EPTL § 3-4.3: Separation Agreement Containing General Release of Rights Held Insufficient to Revoke Specific Will Bequests to Spouse

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rights which the fourteenth amendment has been held to afford.\textsuperscript{60} Emilia M. Naccarato

\textbf{ESTATES, POWERS AND TRUSTS LAWS}

\textit{EPTL § 3-4.3: Separation agreement containing general release of rights held insufficient to revoke specific will bequests to spouse}

\textit{EPTL § 3-4.3 provides that any conveyance, settlement, or other}

\textsuperscript{60} The principle establishing a liberty interest of familial integrity evolved from the fourteenth amendment due process clause of the United States Constitution. In the seminal case of Meyer v. Nebraska, 262 U.S. 390 (1923), the Supreme Court held unconstitutional a state law prohibiting the teaching of a foreign language to a child not yet in the eighth grade because it deprived parents of their due process liberty to "establish a home and bring up children." \textit{Id.} at 399. Similarly, in Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Supreme Court noted that parents have the right to direct their children's education free from unreasonable state interference. \textit{Id.} at 518-19. Recently, the Court in Wisconsin v. Yoder, 406 U.S. 205 (1972), upon upholding the right of Amish parents to instill their own religious beliefs in their children, held that such parents were not required to comply with compulsory education laws. \textit{Id.} at 213-14. This analysis has been extended to the right of a parent to custody where the family unit is of paramount concern. See Stanley v. Illinois, 405 U.S. 645, 651, 658 (1972). Similarly, the New York Court of Appeals has viewed the family as protected by the due process liberty interest and has upheld parent's rights to raise their families. See Roe v. Doe, 29 N.Y.2d 188, 193, 272 N.E.2d 567, 570, 324 N.Y.S.2d 71, 75 (1971); People ex rel. Kropp v. Shopsky, 305 N.Y. 465, 468, 113 N.E.2d 801, 803 (1953); People ex rel. Portnoy v. Strasser, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952); People ex rel. Sisson v. Sisson, 271 N.Y. 285, 287, 2 N.E.2d 660, 661 (1936) (per curiam).

Additionally, the Supreme Court has articulated a fundamental right to privacy implicit in the due process liberty clause. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (right of privacy includes a married couple's use of contraception). Subsequently, the basis for many family protection decisions was the fundamental right of privacy. This right, however, was extended only to situations directly affecting the marital relationship. In Paul v. Davis, 424 U.S. 693, 713 (1976), the Supreme Court noted that the constitution protects individuals in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." \textit{Id.}; e.g., Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (constitution protects sanctity of the family); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (woman has a right to determine whether to bear a child); Roe v. Wade, 410 U.S. 113, 153 (1973) (woman has a right to decide whether to terminate her pregnancy); Loving v. Virginia, 388 U.S. 1, 12 (1967) (constitution guarantees the right to marry); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (fundamental right to marry and procreate). See \textit{generally} Richards, \textit{The Individual, the Family, and the Constitution: A Jurisprudential Perspective}, 55 N.Y.U. L. Rev. 1, 31-62 (1980). Notwithstanding the fundamental right of privacy, the Court in Zablocki v. Redhail, 434 U.S. 374 (1978), stated that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." \textit{Id.} at 386. This holding recognizes that domestic relations is "an area that has long been regarded as a virtually exclusive province of the States." Sosna v. Iowa, 419 U.S. 393, 404 (1975).
act of a testator which is "wholly inconsistent" with a previous testamentary disposition acts as a revocation of the prior disposition.\(^6\) Although it is well-settled that a separation agreement does not, in and of itself, revoke testamentary dispositions in a prior will,\(^6\) it has been unclear whether a clause within such an agree-

\(^6\) EPTL § 3-4.3 provides:

A conveyance, settlement or other act of a testator by which an estate in his property, previously disposed of by will, is altered but not wholly divested does not revoke such disposition, but the estate in the property that remains in the testator passes to the beneficiaries pursuant to the disposition. However, any such conveyance, settlement or other act of the testator which is wholly inconsistent with such previous testamentary disposition revokes it.

EPTL § 3-4.3 (1981). EPTL § 3-4-3 is a reenactment of sections 39 and 40 of the Decedent Estate Law which were originally enacted as part of the Revised Statutes of 1829. 9 ROHAN, N.Y. CIVIL PRACTICE ¶ 3-4.3(1), at 3-210.3 n.2.7 (1981). In creating EPTL § 3-4.3, the revisors omitted the portion of section 39 of the Decedent Estate Law which stipulated that a transaction which merely alters the testator's interest shall not be deemed a revocation of the devise or bequest of such property "unless in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise or bequest." DECEDE NT ESTATE LAW § 39 (McKinney 1949) (repealed 1967). This stipulation is inconsistent with EPTL § 3-4.1, which requires that a revocatory instrument be executed with the same formalities as set forth in EPTL § 3-2.1 for the execution of wills. See 9 ROHAN, N.Y. CIVIL PRACTICE ¶ 3-4.3(1), at 3-210.3 (1981). See generally EPTL §§ 3-2.1, 3-4.1 (1981). EPTL § 3-4.3 does carry over from section 40 of the Decedent Estate Law "the principle that a conveyance, settlement, or other act of the testator which is 'wholly inconsistent' with a previous testamentary disposition revokes it." 9 ROHAN, N.Y. CIVIL PRACTICE ¶ 3-4.3(1), at 3-210.3 (1981); In re Estate of Maruccia, 78 App. Div. 2d 321, 321-22, 434 N.Y.S.2d 678, 678 (1st Dep't), aff'd, 54 N.Y.2d 196, 429 N.E.2d 751, 445 N.Y.S.2d 73 (1981); In re Estate of Fisher, 109 Misc. 2d 563, 565, 440 N.Y.S.2d 519, 520 (Sur. Ct. Broome County 1981); Estate of Reckseit, N.Y.L.J., May 24, 1979, at 13, cols. 4-5 (Sur. Ct. Nassau County).

The Revised Statutes of 1829 were passed to overcome the common law rule which required that the interest which the testator had in the subject of the devise when he made his will should remain unchanged until his death. See 9 ROHAN, N.Y. CIVIL PRACTICE ¶ 3-4.3(1), at 3-210.1 (1981) (citing Beck v. McGillis, 9 Barb. 35, 53 (1850)). Even a minor alteration in the relationship between the testator and the subject matter of the prior specific bequest or devise constituted an automatic revocation of such bequest or devise by implication. Id. Occasionally, this common-law rule defeated the intentions of testators. See, e.g., Beck v. McGillis, 9 Barb. 35, 53 (1850).

\(^6\) See In re Hollister, 18 N.Y.2d 281, 286, 221 N.E.2d 376, 378, 274 N.Y.S.2d 585, 588 (1966); In re Estate of Crounse, 165 Misc. 359, 361, 6 N.Y.S.2d 32, 35 (Sur. Ct. Albany County 1938); Hoffman, Revocation of Wills and Related Subjects, 32 BROOKLYN L. REV. 1, 15 (1965). A divorce, annulment, or declaration of nullity or dissolution of marriage, however, automatically revokes any disposition or appointment of property made by a prior will. EPTL § 5-1.4 (1981). EPTL § 5-1.4 creates a conclusive presumption, absent an express provision to the contrary, that the parties intended that the will be revoked. See 9 ROHAN, N.Y. CIVIL PRACTICE ¶ 5-1.4(1), at 5-244 (1981). EPTL § 5-1.4 reversed the previously settled law of New York that a divorce or an annulment did not expressly or impliedly revoke a prior will. See, e.g., In re Hollister, 18 N.Y.2d 281, 287, 221 N.E.2d 376, 378, 274 N.Y.S.2d 585, 589 (1966) (divorce); In re Will of De Nardo, 268 App. Div. 865, 865-66, 50 N.Y.S.2d
ment which serves as a general release of a spouse’s rights against
the other’s estate will revoke the other spouse’s prior be-
quests. Recently, in In re Estate of Maruccia, the Court of Ap-
peals held that a general release is not sufficient to revoke prior
will bequests and that, instead, the agreement must either contain
a provision whereby the spouse explicitly renounces any testamen-
tary disposition in his or her favor made prior to the date of the

561, 561 (2nd Dep’t 1944) (annulments); In re Sussdorf, 182 Misc. 69, 70, 43 N.Y.S.2d 760, 761 (Sur. Ct. Queens County 1943) (divorce). Prior to EPTL § 5-1.4, New York case law
provided for no revocation in cases of divorce because the courts took the position that the
then existing statutory provisions for revocation were exclusive. 182 Misc. at 71, 43 N.Y.S.2d
at 762 (“the common law doctrine of implied revocation of wills by reason of subsequent
changes in the condition or circumstances of a testator does not prevail in this State.” (cita-
tions omitted)). For a discussion of a revocation of wills by operation of law, see Hoffman,

Compare In re Estate of Coffed, 46 N.Y.2d 514, 520, 387 N.E.2d 1209, 1211, 414
N.Y.2d 893, 895 (1979) with In re Hollister, 18 N.Y.2d 281, 286, 221 N.E.2d 376, 378, 274
N.Y.S.2d 585, 588 (1968). In Hollister, the separation agreement provided that the husband
released “any and all right, title and interest in and to the property or estate of the Wife
(whether now owned or hereafter acquired), her executors and administrators, heirs at law
and next of kin, which the husband now has or may have including any right to take against
her will under section 18 of the Decedent Estate Law.” 18 N.Y.2d at 286, 221 N.E.2d at 378,
274 N.Y.S.2d at 588. The Court of Appeals ruled that this language was wholly inconsistent
with the survival of testamentary gifts to the husband. Id. The concurrence stated, however,
that “[t]he question of what language in a separation agreement shall have the effect of a
revocation of a prior testamentary disposition . . . does not appear to have been decided by
this court.” Id. at 287, 221 N.E.2d at 379, 274 N.Y.S.2d at 589 (Keating, J., concurring). In
Coffed, the issue was whether a reciprocal will may be revoked by a general release which
discharges the testator’s contractual obligation to execute such a will. 46 N.Y.2d at 517, 387
N.E.2d at 1209, 414 N.Y.S.2d at 894. The appellant argued that the will should be impliedly
revoked in accordance with Hollister. Id. at 519, 387 N.E.2d at 1211, 414 N.Y.S.2d at 895.
The Court of Appeals, however, distinguished Hollister on its facts and noted that the via-
bility of the Hollister decision “may be in doubt.” Id. at 520, 387 N.E.2d at 1211, 414
N.Y.S.2d at 895. Subsequent to the Coffed decision, the Nassau County Surrogate followed
the Hollister rule, declaring a separation agreement “wholly inconsistent” with the terms of
a prior will. Estate of Reckseit, N.Y.L.J., May 24, 1979, at 13, cols. 4-5 (Sur. Ct. Nassau
County). In Reckseit, Surrogate Bennett held that a separation agreement, in which the
parties released all right to elect and inherit in intestacy, effected a revocation within EPTL
§ 3-4.3. Id. The separation agreement provided that each party waived, released, and relinquished

all rights of election against the will of the other party, and all rights to act as
administrator of the other party’s estate; provided that nothing herein shall pre-
clude either party from making voluntary provision for the other party by his or
her Last Will and Testament.

Id. at col. 4-5 (emphasis supplied by court). From this language, Surrogate Bennett found
that “[i]t was evident that . . . [in the] instant case both the parties intended to waive any
and all rights not only in intestacy but also under the terms of each others will.” Id. at col.

N.Y.S.2d 678 (1st Dep’t).
separation agreement or employ language which “clearly and unequivocally manifests an intent” to revoke prior testamentary dispositions.65

In Maruccia, the decedent had executed a will in 1966 which contained several specific bequests to his then second wife.66 In 1976, the decedent and his wife executed a separation agreement which included a general release waiving any right of either spouse to the property or estate of the other.67 The decedent thereafter died without either obtaining a divorce or rewriting his will, and a dispute arose as to whether the general release abrogated his bequest to his second wife.68 Surrogate Midonick, relying primarily upon the Court of Appeal’s decision in In re Hollister,69 determined that the general release was wholly inconsistent with the prior will bequests in favor of the decedent’s wife and, therefore, concluded that the bequests had been revoked.70 The Appellate Division, First Department, reversed, holding that the provisions of the separation agreement merely released statutory rights and were not “wholly inconsistent” with the voluntary bequests of the

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65 54 N.Y.2d at 205, 429 N.E.2d at 754, 445 N.Y.S.2d at 76.
66 Id. at 200, 429 N.E.2d at 751-52, 445 N.Y.S.2d at 73-74.
67 54 N.Y.2d at 200, 429 N.E.2d at 752, 445 N.Y.S.2d at 74. The separation agreement provided that the husband would make certain payments to his second wife through 1981, assign to her his 200 shares of common stock in the First National Bank of Florida, and acknowledge that a mortgage on certain New York realty belonged solely to the second wife. Id. His second wife was required to transfer to the husband certain stock in his real estate corporation, execute a quitclaim deed in decedent’s favor covering certain Florida realty, and assign to decedent her interest in their joint bank account and certificate of deposit. Id. The release clause which appeared in article twelve of the agreement provided:

TWELFTH: Except as hereinbefore stated, each party hereto releases and relinquishes to the other party all claims or rights which may now exist or hereafter arise by reason of the marriage between the parties with respect to any property, whether real or personal, belonging to such other party and, without limiting the foregoing, each party hereby waives and releases to the other party all right to share in any of the property or estate of such other party which has arisen or may hereafter arise by operation of the law or otherwise, and hereby specifically waives and releases all right of dower or curtesy, or rights in lieu thereof, and all rights to share in the estate of the other party under the intestacy laws of any jurisdiction and all right of election to take against (a) any Last Will and Testament of such other party whether executed prior or subsequent to the execution hereof or (b) any testamentary substitute or inter vivos transfer made by the other party and all right to administer the estate of such other party.

54 N.Y.2d at 200-01, 429 N.E.2d at 752, 445 N.Y.S.2d at 74.
68 Id. at 201, 429 N.E.2d at 752, 445 N.Y.S.2d at 74.
testator.\textsuperscript{71}

On appeal, the Court of Appeals affirmed.\textsuperscript{72} Writing for a unanimous Court, Judge Jasen stated that in order for a separation agreement to have a revocatory effect on prior testamentary dispositions, it must contain either explicit language renouncing the bequest or language which "clearly and unequivocally" reveals an intent to prevent the spouse from benefiting under the will.\textsuperscript{73} The Court maintained that ambiguous phrases in a separation agreement which merely purport to waive all rights in an estate are insufficient to indicate that a revocation of specific bequests was intended.\textsuperscript{74} Indeed, Judge Jasen noted that the legislature had advocated both a narrow construction of waiver clauses and an adherence to the strict statutory requirements for validating and amending wills.\textsuperscript{75} The Court concluded that to the extent the \textit{Hollister} decision found a general release to be "wholly inconsistent" with prior specific bequests, it should be overruled.\textsuperscript{76}

\textsuperscript{71} In \textit{re} Estate of Maruccia, 78 App. Div. 2d 321, 323, 434 N.Y.S.2d 678, 679 (1st Dep't 1981).
\textsuperscript{73} Id. at 205, 429 N.E.2d at 754, 445 N.Y.S.2d at 76. The \textit{Maruccia} Court emphasized that the term "wholly inconsistent" as used in EPTL § 3-4.3 supported a strict approach to implied revocations. 54 N.Y.2d at 205, 429 N.E.2d at 754, 445 N.Y.S.2d at 76.
\textsuperscript{74} Id. at 205-06, 429 N.E.2d at 755, 445 N.Y.S.2d at 77.
\textsuperscript{75} Id. at 204-05, 429 N.E.2d at 754, 445 N.Y.S.2d at 76. Judge Jasen noted a concern of the legislature that the judiciary should avoid decisions which weaken statutory requirements as to the revocation of testamentary dispositions. Rep. No. 8.2.5A, 5TH REP., N.Y. COMMISSION ON ESTATES 435-36 (1966) [hereinafter cited as \textit{THE REPORT}]. The Court also noted that the legislature disfavored the revocation of a testamentary disposition when the decedent had ample opportunity during his lifetime to revoke or amend the instrument. 54 N.Y.2d at 204-05, 429 N.E.2d at 754, 445 N.Y.S.2d at 76.

Finally, the \textit{Maruccia} Court commented upon the disparity among lower court decisions which had construed virtually identical waiver clause provisions. Id. at 203, 429 N.E.2d at 753, 445 N.Y.S.2d at 75. Compare \textit{In re Estate of Nelson}, 51 Misc. 2d 375, 376, 273 N.Y.S.2d 333, 334 (Sur. Ct. Erie County 1968) with \textit{In re Will of Shack}, 207 Misc. 953, 954, 140 N.Y.S.2d 744, 745, aff'd on reargument, 207 Misc. 953, 143 N.Y.S.2d 54 (Sur. Ct. Kings County 1955). In \textit{Nelson}, the separation agreement contained language which stated that "[e]ach of the parties does hereby stipulate and agree that this agreement shall constitute a waiver under Section 18 of the Decedent's Estate Law . . . of any right of election to take against any Last Will and Testament of the other party, whether heretofore or hereafter executed, and each party releases any and all interest and claim in the estate of the other party." 51 Misc. 2d at 376, 273 N.Y.S.2d at 334. The court held this was a waiver of testamentary rights, but not a waiver of testamentary gifts. Id., 273 N.Y.S.2d at 335. In contrast, the \textit{Shack} court found that language which "waived any and all right to the estate of the other" and further released and waived "all right to inherit under any will of the other" was wholly inconsistent with a prior will. 207 Misc. at 954, 140 N.Y.S.2d at 745.

\textsuperscript{76} 54 N.Y.2d at 205, 429 N.E.2d at 754-55, 445 N.Y.S.2d at 76-77. The \textit{Maruccia} Court stated that the language of article twelve of the separation agreement, see note 67 supra,
It is submitted that the *Maruccia* Court’s holding that a general release in a separation agreement is insufficient to revoke a prior will bequest is founded upon a mistaken interpretation of discordant legislative objectives. Concededly, the meticulous drafting of agreements and the timely redrafting of wills are two important legislative concerns and, as such, should be accommodated. Nevertheless, the legislature also has recognized that individuals often are not as expeditious as they should be in updating their wills and, mindful of the significant change in circumstances wrought by divorce, has provided for automatic revocation of bequests upon divorce. It is suggested that the latter, not the for-

indicated that the parties deliberately had avoided any reference to the voluntary bequests in the will. 54 N.Y.2d at 205, 429 N.E.2d at 755, 445 N.Y.S.2d at 77. The Court also suggested that sound legal practice would dictate that when a party was legally separated, his will should be amended to reflect his changed intentions. Id. at 206, 429 N.E.2d at 755, 445 N.Y.S.2d at 77 (citing EPTL § 3-4.1, commentary at 526 (1981)).

Notably, in the course of espousing a strict standard for the revocation of prior testamentary dispositions, the *Maruccia* decision reaffirmed that a conveyance or other act of a testator which is wholly inconsistent with a prior disposition in a will revokes it. 54 N.Y.2d at 203, 429 N.E.2d at 753, 445 N.Y.S.2d at 75. Thus, the Court of Appeals has withdrawn its formerly undecided stand on this issue. See *In re Estate of Coffed*, 46 N.Y.2d 514, 520, 387 N.E.2d 1209, 1211, 414 N.Y.S.2d 893, 895 (1979). Nevertheless, *Maruccia* marks a departure from previous case law which attempted to discern the intentions of the parties through an analysis of the language of the separation agreement and the surrounding circumstances. See, e.g., *In re Will of Shack*, 207 Misc. 953, 956, 143 N.Y.S.2d 54, 56 (Sur. Ct. Kings County 1955); *In re Will of Cote*, 195 Misc. 410, 416, 87 N.Y.S.2d 555, 560 (Sur. Ct. Broome County 1949); *In re Estate of Gilmour*, 146 Misc. 113, 115, 260 N.Y.S. 761, 762 (Sur. Ct. St. Lawrence County 1932). In *Shack*, the court allowed a separation agreement, which mutually waived any and all right to the estate of the other and further released and waived all right to inherit under any will of the other, to revoke a prior will, stating that “the construction of such a contract is for the court.” A fundamental rule in the construction thereof is the ascertainment of the intent of the parties. 207 Misc. at 956, 143 N.Y.S.2d at 56. In *Cote*, the court, refusing to revoke a prior will where the separation agreement waived statutory rights, stated that “[i]n order to reach the conclusion that . . . provisions of the separation agreement are ‘wholly inconsistent’ with the provisions of the will, we are required to determine the sufficiently expressed intent derivable from an examination of the separation agreement in all its aspects and, also, in the light of circumstances surrounding its execution.” 195 Misc. at 416, 87 N.Y.S.2d at 560. In *Gilmour*, the court stated that “[i]n interpreting and construing written instruments, recognition is given not only to the letter, but to the spirit of the instrument; that is, what did the parties really intend.” 146 Misc. at 115, 260 N.Y.S. at 762.


*EPTL* § 5-1.4 (1981); see note 63 supra. *EPTL* § 5-1.4 was adopted in recognition of the strong presumption that, in the case of a divorce or annulment, the testator no longer wished previous testamentary dispositions to the other spouse to be effective. See 9 P. ROHAN, N.Y. CIVIL PRACTICE § 5-1.4[1], at 5-244 (1981) (quoting *The Report*, supra note 75, at 464). Indeed, before the adoption of *EPTL* § 5-1.4, divorce was a major factor in finding that the testator had intended to revoke his prior will at the time of entering the separation
mer, legislative policy should control the status of testamentary dispositions insofar as divorce and separation are concerned.

Another persuasive factor militating against the Maruccia Court's decision is the increasing use of separation agreements as predicates for divorce.79 Surely, an agreement to revoke prior testamentary dispositions properly may be inferred when parties, who have entered into an agreement for the sole purpose of obtaining a divorce, have, as an additional measure, provided for the disposition of property and a general release of rights. Given the contrary position of the Maruccia Court, however, it is hoped that the legislature will act to sanction the revocatory effect of such general releases.80

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79 The Domestic Relations Law provides that an action for a divorce may be maintained by a husband or wife when "[t]he husband and wife have lived separate and apart pursuant to a written agreement of separation . . . for a period of one or more years after the execution of the agreement." DRL § 170(6) (1977). Such an agreement often is used as a ground for divorce when the parties mutually consent to end the marriage, since the mere execution of the agreement is implied consent to a divorce by either a year later. See Foster & Freed, Divorce in the Fifty States, 13 Fam. L.Q. 105, 113 (1978).

80 One commentator has suggested that EPTL § 5-1.4 be revised to provide that a separation agreement accomplish the same results that divorce, dissolution, or annulment of the marriage now accomplishes, namely, automatic revocation. Midonick, Multiple Spouse
INSURANCE LAW

Ins. Law § 673(2): No-fault insurer’s action for recovery of first-party benefits deemed an independent action which accrues 2 years after injury if insured has failed to bring suit

When an insurer has paid benefits to its insured as compensation for an injury sustained by the insured, the common-law right of subrogation generally permits the insurer to bring suit against the third party whose conduct caused the injury. The insurer as subrogee “steps into the shoes” of its insured, succeeding to all the rights and privileges which the insured possessed. Conversely,

Problems Surface to Determination in Surrogate Court Issues, N.Y.L.J., Oct. 19, 1981, at 19, col. 1, 27, col. 2. “The recent addition as a ground for divorce of the mere existence of a valid written separation agreement after the agreement has endured for one year, should lead to a strong or conclusive presumption, absent express contrary intention in the separation agreement or will, that the soon-to-be former spouse be cut off from all participation in the estate.” Id. Nevertheless, it is submitted that a presumption should be entertained only when the separation agreement contains a general release and is filed with the intention of obtaining a later divorce.

The doctrine of subrogation in insurance arises from “general principles of equity.” G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 1997, at 6590 (1931). It may be defined broadly as the substitution of one who has paid another’s debt into the place of the creditor. Id. § 1996, at 6587. The insurer, upon payment of an insured’s loss, is subrogated to the insured’s cause of action against anyone responsible for the loss. Hamilton Fire Ins. Co. v. Greger, 246 N.Y. 162, 164, 158 N.E. 60, 61 (1927); see 6A J.A. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4051 (1972). Almost all standard form insurance policies provide for the insurer’s right to subrogation despite the fact that the right attaches without any formal stipulation. See Am. Jur. INSURANCE § 1335 (1940); G. COUCH, supra, § 1996, at 6588. Moreover, it is generally accepted that the right to subrogation does not inure to the insurer until it has paid a claim under a policy. J.A. APPLEMAN & J. APPLEMAN, supra, § 4051, at 112; see, e.g., Safeguard Ins. Co. v. Rosen, 39 App. Div. 2d 851, 851, 332 N.Y.S.2d 963, 964 (1st Dep’t 1972) (per curiam), aff’d, 31 N.Y.2d 1054, 295 N.E.2d 189, 342 N.Y.S.2d 378 (1973); Krause v. American Guar. & Liab. Ins. Co., 27 App. Div. 2d 353, 355, 279 N.Y.S.2d 235, 237 (1st Dep’t 1967), aff’d, 22 N.Y.2d 147, 239 N.E.2d 175, 292 N.Y.S.2d 67 (1968). In order to be subrogated, however, the insurer must not be acting as a volunteer and must be secondarily liable when it pays the claim of its insured. 11 J.A. APPLEMAN & J. APPLEMAN, supra, § 6501.