "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement and neither provided for nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate as would have descended or have been distributed to such child, if such parent had died intestate . . ." The civil law principle which nullifies a will made prior to the birth of a child was in part adopted by this section. *Tarshanjian v. Abbot,* 200 N. Y. 378, 93 N. E. 978 (1911). Such section partially revokes a will to the extent of the child's intestate share. *Matter of Murphy,* 144 N. Y. 562, 36 N. E. 691 (1895); *Matter of Kraston,* 58 N. Y. S. 2d 364 (Surr. Ct. 1945). The purpose of this section is to protect after-born children from oversight on the part of the testator in the disposition of his estate. *McLean v. McLean,* 207 N. Y. 371, 101 N. E. 178 (1913).

The problem which faced the court in the instant case is what constitutes "any settlement" under this section. The majority felt that where a testator has named the child joint beneficiary to a "substantial" amount in life insurance policies, that it could not be said that testator lacked the intention to make a "settlement". This position exemplifies the broad interpretation of the word "settlement". Under this interpretation a settlement need not be of any particular kind, *Matter of Froeb,* 143 Misc. 660, 257 N. Y. Supp. 850 (Surr. Ct. 1932), nor does it need to be adequate. *Matter of Kraston, supra.* The following have been held to constitute a "settlement": (Child's savings of $7.13 put in trust as against an estate of over $140,000). In re *Griffin's Will,* 159 Misc. 12, 287 N. Y. Supp. 514 (Surr. Ct. 1936). (Two children made beneficiaries of policies of life insurance, savings bank trust accounts, and United States savings bonds in the aggregate sum of $7,469.51 and $7,128.22). In re *Stone's Will,* 200 Misc. 639,

107 N. Y. S. 2d 775 (Surr. Ct. 1951). (A $10,000 life insurance policy.) *Matter of Kraston, supra.*

A much narrower view of what constitutes a "settlement" under this section is that it must be in writing and prior to or contemporaneous with the making of the will. *Matter of Stern,* 189 Misc. 639, 56 N. Y. S. 2d 631 (Surr. Ct. 1945); In re *Robinson's Estate,* 188 Misc. 720, 66 N. Y. S. 2d 705 (Surr. Ct. 1946); In re *Kirk's Estate,* 196 Misc. 473, 80 N. Y. S. 2d 378 (Surr. Ct. 1948). However, this interpretation has been effectively criticized. A testator who at the time of making his will has overlooked the possibility of after-born children probably would not have considered it prior to the instrument. See In re *Stone's Will, supra.*

The majority in the instant case specifically rejects the rule of the *Stern* case and states that the sole issue is whether "in fact" a settlement was intended. However, they fail to investigate all facts and circumstances surrounding the transaction to determine the testator's intention "in fact". The mere provision of insurance by the testator was determined to be indicative of his intention, because of the court's apparent fear of writing a new will for him. *(Supra,* at 396, 144 N. Y. S. 2d 119 at 121.) The rule of construction that the testator's intent prevails as expressed in the will has no application here. The application of §26 requires that one go outside of the will to determine whether there has been a "settlement". See *Matter of Stone, supra.*

The minority in the instant case points out that a failure to examine all the extrinsic circumstances results in an arbitrary determination of the intent of the testator as to whether or not there was a "settlement". They show that the deceased was "insurance-conscious" in that "it was common practice for him to provide for all members of his family by this method." Furthermore, the older daughter would share in testator's $110,000 net estate as well as being joint beneficiary with the plaintiff on the insurance policies in question, whereas the only provision made for the plaintiff was these policies. It was also pointed out that testator died only nine months after plaintiff's birth, a relatively short time in which the will could have been changed.

It is submitted that the approach of the minority is more realistic and in line with the peculiar facts of the case. Since the issue is whether there was "in fact" a settlement, a close scrutiny of surrounding circumstances seems indispensable. From such examination it does not appear that it was the intention of the deceased to exclude the plaintiff from an equal share with his oldest daughter as results from the majority's holding.

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