

## Preface

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## THE RIGHT OF ELECTION OF A SURVIVING SPOUSE UNDER SECTION 18 OF THE DECEDENT ESTATE LAW

### A SYMPOSIUM

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#### PREFACE

LOUIS PRASHKER †

**T**HIRTY years ago the Commission to Investigate Defects in the Laws of Estates, headed by Surrogate James A. Foley, submitted its report to the legislature and recommended substantial changes in the law of inheritance. In 1928, the Assembly passed the bill recommended by the Commission, but not until 1929 was the legislation passed in both houses of the legislature, effective September 1, 1930.

A most significant aspect of the legislation was the abolition of the common-law rights of dower and curtesy, and the substitution therefor of the statutory right of election of a surviving spouse to take, as in intestacy, in respect to both real and personal property of the deceased spouse. When first recommended by the Commission and shortly after enactment, the right of election was hailed as "a new charter of women's rights" principally because of its anticipated effect on the right of inheritance of a surviving widow.

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Almost thirty years have elapsed since the effective date of the legislation. On the whole, the results of the legislation have not measured up to expectations. This is attributable in part to the diluting compromises with original proposals of the Commission in the process of enactment, and the corrosive effect of decisional law tending to minimize the import of the right of election. Another contributing factor has been the role of the lawyer who has strained his intellect in drafting a will or inter vivos conveyance, or in utilizing the corporate device to effectuate the intent of his client to emasculate the right of election.

It is timely that the problem be reviewed critically, with a view of pointing up deficiencies in the existing legislation. With this in mind, the following symposium has been planned by the St. John's Law Review.

Heading the contributors to the symposium is Surrogate Joseph A. Cox who, in 1956, on the eve of his election as Surrogate of New York County and his resignation as Justice of the Appellate Division, First Department, in an address at the Bar Association of the City of New York, made a critical appraisal of Section 18 of the Decedent Estate Law. The other contributors are recognized experts in the field.

Surrogate Cox deals with the antecedents and history of Section 18, and indicates some directions for future development of the law. James A. Vaughan deals with antenuptial conveyances or agreements intended to defeat the right of election. Malcolm Wilson, an honored member of the legislature, deals with the impact of divorce and separation on the right of election. Paul Powers, Professorial Lecturer at St. John's University School of Law, deals with illusory transfers tending to defeat or minimize the right of election. Joseph D. Garland, Professor of Law at St. John's University School of Law, deals with the inadequacy of the benefits available to a surviving spouse, particularly in instances where testamentary provision takes the form of a trust.

The several aspects of the right of election treated in this symposium are by no means all-inclusive; some other significant aspects would include consideration of the following problems:

1. Is the existing limitation, that the right of election of a surviving spouse is personal, inequitable? <sup>1</sup>
2. Waiver of right of election—ten years after statutory clarification of subdivision 9. Is the provision, validating waiver of right of election executed before or after the marriage of a spouse, sound, particularly in so far as it affects a surviving widow? <sup>2</sup>
3. Tax aspects of the right of election of surviving spouse, with specific reference to the impact of the Internal Revenue provision affecting marital deduction.
4. The right to contest illusory transfers in case of intestacy.
5. The impact of the 1936 amendment to Section 18(1)(h) extending the superintendence of the Surrogate's Court on the authority of a fiduciary.

It is questionable whether a satisfactory disposition can be made of these and related problems except by a body specifically set up for the purpose. This body might take the form of a Joint Legislative Committee or a new Decedent Estate Commission.

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<sup>1</sup> See N.Y. DECED. EST. LAW § 18(1); *Matter of Muhlman*, 140 Misc. 535, 251 N.Y. Supp. 147 (Surr. Ct. 1931). Compare elections made for a surviving spouse who is an infant or an incompetent. N.Y. DECED. EST. LAW §§ 18(6), (7).

<sup>2</sup> Subdivision 9 was revised in 1947 upon recommendation of the Law Revision Commission. See 1946 LEG. DOC. NO. 65(H), REPORT, N.Y. LAW REVISION COMMISSION 231 (1946); 1947 LEG. DOC. NO. 65(A), REPORT, N.Y. LAW REVISION COMMISSION 23 (1947).