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Article 30

Waiver of Citation and Consent to probate: Pre-Probate Decree Withdrawal Permitted Where Status Quo Remained Unchanged

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distinction finds statutory support in Penal Law 215:55, wherein punishment for a criminal contempt adjudicated under 750(A)(3) of the Judiciary Law is declared not to preclude criminal prosecution for the same conduct.

While the continued erosion of the simple common-law maxim, *nemo debet bis puniri pro uno delicto*,[239] may properly be the subject of criticism,[240] it appears to be sound policy, for purposes of double jeopardy, to distinguish between the commission of a single crime and the type of conduct involved in *Colombo*. The mildness of the judicial contempt sanction in New York makes the instant decision all the more palatable.

SURROGATE PRACTICE

Waiver of citation and consent to probate: Pre-probate decree withdrawal permitted where status quo remained unchanged.

Section 401(4) of the Surrogate's Court Procedure Act[241] provides that in any proceeding within the subject matter jurisdiction of the Surrogate's Court, the filing of a waiver of issuance and service of process shall constitute a notice of appearance.[242] Although this same act makes no provision for the filing of a consent to probate (an act which is wholly unnecessary so long as there is a valid waiver of citation),[243] that consent is normally embodied in the original waiver of process.[244]

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239 "No man ought to be punished twice for one offense." BLACK'S LAW DICTIONARY 1189 (4th ed. 1951).

240 *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121, 150 (1958) (Black, J., dissenting); Abbate v. United States, 359 U.S. 187, 201 (1958) (Black J., dissenting). *See generally* Note, *Double Jeopardy: A Vanishing Constitutional Right*, 14 How. L. J. 360 (1968); Note, *Constitutional Law — Double Jeopardy*, 13 N.Y.L.F. 133 (1967).

241 N.Y. SURR. CT. PROC. ACT § 401(4) (McKinney 1967) [hereinafter SCPA]:

> Appearance by waiver of process. Any adult competent party may also appear by an acknowledged waiver of issuance and service of process. . . . In a probate proceeding the waiver shall state the date of the will to which it relates.

242 It is in that reference that the document serves to confer in personam jurisdiction on the court, as the maker "appears" in the Surrogate's Court and "waives" the issuing and service of a citation. SCPA § 203 states that "[p]ersonal jurisdiction of parties is obtained by service of process upon the parties or by submission to the jurisdiction of the court *by waiver of issuance and service of process* . . . ." (Emphasis added). It should be noted that SCPA § 1403 sets out those persons upon whom process is to be served in a proceeding for the probate of a will where no waiver has been executed. It is of further significance that a majority of all probate proceedings are dealt with by waiver of citation, and that less than one percent of all will contests are ever successful. *In re* Frutiger, 29 N.Y.2d 143, 155, 272 N.E.2d 543, 549, 324 N.Y.S.2d 36, 45 (1971) (Burke, J., dissenting).

243 "For a valid probate the portion relating to consent is unnecessary. When a citation is issued and no objections are filed, there are no consents by the person so cited." *In re* Frutiger 62 Misc. 2d 169, 167, 308 N.Y.S.2d 692, 697 (Sur. Ct. Broome County), *rev'd*, 35 App. Div. 2d 755, 314 N.Y.S.2d 949 (3d Dep't 1970), *rev'd* 29 N.Y.2d 143, 272 N.E.2d 543, 324 N.Y.S.2d 36 (1971).

244 *See, e.g.*, 25 CARMODY-WAIT 2d § 149:183, at 170-71 (1968).

> Where a person of legal age and sound mind properly executes a waiver of consent [irrespective of a consent to probate], he cannot withdraw unless he establishes the essential facts showing grounds for such withdrawal. To a very large extent, the rules are the same as those that apply where a person seeks to avoid the effect of any contract in writing.[245]

However, it must be stressed that in treating waivers of citation as coming within the purview of contract law (and thus requiring a showing of fraud, coercion, misrepresentation or some other ground necessary to void the waiver), such has been held to apply solely in matters arising post-decree. With this, the majority in *Matter of Frutiger*[246] had no complaint. Indeed, in dicta, the *Frutiger* majority cited with approval numerous decisions which permitted post decree withdrawals.[247]

In *Matter of Teller*,[248]—a case cited by the Court of Appeals—the Appellate Division, Fourth Department, held that where a petitioner seeks to open a final decree, fraud must be alleged. Furthermore, in *Matter of Westberg*,[249] the appellate division held that in order to open a final decree admitting a will to probate, the plaintiff must be able to show fraud, coercion, misrepresentation or some other ground which will vitiate the waiver. Clearly, the law relating to the opening of a final decree admitting a will to probate is contractual,[250] and to that law the

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245 1A WARREN'S HEATON, SURROGATE'S COURTS § 73 ¶ 4A (6th ed. 1970).

246 29 N.Y.2d at 149, 272 N.E.2d at 545, 324 N.Y.S.2d at 39.

247 The following cases and authorities were among those cited by the New York Court of Appeals in its discussion of the point in issue: *In re* Hawley, 6 App. Div. 2d 594, 180 N.Y.S.2d 168 (3d Dep't 1958); *In re* Baldwin, 3 App. Div. 2d 635, 158 N.Y.S.2d 39 (3d Dep't 1956); *In re* Pearson, 19 Misc. 2d 833, 185 N.Y.S.2d 971 (Sur. Ct. Westchester County 1959); *In re* White, 16 Misc. 2d 22, 187 N.Y.S.2d 833 (Sur. Ct. Cattaraugus County 1959); *In re* Hinderson, 4 Misc. 2d 559, 150 N.Y.S.2d 869 (Sur. Ct. Westchester County), *aff'd*, 2 App. Div. 2d 682, 153 N.Y.S.2d 584 (2d Dep't 1956). *See generally* 25 CARMODY-WAIT 2d § 149:184, at 172 (1968); 1A WARREN'S HEATON, SURROGATE'S COURTS § 73, ¶ 4A (5th ed. 1970).

248 *In re* Teller, 277 App.. Div. 937, 98 N.Y.S.2d 875 (4th Dep't 1950).

249 *In re* Westberg, 254 App. Div. 320, 5 N.Y.S.2d 31 (1st Dep't) *appeal dismissed*, 279 N.Y. 316, 18 N.E.2d 291 (1938), *motion for reargument denied*, 283 N.Y. 589, 27 N.E.2d 444 (1940).

250 The law is clear as to this, with the exception of *In re* Sturges, 24 Misc. 2d 14, 202 N.Y.S.2d 737 (Sur. Ct. Nassau County 1960). However, in *Sturges*, a petition for a pre-decree withdrawal was denied by the surrogate, who relied solely upon previous authority wherein application to withdraw the waivers was made post-decree. The New York Court of Appeals agreed, in *Frutiger*, that an application post-decree warrants a test of fraud, coercion or misrepresentation.

A contract may be released, discharged, terminated or rescinded for numerous reasons. Of pertinence to the case at issue are those releases, both express and implied, due to fraud, duress, mistake, and mutual agreement. *See, e.g.*, Rodgers v. Rodgers, 235 N.Y. 408, 139 N.E. 557, *modified on reargument on other grounds*, 236 N.Y. 577, 142 N.E. 290 (1923); Levine v. Levy, 285 App. Div. 848, 136 N.Y.S.2d 695 (4th Dep't 1955); *In re* McGlone's Will, 258 App. Div. 597, 17 N.Y.S.2d 539 (1940); Stowell Motor Car Co. v. Hull, 117 Misc. 789, 191 N.Y.S. 570 (Sup. Ct. Broome County 1921). As the law relating to the with-

New York Court of Appeals makes no exception. For, *Matter of Frutiger*[251] is a case in which no final decree had been rendered.

Ernest and Willard Frutiger, decedent's brothers and only distributees, met immediately following decedent's internment on June 24, 1965, at the office of the trust company named as executor to the estate. The Frutiger brothers, at the request of the trust company's attorney and without explanation as to the nature and effect of the waivers and consents to be signed,[252] signed the documents, which in fact read that the signatory

> appears in the Surrogate's Court of Broome County, N.Y., and waives the issuing and service of a citation in this matter, and hereby consents that the Last Will and Testament of such decedent bearing the date of . . . be admitted to probate by the Surrogate of Broome County, N.Y., without further notice to the undersigned.[253]

It should be noted that upon completion of the meeting between the brothers and the trust company, both Ernest and Willard Frutiger retained separate counsel, and that neither brother mentioned to counsel, for a period of almost forty-five months—the time between the signing and filing of the waivers and consents—that they had signed any of the documents in issue. Nor did counsel for the trust company during this time mention the signing of those documents to counsel for the Frutigers; even though it was well known from the first meeting between the parties that the Frutigers were planning to contest the will.[254] The probate petition was filed on March 4, 1968, and a citation

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drawal of waivers of citation post-decree is no more than standard contract law, the only problems presented in the determination thereof are questions of fact and applicability.

251 29 N.Y.2d 143, 272 N.E.2d 543, 324 N.Y.S.2d 36.

252 It is to be noted here, however, that the law means for that omission to be of no consequence. "Ordinarily, the signer of a deed or other instrument, expressive of a jural act, is conclusively bound thereby. That his mind never gave assent to the terms expressed is not material." Pimpinello v. Swift & Co., 253 N.Y. 159, 162, 170 N.E. 530, 531 (1930). In *Pimpinello*, plaintiff being unable to read, on the advice of his attorney signed papers which he believed were an acknowledgement of defendant's payment in satisfaction of a personal injury claim. As a matter of fact, plaintiff signed a general release. Although the court held the general release to be invalid, the general rule, as previously stated, was nonetheless looked upon with complete favor. Furthermore, it was held in *In re* Anderson, 22 Misc. 2d 662, 663, 198 N.Y.S.2d 779, 781 (Sur. Ct. Suffolk County 1960), that

> [t]here was no obligation on the part of proponents or their attorney to advise the objectant of the nature and effect of such waiver [Referring to a waiver of citation]. He is chargeable with knowledge of the contents and the legal effects of such waiver whether or not he availed himself of the advice of counsel at the time of the execution thereof.

253 29 N.Y.2d at 146, 272 N.E.2d at 544, 324 N.Y.S.2d at 37.

254 The surrogate viewed this as an implied agreement to withdraw and cancel the waiver:

> The conduct of the attorneys for the proponent from November, 1965, when the first conference was held attended by counsel for the brothers, during which it

was issued and served on the Frutiger brothers.[255] On June 28, 1968, objections to the will were filed, but waivers were not filed until March 18, 1969.

The Surrogate's Court based its decision allowing withdrawal solely on the theory of implied agreement.[256] Furthermore, it found, as trier of fact, that there was no fraud or misrepresentation regarding the signing of the papers. The Appellate Division, Third Department, reversed, and in turn, was reversed by the New York Court of Appeals. In upholding the surrogate's decision, the Court implicitly stated that its decision need not have been based solely on the authority as set down in the Surrogate's Court. No mention was made of an implied agreement of withdrawal; rather, the Court propounded a holding wherein the consent to probate was to be treated as "essentially a stipulation."[257]

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appeared that objections to the will were being contemplated, and all of the subsequent acts of counsel for the proponent and counsel for the Frutiger brothers, have been consistent with only one conclusion, namely, that the waivers and consents to probate were withdrawn and no longer valid between the parties.

62 Misc. 2d at 170-71, 308 N.Y.S.2d at 700.

While deciding in this manner, the surrogate rejected the two other grounds advanced by the Frutigers for cause in vacating the waivers. First, it was contended that the instruments were not validly acknowledged. Whereas SCPA § 401(4) requires an acknowledgment for validity of the waiver of citation this would appear to be non-mandatory, as the surrogate found that an instrument is valid between the parties even though a defective acknowledgment prevents its recording. *See, e.g.*, 1 WARREN'S WEED NEW YORK REAL PROPERTY, *Acknowledgements*, § 3.10 (4th ed. 1950). And, in concluding on that point, it was decided by the surrogate that an invalid acknowledgment does not void the entire instrument and, therefore, under that theory, the waiver was still maintainable.

Second, it was argued that the instruments were fraudulantly obtained. This argument was dispensed with upon the finding that there was to be found "no credible evidence of fraud on the part of the bank or it's attorney" in procuring the waivers.

The appellate division reversed, stating that

> [w]hile the waivers and consents could have been withdrawn and canceled by agreement, clearly there was no express agreement to this effect. And the delay in producing and filing the documents involved is more rationally explained by the explanation that they were forgotten about than inferring such an agreement.

35 App. Div. 2d at 755, 314 N.Y.S.2d at 950.

Indeed, Mr. Evans, vice-president of the trust company named as executor to the estate, stated that he had tendered the waivers for filing in Surrogate's Court on September 15, 1965, some three months after their procurement, but was told that they could not be filed in the absence of any pending proceeding. It would be logical to agree, therefore, more so with the Surrogate's Court in this matter, that being the body acting as trier of fact, and likewise dispense with the appellate division's judgment as one clearly erroneous in foundation. However, as will be discussed, in affirming the holding of the Surrogate, the New York Court of Appeals embarked on a completely different rationale.

[255] If there existed a valid waiver, this was indeed a most unnecessary step to probate.

[256] *See* note 250 *supra*. Also, a waiver of contract provisions may be express, or it may be implied from the acts of the parties. *See, e.g.*, West v. Banigan, 51 App. Div. 328, 64 N.Y.S. 884 (2d Dep't 1900), *aff'd*, 172 N.Y. 622, 65 N.E. 1123 (1902).

[257] A contract is an agreement entered into by the mutual consent of the parties, but a stipulation is an instrument taken by order of the court; its terms are determined by the will of the court, and not by that of the parties. Consequently

"Indeed," the Court stated, "proponent's omission, over a period of years, to make known the existence of the waivers procured in the presence of its officer and its attorney, served to preserve the *status quo* and to contribute to any prejudice that has ensued."[258] In following the lead of *Campbell v. Bussing* [259] and *Foote v. Adams*,[260] the Court held that the stipulations were no longer valid, reversed the holding of the appellate division, and remanded the case to Surrogate's Court of Broome County, with instructions to proceed as if the waivers and consents had never been discussed, let alone signed.[261]

Perhaps analogous to the decision reached by the Court of Appeals in *Frutiger* is that Court's holding in *Matter of Creekmore*.[262] In *Creekmore,* the decedent mother, of advanced years, bequeathed her two savings accounts in equal shares to each of her two daughters. When Mrs. Creekmore became fatally ill, a request was made on her behalf to her attorney, by her daughter, Mrs. Rowland, to secure powers of attorney regarding her bank accounts and safe-deposit box. Mrs. Row-

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it is to be interpreted by the intention of the court only, as to the nature and intent of its obligation. It being an instrument taken in the interest of justice, to sustain the jurisdiction of the court, it ought not to receive such a construction as would deprive either party of any of his legal rights.

Lewis v. Orpheus, 15 F. Cas. 492, 493 (No. 8,330) (D. Mass. 1858).

258 29 N.Y.2d at 150, 272 N.E.2d at 546, 324 N.Y.S.2d at 41.

259 274 App. Div. 893, 82 N.Y.S.2d 616-17 (2d Dep't 1948), held that

[t]he court has control over stipulations and power to relieve from the terms thereof when the parties can be placed *in statu quo* [sic]. But the stipulation will not be destroyed without a showing of good cause therefor, such as fraud, collusion, mistake, accident, or some other ground of the same nature. . . .

260 232 App. Div. 60, 63, 248 N.Y.S. 539, 542 (2d Dep't 1931), stated that the principle as proposed in the *Campbell* decision was not to be limited to mistakes of mutuality only. As set down in Van Nuys v. Titsworth, 57 Hun. 5, 7, 10 N.Y.S. 507, 508 (Sup. Ct. Gen. T. 5th Dep't 1890)

It is sufficient if it appear that either party has inadvertently, unadviseably or improvidently entered into an agreement which will take the case out of the due and ordinary course of proceeding in the action, and in so doing may work to his prejudice. Where both parties can be restored to substantially their former position the court, as a general rule, exercises such power if it appears that the stipulation was entered into inadvisedly or that it would be inequitable to hold the parties to it.

Magnolia Metal Co. v. Pound, 60 App. Div. 318, 320, 70 N.Y.S. 230, 231 (1st Dep't 1901).

261 It is of considerable note here that the Court of Appeals in upholding the surrogate's decision, need not have advanced the theory of stipulation for affirmance of the lower court. As trier of fact, the surrogate's determination involving an implied agreement of withdrawal could have easily been affirmed by the Court of Appeals. Furthermore, any contract where there exists a case of unilateral mistake, may be set aside for the reason of hardship (*see* Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85 (1919), so long as the contracting parties can be restored to the positions they had occupied prior to the signing of the contract. *See, e.g.*, Mowatt v. Wright, 1 Wend. 353 (Sup. Ct. N.Y. 1828). Clearly, therefore, having found that "the proponent [had] not changed its position by reason of the waiver, and that the *status quo* [remained]," the court could have held under the theory of hardship and unilateral mistake.

262 1 N.Y.2d 284, 135 N.E.2d 193, 152 N.Y.S.2d 449 (1956).

land desired the power to pay her mother's bills as they became necessary. Mr. Matthews, Mrs. Creekmore's attorney, procured for her the power of attorney relating to the safe-deposit box and to the one bank account as per that request. But, in attempting to procure the same from another bank for another account, he was informed that powers of attorney were disfavored under company policy. Instead, it was recommended that the account be changed to a joint account. For that purpose, certain papers were procured by him for Mrs. Creekmore. Mrs. Creekmore, having been advised by counsel of the nature and effect of that which she was signing, and before a notary public, signed the documents in issue to establish a joint account with her daughter, Mrs. Rowland.

In his decision, the surrogate found that Mrs. Rowland, "[had] not shown that the alleged joint accounts were knowingly and consciously created and sanctioned by her mother."[263] In modifying that decision, the Appellate Division, Second Department, held:

> The evidence showed that the accounts and deposits therein were in the form prescribed by subdivision 3 of section 239 of the Banking Law. Such evidence established conclusively the intention to vest title in the survivor to the monies in the accounts at the time of death.[264]

However, the Court of Appeals, in a four to three decision, reversed

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263 139 N.Y.S.2d 434, 437 (Sur. Ct. Queens County 1954).

264 286 App. Div. 857, 141 N.Y.S.2d 556, 557 (2d Dep't 1955). The repeal of the N.Y. BANKING LAW § 239(3) (McKinney 1950) was made effective June 1, 1965. Prior to that repeal date, subdivision 3 read that

> [t]he making of the deposit in such form shall, in the absence of fraud or undue influence, be *conclusive evidence*, in any action or proceeding to which either the savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor. (Emphasis added.)

And in an unbroken line of decisions, the Court of Appeals, prior to *Creekmore*, had declared that provision to mean precisely what it said. *See* Walsh v. Keenan, 293 N.Y. 573, 59 N.E.2d 409 (1944); Inda v. Inda, 288 N.Y. 315, 43 N.E.2d 59 (1942); Matter of Juedel, 280 N.Y. 37, 19 N.E.2d 671 (1939); *In re* Fenelon, 262 N.Y. 308, 186 N.E. 794 (1933); *In re* Poriando, 256 N.Y. 423, 176 N.E. 826 (1931); Moskowitz v. Marrow, 251 N.Y. 380, 167 N.E. 506 (1929). The statute was said to create a presumption "irrefutable by proof, and, therefore, a rule of substantive law." *In re* Porianda, 256 N.Y. at 425, 176 N.E. at 827. Where the deposit is so made, "the actual intent of [the depositor] makes no difference. . . ." Inda v. Inda, 288 N.Y. at 318, 43 N.E.2d at 61. Even where it was expressly found that a joint account was not intended, that the depositor intended that he be privileged to make withdrawals during his life, the Court of Appeals held, "[c]oncededly the statutory presumption that [the survivor] was a joint tenant with the testator then [upon the latter's death] became *conclusive* in her favor. . . . with the result that she was at all events entitled thereto as survivor." (Emphasis added). *In re* Juedel, 280 N.Y. at 41, 19 N.E.2d at 672; *see also* Inda v. Inda 288 N.Y. at 318, 43 N.E.2d at 61. Where there is compliance with the demands of the statute, the legal result of a joint account with survivorship must follow as "a rule of substantive law." *In re* Porianda, 256 N.Y. at 425, 176 N.E. at 827.

the appellate division, on the unsupported ground[265] that Mrs. Creekmore did not "knowingly and consciously" create the joint accounts, and thus reinstated precisely the surrogate's finding. The Court found no evidence of incompetence, fraud or undue influence, and drew no inference of incapacity, but, nonetheless, affirmed the surrogate. In construing her actions under the ordinary rules of evidence, and with total disregard of the conclusive establishment of intent as set forth in the Banking Law, the signing by Mrs. Creekmore of the documents in issue certainly would have been a sufficient basis for charging her with knowledge of and the legal consequences of her actions.[266] Why then did the Court of Appeals reverse the decision of the appellate division?

Although the Court's opinion is not perfectly clear, it appears that the majority reasoned that the physical condition of the decedent, in conjunction with the unlikelihood of any intent on her part to disinherit her other daughter, raised an inference that the joint account had not been created consciously. Necessarily inherent in that inference, however, is the premise that the depositor must understand the incidents of the joint tenancy if he is to be charged with a conscious creation thereof. But such was not the meaning of the law as written.[267] Clearly, therefore, both the *Creekmore* and *Frutiger* Courts were motivated by the desire to avoid hardship.[268] The majority in *Frutiger,* from which only Judge Burke dissented, propounded its holding on an equitable, rather that a legal theory, that the status quo had not been altered. And, in so finding, the Court was able, in its own discretion, as preliminary to a final decree, to withdraw from the merits of the case the signed waivers of consent, and to allow the Frutigers to proceed unencumbered hereby in their action to contest the will.

It was in accord with Judge Fuld's dissent in *Creekmore* that Judge Burke, in an extremely powerful yet singular opinion, dissented. Judge Fuld had stated, "[i]f there is dissatisfaction with the law as enacted by

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265 *See* note 260 *supra.*

266 *See, e.g.,* 7 J. WIGMORE, EVIDENCE § 2134 (3d ed. 1940); 9 *id.* § 2415. *See also* Pimpinello v. Swift & Co., 253 N.Y. 159, 170 N.E. 530 (1930); Metzger v. Aetna Ins. Co., 227 N.Y. 411, 125 N.E. 814 (1920).

267 *See* note 260 *supra.* On March 23, 1964, the Banking Law § 239 was amended so as to repeal subdivision 3. In its place now is N.Y. BANKING LAW § 675 (McKinney 1971) wherein subdivision (b) states that "[t]he making of such deposit or the issuance of such shares in such form shall, in the absence of fraud or undue influence, be *prima facie evidence* . . . of the intention of both depositors or shareholders to create a joint tenancy. . . ." (Emphasis added). The conclusive evidence rule has now been abolished; the rebuttable presumption rule has been incorporated in its stead.

268 *See* note 260 *supra.* The weight of the law was totally opposed to the decision as rendered in *Creekmore.* That her physical condition was of great importance in the decision there, cannot be doubted.

the legislature or its application seems to work a hardship on this or that case, it is for the legislature, not the court, to rewrite it."[269] Judge Burke stated, "The theory that a different rule should govern waivers and consents sought to be reneged upon before the entry of a decree is baseless,"[270] citing *Matter of Sturges*.[271] For,

> [t]here is no provision of the Surrogate's Court Act or any other statute or decision which empowers the Surrogate to exercise discretion to treat a waiver of citation and a consent to the entry of a decree as a stipulation. In this case, this appellate court invents a doctrine without notice to counsel on a question which was never presented to the court below.[272]

But such was not troublesome to the Court. *Sturges* was looked upon as a fallible doctrine, and the majority summarily disregarded it.[273] And, although prompted by emotion, the Court nonetheless formulated good law. As did the surrogate in *Matter of Bissell*,[274] the Court of Appeals took the position that, even in the absence of a showing of fraud, where a pre-decree application is made to allow the withdrawal of waivers of citation, such an application shall be granted where there will be no prejudice toward any of the interested parties.[275] Each application should be considered on its merits, the Court rightly reasoned.

Justice Burke opined that *Sturges* should be the basis for the granting of a withdrawal application whether such is requested prior to or subsequent to the final decree. But, *Sturges* applied post-decree law to a pre-decree case, *i.e.*, it required a showing of fraud, duress, misrepresentation, or other basis to invalidate the waiver, despite its pre-decree nature.

Nonetheless, the decision in *Frutiger* has been rendered, and its impact is certain to be felt. It becomes clear, therefore, that instruments of the type in issue in *Frutiger* will be upheld or invalidated according to judicial discretion. More relevant than that precept, however, is the ability to discern when that power will be invoked so as to hold a waiver of citation invalid.

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269 1 N.Y.2d 284, 300, 135 N.E.2d 193, 201, 152 N.Y.S.2d 449, 461 (Fuld, J., dissenting).
270 29 N.Y.2d at 153, 272 N.E.2d at 548, 324 N.Y.S.2d at 43 (Burke, J., dissenting).
271 *In re* Sturges, 24 Misc. 2d 14, 202 N.Y.S.2d 737 (Sur. Ct. Nassau County 1960).
272 29 N.Y.2d at 156, 272 N.E.2d at 550, 324 N.Y.S.2d at 46 (Burke, J., dissenting). Judge Burke also states that

> [t]hese legal documents are not mere stipulations between parties. They are furnished by the clerk of the court in printed jurative form for use in probate proceedings. They are unilaterally executed and notarized.

29 N.Y.2d at 155-56, 272 N.E.2d at 549, 324 N.Y.S.2d at 45 (Burke, J., dissenting).
273 29 N.Y.2d at 149, 272 N.E.2d at 545, 324 N.Y.S.2d at 40.
274 *In re* Bissell, 57 Misc. 2d 220, 291 N.Y.S.2d 663 (Sur. Ct. Erie County 1968).
275 *Id.* at 221-22, 291 N.Y.S.2d at 665.

It is necessary to stress again that the *Frutiger* holding was based upon the finding that the status quo had been preserved. Indeed, had the status quo been altered in any way, there is no reason to surmise that the Court would have held as it did. Clearly, therefore, while the Court acted within its discretion in allowing withdrawal of the waiver of citation, it did not establish precedent for permitting withdrawal where it would be prejudicial, *e.g.*, after a final decree.