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### Amendment to the Decedent Estate Law Clarifying Waiver of the Spouse's Right of Election Against a Will

A. Matthew Broughton Jr.

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## CURRENT LEGISLATION

AMENDMENT TO THE DECEDENT ESTATE LAW CLARIFYING WAIVER OF THE SPOUSE'S RIGHT OF ELECTION AGAINST A WILL.— Under a statute entitled "An Act to Amend the Decedent Estate Law in Relation to Waiver of the Right of Election by a Surviving Spouse Against or in Absence of Testamentary Provision," the New York State Legislature, in its 170th Session, has attempted to reform subdivision nine, section eighteen, of the Decedent Estate Law, so as to eliminate several serious occasions of doubt and confusion.

The bill was first recommended to the legislature in 1946<sup>1</sup> when it passed the state senate, but failed to pass the assembly. It was recommended again this year<sup>2</sup> and finally became law. The amendment became effective March 25, 1947.

In a footnote to the bill as introduced in 1946,<sup>3</sup> the purpose of the amendment was stated to be the codification of judicial interpretations resolving ambiguities which had caused frequent litigation. When it was reintroduced, a similar footnote was present, but this time it was more explicit. "Its purpose is to eliminate ambiguities in the language of subdivision 9 of section 18 of the Decedent Estate Law which have caused frequent litigation. The amendment provides a single comprehensive statement of the requirements of a valid waiver of a surviving spouse's right to elect against the will of a decedent spouse."<sup>4</sup>

Criticism of the old subdivision was so severe that one distinguished surrogate said of it, "The legislative text has the sorry distinction that in its two sentences are found seeds of controversy so many as to cause doubt that any other legislative text of comparable length has ever posed so many problems."<sup>5</sup>

Section 18, subdivision 9, of the Decedent Estate Law as amended<sup>6</sup> now reads:

The husband or wife, during the lifetime of the other, may waive or release the right of election to take as against a particular last will, or as against

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<sup>1</sup> N. Y. LAW REVISION COMMISSION REPORT, Legis. Doc. No. 65(H) (1946).

<sup>2</sup> N. Y. LAW REVISION COMMISSION REPORT, Legis. Doc. No. 65(A) (1947).

<sup>3</sup> N. Y. LAW REVISION COMMISSION REPORT, Legis. Doc. No. 65(H) (1946).

<sup>4</sup> N. Y. LAW REVISION COMMISSION REPORT, Legis. Doc. No. 65(A) (1947).

<sup>5</sup> Matter of Schwimmer's Estate, — Misc. —, 49 N. Y. S. 2d 481, 506 (Surr. Ct. 1944).

<sup>6</sup> N. Y. DECEDENT ESTATE LAW § 18(9).

any last will of the other spouse. A waiver or release of all rights in the estate of the other spouse shall be deemed to be a waiver or release of the right of election as against any last will. A waiver or release to be effective under this subdivision shall be subscribed by the maker thereof and either acknowledged or proved in the manner required for the recording of a conveyance of real property.

A waiver or release of the right of election granted in this section shall be effective, in accordance with its terms, whether

- (a) executed before or after marriage of the spouse affected;
- (b) executed before, on, or after September first, nineteen hundred thirty;
- (c) unilateral in form, executed only by the maker thereof, or bilateral in form, executed by both spouses affected;
- (d) executed with or without consideration;
- (e) absolute or conditional.

In order to facilitate discussion of the amendment and to follow more closely the changes made therein, a footnote is inserted below giving the text of the subdivision as it existed prior to amendment.<sup>7</sup> Particular attention must be paid to the wording, since the language of the statute will be controlling. Nothing more than an analogy can be found in early cases as the right of election has no common law origin. "Common law concepts as to the requirement for an effective release, waiver or estoppel yield to the controlling force of the statutory provisions governing the extinguishment of *this* right."<sup>8</sup>

The first and probably the most important change to be noted is the omission of the words "agreement" and "instrument" from the new text. Not only was their presence a focal point of much litigation and legal argumentation, but their position in the text added to the confusion.<sup>9</sup>

In one case it was stated that the old subdivision contemplated two varieties of waiver: one, as to a *particular* will which required

<sup>7</sup> N. Y. DECEDENT ESTATE LAW § 18(9) (prior to amendment). "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

<sup>8</sup> N. Y. LAW REVISION COMMISSION REPORT, Legis. Doc. No. 65(H), p. 11 (1946).

<sup>9</sup> Matter of Schwimmer's Estate, — Misc. —, 49 N. Y. S. 2d 481 (Surr. Ct. 1944); Matter of McGlone, 171 Misc. 612, 13 N. Y. S. 2d 76 (Surr. Ct. 1939), *rev'd*, 258 App. Div. 596, 17 N. Y. S. 2d 316 (2d Dep't 1940), *rev'd*, 284 N. Y. 527, 32 N. E. 2d 539 (1940), *aff'd sub nom.*, Irving Trust Co. v. Day, 314 U. S. 556, 86 L. ed. 452 (1942); Matter of Moore, 165 Misc. 683, 1 N. Y. S. 2d 281 (Surr. Ct. 1937), *aff'd*, 254 App. Div. 856, 6 N. Y. S. 2d 309 (1st Dep't 1938), *aff'd*, 280 N. Y. 733, 21 N. E. 2d 512 (1939); Matter of Shapiro, 154 Misc. 55, 276 N. Y. Supp. 560 (Surr. Ct. 1935).

a duly acknowledged "instrument," the other, as to a waiver of the right to take against *any* will where an "agreement" was required.<sup>10</sup> This construction was partially occasioned, by the presence of a comma between the clause relating to a "particular will" containing the reference to an "instrument" and the clause relating to "any last will" containing the word "agreement."

In *Matter of McGlone*<sup>11</sup> it was stated that there were three kinds of waiver or release referred to: one, an *instrument* of waiver against a single identified will; two, an *agreement* of waiver against *any* will which was executed after the effective date of the statute; three, an *agreement* made prior to September 1, 1930, on which date Section 18 went into effect.

Counsel for the plaintiff in the case of *In re Schwimmer's Estate*<sup>12</sup> relied on the three variety construction. Surrogate Delehanty, when confronted with this interpretation, expressly rejected it and the idea that any distinction should have been made between an "instrument" and an "agreement."

The cases reviewed make it clear that no distinction has been made between a so-called "instrument" and a so-called "agreement." These cases also make it clear that the references in the subdivision to a "particular last will" and to "any last will" imported no legislative intent to categorize the writings effective as waivers.<sup>13</sup>

He dispensed with the problem of the comma by referring to it as a "mere misuse of a comma."<sup>14</sup>

That the constructions placed upon the old subdivision in *Matter of Shapiro*<sup>15</sup> and in *Matter of McGlone*<sup>16</sup> were dicta is not of particular concern to this discussion. What is important is that learned attorneys and judges could find themselves at such variance on the interpretation of a statute of such serious import. It is to be hoped that by deleting these litigious words from the text of the subdivision the legislature has removed this specious argument from the already heavy burden the courts endure and relegated it to the academic field of legal history. A waiver or release of the right to elect against a *particular will* should, henceforth, require the same formality and like tests of validity as one waiving the right to take against *any will* whether such waiver be in the form of an *instrument* or *agreement*

<sup>10</sup> *Matter of Shapiro*, 154 Misc. 55, 276 N. Y. Supp. 560 (Surr. Ct. 1935).

<sup>11</sup> *Matter of McGlone*, 171 Misc. 612, 13 N. Y. S. 2d 76 (Surr. Ct. 1939), *rev'd*, 258 App. Div. 596, 17 N. Y. S. 2d 316 (2d Dep't 1940), *rev'd*, 284 N. Y. 527, 32 N. E. 2d 539 (1940), *aff'd sub nom.*, *Irving Trust Co. v. Day*, 314 U. S. 556, 86 L. ed. 452 (1942).

<sup>12</sup> *Matter of Schwimmer's Estate*, — Misc. —, 49 N. Y. S. 2d 481 (Surr. Ct. 1944).

<sup>13</sup> *Matter of Schwimmer's Estate*, — Misc. —, 49 N. Y. S. 2d 481, 506 (Surr. Ct. 1944).

<sup>14</sup> *Matter of Schwimmer's Estate*, — Misc. —, 49 N. Y. S. 2d 481, 485 (Surr. Ct. 1944).

<sup>15</sup> 154 Misc. 55, 276 N. Y. Supp. 560 (Surr. Ct. 1935).

<sup>16</sup> See note 11 *supra*.

and whether it be executed "before, on or after September first nineteen hundred thirty" and be "effective in accordance with its terms."<sup>17</sup>

Another problem, previously referred to, which the new amendment has attempted to resolve is the effect of waivers made before the effective date of Section 18, *i.e.*, September 1, 1930. Because of the inexact wording of the old subdivision, unique arguments were put forth to challenge waivers made before that date. Having removed the distinction between "instruments" and "agreements," and being no longer confronted with the problem of their grammatical position in the text, it would appear definitely now that waivers or releases executed prior to the date of the section should, provided such waivers meet the other tests of the statute, be as effective as those made thereafter. There is no constitutional objection to such a concept. The right to make a will is, at best, only a statutory one which exists at the sufferance of the legislature.<sup>18</sup> The legislature is entirely at liberty to do away with this right if it so desires. *A fortiori*, the legislature can regulate the right and create valid limitations on it. It may create a right to elect against that will, as it has done by Section 18 of the Decedent Estate Law and then provide for the method of acquiring the right of election. Having done this, it may provide how the right may be lost or waived. If, before 1930, a spouse has made what amounts to a valid waiver, while in the strictest sense she could not then have waived a right she did not have, she precluded herself from acquiring the right. Nothing in such a situation violates any clause of the U. S. Constitution. It was the legislative intent from the very outset that family arrangements made prior to the passing of the Decedent Estate Law, Section 18, subdivision 9, as originally enacted, should not be disturbed. It was for this reason that the phrase "made before the taking effect of this section" was then inserted. The majority of decisions, except those led astray by the grammatical inexactitude of the subdivision, have sought to effectuate this intent.<sup>19</sup> However, a finding that an agreement did not contemplate a waiver of the right to elect against a will would be perfectly sound if made on a construction of the terms of the agreement as distinguished from a distortion of the statute.

The effect of waivers made before marriage should be the same as those made after marriage. There has been little difficulty with this problem. Waivers made both before and after marriage have been upheld. The usual reason for such arrangements before marriage is that either one or both of the partners may have had children by a previous marriage for whom protection is desired.

There have been questions raised as to the form of the waiver

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<sup>17</sup> N. Y. DECEDENT ESTATE LAW § 18(9) (as amended).

<sup>18</sup> Irving Trust Co. v. Day, 314 U. S. 556, 86 L. ed. 452 (1942).

<sup>19</sup> Matter of McCann, 155 Misc. 763, 281 N. Y. Supp. 445 (Surr. Ct. 1935); Matter of Gilmour, 146 Misc. 113, 260 N. Y. Supp. 761 (Surr. Ct. 1932).

or release. These have usually been concerned with whether or not the instrument was unilateral or bilateral in form.

In *Matter of McGlone*<sup>20</sup> there was further dicta to the effect that the *agreement* must be bilateral in form if the transaction occurred before 1930. Once again it can be seen that the difficulty lay in grammatical construction and that different requirements were being made for what were thought to be different kinds of waiver. In *Matter of Moore*<sup>21</sup> these arguments were rejected. The Law Revision Commission, in its report in 1946<sup>22</sup> chose to follow the reasoning of the last cited case, the *Schwimmer* case,<sup>23</sup> and others, holding that there should be no distinction between different categories of waivers and that the formality required should be uniform whether the waiver be in the form of an instrument or an agreement, and whether it be bilateral or unilateral, and with or without consideration.

The requirement that a waiver or release be acknowledged has been generally enforced. In a very recent case, *Matter of Pietro La Manna*,<sup>24</sup> in which an acknowledgment was defective, one of the subscribing witnesses was permitted to make acknowledgment before the court, thereby giving effect to the waiver. This case was decided on the authority of *Matter of Maul*.<sup>25</sup> It is to be noted that the decision was rendered after the effective date of the amendment under discussion. The Law Revision Commission, in its study, expressed no opposition to this form of liberality. It did, however, think it advisable to be explicit in this regard also. Therefore, it made the provision that a waiver or release should be *proved* or *acknowledged* in the same manner required for the recording of a conveyance of real property.<sup>26</sup>

As has been indicated, the purpose of this amendment was to remove problems arising from the ambiguities contained in the old subdivision. *There was no intent to change any law.* For this reason it is safe to assume that, under the amendment, as before, the same policy of liberality of construction in favor of a surviving spouse will be applied. This is in line with the purpose of the section as a whole, which was to enlarge and not diminish the right of the surviving spouse.

It is believed that this amendment will prove to be of great value, not only to litigants, but also to the courts and the profession as well. Many cases which before would have required decision merely be-

<sup>20</sup> See note 11 *supra*.

<sup>21</sup> *Matter of Moore*, 165 Misc. 683, 1 N. Y. S. 2d 281 (Surr. Ct. 1937), *aff'd*, 254 App. Div. 856, 6 N. Y. S. 2d 369 (1st Dep't 1938), *aff'd*, 280 N. Y. 733, 21 N. E. 2d 512 (1939).

<sup>22</sup> N. Y. LAW REVISION COMMISSION REPORT, Legis. Doc. No. 65(H) (1946).

<sup>23</sup> See note 12 *supra*.

<sup>24</sup> *Matter of Pietro La Manna*, N. Y. L. J. 2486 (Surr. Ct. June 24, 1947).

<sup>25</sup> 287 N. Y. 694, 39 N. E. 2d 301 (1942).

<sup>26</sup> N. Y. DECEDENT ESTATE LAW § 18(9); N. Y. REAL PROPERTY LAW § 304.

cause an ingenious litigant had found a new argument by reading into an already ambiguous claim or defense what was never intended to exist, will never reach the court. It is hoped that in the face of such clear language parties will inspect their case to see if it fits the statute and fail in all attempts to distort the statute to fit their case.

A. MATTHEW BROUGHTON, JR.

**GENERAL LEGACIES—WHEN CHARGEABLE AGAINST REAL PROPERTY—RECENT STATUTORY AMENDMENT.**—Section 47-d of the Decedent Estate Law, added to the law of New York State in 1947, substitutes a statutory intent of a testator to satisfy the general legacies of his will out of real property not specifically devised, where formerly the courts had the discretion of implying an intent to charge the realty. The statute provides:

If the personal property of a testator is insufficient for full payment of his general legacies so much of his real property not specifically devised as shall be necessary for payment of the balance shall be sold and the proceeds used for such payment unless the will shall contain an express direction to the contrary.<sup>1</sup>

This statutory provision represents a material alteration in the law of wills. The amendment becomes effective immediately but only applies to wills executed after August 31, 1947.

A will of a deceased person represents that person's intent. It is that individual's decision as to the disposition to be made of his property after his death. When a will is submitted to a court for interpretation or construction, the intent embodied therein must be followed by the court unless contrary to public policy or to an established rule of law.<sup>2</sup> It is the duty of the court to find and enforce this intent of the testator, whether expressed in the will or implied from the language used and the surrounding circumstances attending the execution.

The testamentary intent with which the statute under consideration deals, relates only to the general legacies of a will. A general legacy has been defined as a gift of personal property by a last will not amounting to a bequest of a particular thing or money, or of a particular fund separated from all other funds.<sup>3</sup> Where there is an express intent to charge a general legacy against the realty there is no problem. However, where there is no express intent to charge

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<sup>1</sup> Laws of N. Y. 1947, c. 521.

<sup>2</sup> *Matter of Buechner*, 226 N. Y. 440, 444, 123 N. E. 741, 742 (1919); *Robinson v. Martin*, 200 N. Y. 159, 164, 93 N. E. 488, 489 (1910).

<sup>3</sup> *Matter of Anslinger*, 185 Misc. 827, 57 N. Y. S. 2d 466 (Surr. Ct. 1945).