As seen in March 31, 2003 edition of the *New York Law Journal*

Updating Right of Election Statute: Testamentary Substitutes

By C. Raymond Radigan

In this column, I discuss testamentary substitutes and other new provisions that were enacted to modernize the Right of Election Statute.

Prior to Aug. 31,1930, a surviving spouse had no right to elect against a will. The wife had "dower rights" and the husband had "curtesy rights". Thereafter, as a result of the work of the Foley Commission, statutory provisions were made for surviving spouses to elect against a will.

However, a surviving spouse was not able to reach lifetime transfers, commonly now called testamentary substitutes. The only time a spouse could reach those assets under the right of election statute was if it could be demonstrated that the decedent transferred assets to avoid the right of election statutes and never intended a true transfer of the assets. These were commonly called "illusory" transfers. (See *Newman v. Dore*, 275 NY 371, 9 NE 2nd 966 (1937)). As an example, when a spouse transferred assets to a revocable living trust and he retained a right to income and principal and/or control over those assets, a spouse would be permitted to elect against such transfers.

However, those transfers and similar illusory transfers proved difficult to establish. As a result, the Temporary State Commission for Modernization, Revision and Simplification of the Laws of Estates, commonly called the Bennett Commission, reviewed this apparent obstacle and as a result of their submission, legislation was enacted, effective in 1966, providing for election against testamentary substitutes. Estate Powers and Trust Law 5-1.1 (b) expanded the election so that not only were the testamentary assets subject to the election, but also non-testamentary assets would be included in the calculation of the elective share. Those enumerated testamentary substitutes are gifts causa mortis, totten trusts, joint bank accounts, property held as joint tenants or tenants by the entirety and revocable trusts. Excluded were such items as pension proceeds, retirement benefits, US savings bonds and insurance. Within EPTL 5-1.1 and SCPA 1421, practice and procedure provisions were enacted to effectuate the calculation and determination of the right of election.

Advisory Committee

In 1990, the Legislature by joint resolution of the New York State Senate and Assembly created the Advisory Committee to the Legislature on EPTL and SCPA with a charge to review all of the provisions of EPTL and SCPA to and determine whether there should be revisions, modifications and simplifications of the Statute. One of the first tasks that the Committee undertook was to review the Right of Election Statute.

In my first report as chairman of the advisory committee, we recommended revisions concerning testamentary substitutes, as it was our belief that the Statute should be broadened to include certain assets and transactions which previously were not considered as testamentary substitutes.

The advisory committee found that despite substantial progress made by the 1966 legislation covering testamentary substitutes, the limitations set forth in the Statute caused certain lifetime arrangements to continue and thereby weakened the protection of the Statute and made it inequitable from the surviving spouse's standpoint. Primary among those arrangements were life insurance contracts, pension plans, U.S. Savings Bonds and transfers with retained life estates. None of those arrangements were considered testamentary substitutes under the 1966 legislation and were thus outside the reach of the statute. The advisory committee found that these opportunities led to inequities, regardless of whether the arrangements benefited the surviving spouse or were in favor of third parties. In the former case they were ignored in computing the spouse's elective share when they should not have been. In the latter case they were not within the reach of the surviving spouse when they should have been. The advisory committee found that these arrangements should be available in the calculation of determining the overall elective shares and be treated as testamentary substitutes.

Recommended Substitutes

Accordingly, the advisory committee recommended that there be an extension of testamentary substitutes. Specifically, they recommended that the following be included as testamentary substitutes:

a. Insurance policies on the life of the decedent wherein the decedent retained or transferred within one year of his death any incidents of ownership. An insurance policy with respect to which the decedent never possessed any incidents of ownership, including one purchased by an irrevocable trust of which the decedent was the grantor, would not have been included.

b. Pension and other qualified plans to some extent such as profit sharing, IRA's and deferred compensation plans.

c. U.S. government bonds payable on death to one other than the decedent or his estate.

d. Certain irrevocable inter-vivos trusts wherein the grantor/decedent retained an income interest in the trust, created after the marriage (this followed the Internal Revenue Code regarding federal estate tax inclusion

e. Certain revocable transfers, even predating the marriage, e.g., totten trusts, revocable trusts, one-half of the interest of joint property.

f. A general power of appointment exercisable during lifetime.

g. Certain inter vivos transfers made within one year of decedent's death to the extent that decedent did not receive full and adequate consideration in money or money's worth for such transfers.

The proposed new Right of Election Statute as outlined above and set forth in the first report of the advisory committee to the Legislature, was passed in the Assembly and the matter was then taken up by the Senate. By that time the insurance industry became tuned to the proposed new statute and how it would affect insurance and pension programs. Although they were invited to give any input to the advisory committee, we did not hear from them until we were advised by the majority leader in the Senate that our first report was in jeopardy because the insurance industry had made it known that they opposed the inclusion of insurance as a testamentary substitute and they had some questions regarding our recommendations concerning pension and retirement benefits. We met with them and, while they were willing to have some minor modifications dealing with pension and retirement benefits as testamentary substitutes, they were absolutely opposed to having insurance included as a testamentary substitute.

Insurance Issue

After lengthy discussions with them and in consultation with various groups that wished to expand testamentary substitutes, it was agreed by the advisory committee that since our entire first report's recommendations could be put in jeopardy, we agreed to delete insurance as a testamentary substitute. The Statute passed in the Senate as modified and was returned to the Assembly and a revised statute was passed and ultimately signed by the governor in 1992.

When the advisory committee reviewed the final revisions, we immediately saw that there was a

problem. Under the "old" statute EPTL 5-1.1(b)(2), insurance was specifically excluded as a testamentary substitute but under the EPTL 5-1.1(A) as recommended by the advisory committee it specifically included insurance. While this provision was deleted in the modified bill signed by the governor, the advisory committee's recommended EPTL 5-1.1-A(b)(1)(F), dealing with contractual arrangements, was enacted without change and there was no provision limiting the scope of that section so as to exclude insurance. Accordingly, a literal reading of the statute would include insurance as a testamentary substitute, since insurance is a contractual arrangement in trust or otherwise, which the decedent at the time of death had the power to dispose, revoke, consume or invade, as provided in EPTL 5-1.1A(b)(1)(F).

A review of this dilemma was addressed in a decision of mine (*In re Boyd*, 61 Misc2d 191, 613 NYS2d 330). Having participated in the deliberation leading up to the modification of testamentary substitutes, I was fully aware that the intent of the Legislature was to exclude insurance as a testamentary substitute. The bill jacket to the legislation clearly supports that conclusion. In the debate concerning the revision, a question was asked of the chairman of the judiciary committee in the Senate if insurance was excluded and he clearly indicated that it was. In correspondence to the governor in support of the revised bill, the chairman of the judiciary committee in the Assembly clearly indicated that insurance would be excluded.

In the *Boyd* decision, while I found that insurance was to be excluded as a testamentary substitute, I noted the various reasons for the opposition to such inclusion. Some thought that any inclusion should have only perspective application. Others were very concerned about protecting life insurance trusts for policies specifically created to finance a child's education. Other advocated that, in order to protect family interests, perhaps insurance should be included as a testamentary substitute only if the beneficiary were a nonfamily member. Some advocates for surviving spouse's rights felt that the right of election should not be deluded by including as a testamentary substitute life insurance where the spouse is the beneficiary.

The advisory committee also had heard from many groups that insurance being exempt as a testamentary substitute provides a means of avoiding the statute by placing all assets in insurance programs that would be beyond the reach of a surviving spouse. The new statute has been in place since 1992. The advisory committee periodically has reviewed whether the matter should be revisited, but other pressing matters dealing with statutory provisions concerning inter vivos trusts, the prudent investor rule and the principal and income act have consumed a great deal of our time and we have not yet addressed the issue, especially since presently we do not have any empirical data which would demonstrate that insurance is purposely being used to avoid our Right of Election Statute.

The committee found that the elective share statute was among the most complicated in the law of trusts and estates and challenged even those practitioners with a great deal of estate experience. The committee's recommendations, while largely retaining the language and general intention of the existing statute, sought to create a more useable and understandable statute for both the bench and bar. For instance, the explicit pecuniary nature of the proposed elective share was thought to ease administration. The modernizing of the list of testamentary substitutes coupled with the elimination of the income-only trust in satisfaction of the elective share was thought to provide a more equitable result for both the decedent's issue and the surviving spouse.

Upcoming

In my next column, I will cover additional revisions dealing with the Right of Election Statute as it applies to enforcing the surviving spouse's right of election.

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C. Raymond Radigan is former surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek's Trusts and Estates Department. He also is chairman of the advisory committee to the Legislature on estates powers and trust law and the Surrogate's Court Procedure Act.