

# Surviving Spouses in New York

William J. O'Shea Jr.

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

### Recommended Citation

O'Shea, William J. Jr. (1934) "Surviving Spouses in New York," *St. John's Law Review*: Vol. 8 : No. 2 , Article 2.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol8/iss2/2>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [lasalar@stjohns.edu](mailto:lasalar@stjohns.edu).

## SURVIVING SPOUSES IN NEW YORK

FOR years, prior to 1927, there was much discussion about reforming and modernizing our New York statutes regulating the descent and distribution of decedents' property. In 1927, this discussion bore fruit in the creation by statute of a Commission to Investigate Defects in the Laws of Estates, charged with the duty, among others, to "investigate and recommend as to the advisability of revision of the Real Property Law, the Personal Property Law, the Decedent Estate Law and the other statutes of this State \* \* \* for the purpose of modernizing and simplifying the law relating to estates and the system of descent and distribution of property."<sup>1</sup>

A commission of fifteen members was created, of whom four were Surrogates, eight were members of the legislature and three were members of the Bar.<sup>2</sup> The Commission selected Surrogate James A. Foley, of New York County, as Chairman. It held hearings, conducted an exhaustive research and solicited and received suggestions from Bar associations, legal periodicals and interested individuals, to which it gave careful consideration. It prepared, proposed, and sponsored to enactment the legislation necessary to effectuate its recommendations.<sup>3</sup>

Much could be written of the changes made. But limitations of space require that this article be confined to one change alone—that effected by new Section 18 of the Decedent Estate Law, giving a surviving spouse the right to elect to take her intestate share in lieu of the testamentary provisions for her benefit. In introduction, however, a word must be said of the abolition of dower and curtesy, for which this new right was substituted.

---

<sup>1</sup> Laws of 1927, c. 519.

<sup>2</sup> The Commission's Reports have been printed as Legislative Documents: 1928, No. 70; 1929, No. 62; 1930, No. 69; 1931, No. 69; 1932, No. 75; 1933, No. 64.

<sup>3</sup> The Commission's recommendations were enacted into law by the following statutes: Laws of 1929, c. 229; Laws of 1930, cc. 174, 175, 599, 709, 710 and 711; Laws of 1931, cc. 62, 134, 135, 136, 137, 150, 151, 165, 178, 321, 358, 359, 360, 361, 562, 705, 706 and 707; Laws of 1932, c. 459; and Laws of 1933, c. 650.

The common law of England gave us dower and estates by the curtesy. For centuries, dower was accepted as assuring to a widow protection and support after her husband's death; and as late as July, 1926, the New York Court of Appeals had referred to it as "perhaps the most highly and widely cherished property right resulting from marriage."<sup>4</sup>

Actually, however, during the twentieth century, dower had not furnished adequate protection to the widow, and, as the Commission reported, was "in most cases an illusion and deception."<sup>5</sup> Since the turn of the century the wealth of most men in New York has been in personalty. The owner of real estate often holds the title in the name of a corporation of which he owns all the stock instead of in his individual right. The Commission found that in most estates of wealthy men or those who had been familiar with modern business methods, "dower in real estate does not exist."<sup>6</sup>

England, which had given us dower, from time to time curtailed it, and in 1925 abolished it.

The Commission reported "a glaring inconsistency in our law which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death."<sup>7</sup> One of its first recommendations was for a system of uniform descent and distribution of real and personal property by which the wife would receive immensely increased advantages out of her husband's estate in place of her "almost worthless dower." It advocated the adoption of a statute modelled on that of Pennsylvania, under which, in place of dower, a widow has the right to take her intestate share against the will.<sup>8</sup>

The principal recommendations of the Commission were enacted into law by the 1929 Legislature.<sup>9</sup> On and after September 1, 1930, estates by the curtesy, and dower (except as to lands owned by the husband during marriage and prior to that date) were abolished.<sup>10</sup> New Section 18 was created.<sup>11</sup>

<sup>4</sup> *Byrnes v. Owen*, 243 N. Y. 211, 216, 153 N. E. 51, 52 (1926).

<sup>5</sup> Leg. Doc. (1928) No. 70, p. 9; Leg. Doc. (1930) No. 69, p. 83.

<sup>6</sup> *Ibid.*

<sup>7</sup> Leg. Doc. (1928) No. 70, p. 12; Leg. Doc. (1930) No. 69, p. 86.

<sup>8</sup> Leg. Doc. (1928) No. 70, p. 13; Leg. Doc. (1930) No. 69, p. 87.

<sup>9</sup> Laws of 1929, c. 229.

<sup>10</sup> *Id.* §§11 and 12; N. Y. REAL PROP. LAW (1929) §§189 and 190.

<sup>11</sup> Laws of 1929, c. 229, §4; N. Y. DEC. EST. LAW (1929) §18.

*A New Public Policy.*

Section 18 was designed to be, and has been, the keystone of a new and humane system based on a new and enlightened public policy of this state. "The purpose of the Legislature was the protection of the widow."<sup>12</sup>

It was a remedial statute, framed on the theory that a wife had as much right to support from her husband after his death as she had during his life. This is obvious from the language of the statute,<sup>13</sup> from a consideration of the defects in the old law which the new statute was intended to cure,<sup>14</sup> and from the reports of the Commission, which the courts have held are a proper subject for their consideration in construing statutes enacted pursuant to a commission's recommendation.<sup>15</sup>

---

<sup>12</sup> Chief Judge Pound in *Matter of Greenberg*, 261 N. Y. 474, 478, 185 N. E. 704, 705 (1933).

<sup>13</sup> The statute that enacted §18 (Laws of 1929, c. 229) provided in §20 as follows: "The provisions of section four \* \* \* (now Section 18, Decedent Estate Law) of this act are hereby enacted pursuant to the intention of the legislature to increase the share of a surviving spouse in the estate of a deceased spouse, either in a case of intestacy or by an election against the terms of the will of the deceased spouse, thus enlarging property rights of such surviving spouse; \* \* \* and such provisions shall be liberally construed to carry out such intention." In *Matter of Muhlman* (140 Misc. 535, 537, 251 N. Y. Supp. 147, 150 [1931]), Surrogate Wingate said: "Apparently, the evasion of this natural obligation of support was the particular defect in the law at which the (Commission's) recommendation was directed." Pursuant to the legislative plan of a continuing obligation of support, §18 confers rights only on a woman who is entitled to support at the time of her husband's death, and provides that neither a divorced wife nor one against whom a final decree of separation has been rendered (subd. 3), nor one who has abandoned her husband (subd. 5; also *vide* subd. 4) has a right to elect (*vide* Leg. Doc. [1930] No. 69, p. 116).

<sup>14</sup> Section 18 is expressly declared to be remedial. (*Vide* *Matter of Simeone*, 141 Misc. 737, 253 N. Y. Supp. 683 [1931], Slater, S.) The rule governing the interpretation of remedial statutes, as stated by Blackstone, was repeated by the Court of Appeals in *American Historical Society v. Glenn*, 248 N. Y. 445, 451, 162 N. E. 481, 482 (1928), as follows: "There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy."

<sup>15</sup> *Supra* note 2. In construing a statute drafted by a Legislative Commission it is appropriate to refer to the Commission's report to ascertain the purpose of the legislation. *Matter of Hamlin*, 226 N. Y. 407, 414, 124 N. E. 4, 6 (1919); *Archer v. Equitable Life Assurance Society*, 218 N. Y. 18, 22, 112 N. E. 433, 434 (1916); *People v. Schweinler Press*, 214 N. Y. 395, 404, 108

The legislature provided that the new section should be "liberally construed" to "increase the share of a surviving spouse." Surrogate Foley, in deciding the first important case to arise under the section,<sup>16</sup> said: "That mandate should be given vigorous support and the new right should not be whittled down by the ingenuity of a draftsman of a will or by the design of the husband to deprive the wife of her lawful rights."<sup>17</sup>

Only two cases directly concerned with the construction of the section have come before the Court of Appeals.<sup>18</sup> In each of them the court approved the reform initiated by the Commission and enacted by the legislature. In the *Byrnes* case, the court said: "In making these provisions it was the evident purpose of the Legislature that a surviving spouse should retain the right to claim his or her full intestate share in spite of any will unless the instrument should provide substantial equivalents."<sup>19</sup> \* \* \* In adopting the new Section 18 as received from the hands of the Commission, the Legislature announced its intention to be 'to increase the share of a surviving spouse in the estate of a deceased spouse, either in a case of intestacy or by an election against the terms of the will of the deceased spouse, thus enlarging the property rights of such surviving spouse,' and stated that 'such provisions shall be liberally construed to carry out such intention.'<sup>20</sup> \* \* \* We conceive its intent to have been that the equivalent substitute of the intestate share in the form of a trust should be none other than a trust for the benefit of the surviving spouse throughout life. Not otherwise may the statutory injunction that

N. E. 639, 641 (1915); and with particular reference to this statute see *Matter of Byrnes*, 260 N. Y. 465, 472, 184 N. E. 56, 58 (1933), and *Matter of Greenberg*, 261 N. Y. 474, 478, 185 N. E. 704, 705 (1933).

<sup>16</sup> *Matter of Byrnes*, 141 Misc. 346, 252 N. Y. Supp. 587 (1931), *aff'd*, 235 App. Div. 782, 257 N. Y. Supp. 884 (1st Dept. 1932), *aff'd*, 260 N. Y. 465, 184 N. E. 56 (1933); reargument denied 261 N. Y. 623, 185 N. E. 765 (1933). Surrogate Wingate several months earlier had decided *Matter of Muhlman*, 140 Misc. 535, 251 N. Y. Supp. 147 (1928), holding that the widow's right of election was personal, and could not be exercised, after her death, by her administrator.

<sup>17</sup> 141 Misc. 346, 350, 252 N. Y. Supp. 587, 591 (1931).

<sup>18</sup> *Matter of Byrnes*, 260 N. Y. 465, 184 N. E. 56 (1933); *Matter of Greenberg*, 261 N. Y. 474, 185 N. E. 704 (1933).

<sup>19</sup> 260 N. Y. 465, 470, 184 N. E. 56, 57 (1933).

<sup>20</sup> *Id.* at 472, 184 N. E. at 58.

the provisions, to 'increase the share of a surviving spouse' shall be 'liberally construed,' be obeyed."<sup>21</sup>

In the *Greenberg* case,<sup>22</sup> the court referred to the "new policy" as being "well defined"; and, using practically the language of the Commission, said: "The inconsistency in our old law which compelled a man to support his wife during his lifetime and permitted him to cut her off with a dollar at his death has given way to a *new public policy* which no longer permits a testator to dispose of his property as he pleases."<sup>23</sup>

### *The Widow's Right.*<sup>24</sup>

In February of this year, in deciding an action<sup>25</sup> to have a deed transferring an interest in real property declared invalid, the Court of Appeals took occasion to point out that the abolition of dower and the substitution of Section 18 had worked a change in the law of evidence. Its decision throws an interesting sidelight on how extensive a change Section 18 has accomplished, not only in the substantive law of estates and of property but also in the adjective law.<sup>26</sup>

Its decision points the distinction that the rights conferred by Section 18 do not arise upon marriage, as did dower; but upon death. During the husband's life the wife has no immediate interest in his property. He may sell or give away his personalty, and he may convey his realty, without her consent (except in so far as Real Property Law, section 190, applying to real estate owned during coverture and prior to September 1, 1930, restricts him). In view of

---

<sup>21</sup> *Id.* at 474, 184 N. E. at 59.

<sup>22</sup> 261 N. Y. 474, 185 N. E. 704 (1933).

<sup>23</sup> *Id.* at 478, 185 N. E. at 704.

<sup>24</sup> What is here said regarding a widow applies equally to a widower. Husband and wife are now on an equality. Section 18 makes no distinction between the sexes. It refers to a testator who "leaves surviving a husband or wife" and uses the words "surviving spouse" to include both. This is in accord with the Commission's recommendation that "in harmony with the policy of equality between men and women" the rights of husband and wife should be uniform and reciprocal. Leg. Doc. (1928) No. 70, p. 14; Leg. Doc. (1930) No. 69, p. 88.

<sup>25</sup> *Herrmann v. Jorgenson*, 263 N. Y. 348, 189 N. E. 449 (1934).

<sup>26</sup> *Id.* at 355-357, 189 N. E. at 451, 452.

his power to dispose of his property without her consent during life the Court of Appeals describes her interest therein prior to his death as "remote and contingent."<sup>27</sup>

But on his death an entirely different situation arises. If he dies intestate she is entitled to one-half or one-third of all his property, real and personal, depending on offspring;<sup>28</sup> or if he made a will subsequent to August 31, 1930, she may elect to take in lieu of its provisions her intestate share as limited by Section 18.

Section 18 took effect on September 1, 1930. It provides, in substance, that where a testator dies after August 31, 1930, leaving a will executed after that date, his surviving spouse can elect to take her intestate share (or one-half the net estate, whichever is smaller) in lieu of the provisions in the will for her benefit; but subject to specified "limitations, conditions and exceptions"<sup>29</sup> which allow a testator to leave the share, to which his wife would otherwise be entitled, in trust for her benefit for life. In the event he does so, she has the limited right to take \$2,500 outright from the principal of the trust and to enjoy a life interest in the remainder.

"Proper provision" must be made for her, says Chief Judge Pound.<sup>30</sup> Surrogate Foley earlier had said: "Minimum requirements are fixed. If these benefits are given, the surviving wife cannot exercise the right of election to take against the will, and its terms stand.<sup>31</sup> \* \* \* The New York statute gives the husband the first choice. If he provides what the law regards as an adequate recognition of his wife the will cannot be attacked and the wife cannot elect."<sup>32</sup>

A better appreciation of the practical effect of Section 18 may be had by a consideration of the two proceedings in the Estate of Harwood Byrnes. It was the first case wherein the Court of Appeals reviewed the widow's right of elec-

<sup>27</sup> *Id.* at 356.

<sup>28</sup> N. Y. DEC. EST. LAW (1929) §83.

<sup>29</sup> These "limitations, conditions and exceptions" as set forth in the subdivisions of §18 should be read. Also *vide* note 35 *infra*.

<sup>30</sup> Matter of Greenberg, 261 N. Y. 474, 478, 185 N. E. 704 (1933).

<sup>31</sup> Matter of Byrnes, 141 Misc. 346, 347, 252 N. Y. Supp. 587, 588 (1931).

<sup>32</sup> *Id.* at 349.

tion.<sup>33</sup> Subsequently it became the leading authority on the subject of ratable contribution by other legatees to make up the widow's elective share.<sup>34</sup>

Harwood Byrnes made his will on January 30, 1931, and died a little more than a month later, leaving an estate of over \$300,000 net. By his will he left \$40,000 to educational and charitable corporations, and the entire residue in trust to pay the income to his widow during her life or widowhood, with secondary life estates and remainders to his brother's children. The widow brought a proceeding to have the court declare that she was entitled to take her intestate share outright. Concededly, if the trust for her benefit had not been limited on remarriage, but had been a full, undiminishable life estate, her proceeding must have failed. For the will would then have provided for her more than was required by Section 18. Under that section a trust for life of the intestate share, or about \$150,000, would have been sufficient.<sup>35</sup> The will gave her a trust of about \$260,000.

<sup>33</sup> *Supra* note 16.

<sup>34</sup> Matter of Byrnes, 149 Misc. 449, 267 N. Y. Supp. 627 (1933).

<sup>35</sup> Subdivision 1 (e) of §18 would then have applied, because testator bequeathed his wife jewelry of trifling value in addition to the trust.

The various limitations, conditions and exceptions specified in §18 divide all testators' wills to which §18 is applicable into the following groups:

**GROUP A. WHERE THE WILL MAKES NO PROVISION FOR THE WIDOW.** She can elect to take her intestate share (or one-half the net estate) outright.—Subd. 1.

**GROUP B. WHERE THE WILL MAKES SOME PROVISION FOR THE WIDOW.**

(1) If her intestate share is less than \$2,500, then, regardless of the will, she can elect to take her intestate share (or one-half the net estate) "in lieu of any provision for \* \* \* her benefit in the will."—Subd. 1 (c).

(2) If her intestate share is more than \$2,500 and the will gives her nothing outright, but contains a trust of an amount equal to or greater than her intestate share, with income payable to her for life, she has "the limited right to elect to take the sum of \$2,500 absolutely which shall be deducted from the principal of such trust fund and the terms of the will shall otherwise remain effective."—Subd. 1 (b).

(3) If the will gives her \$2,500 or more outright and also contains a trust for her benefit for life of a principal equal to or more than the difference between such outright legacy and her intestate share "no right of election whatever shall exist."—Subd. 1 (d).

(4) If the will gives her an outright legacy of a value less than \$2,500 and also contains a trust for her benefit for life of a principal equal to or more than the difference between such outright legacy and her intestate share she has "the limited right to elect to take not more than the sum of \$2,500, inclusive of the amount of such legacy or devise, and the difference between



It was urged by the executors and the guardian for the remaindermen that this trust was "for life" within the well-settled definition of that term at common law for centuries<sup>36</sup> and under other New York statutes;<sup>37</sup> and that, in any event, as the trust during widowhood obviously had some value and was capable of being measured by the Remarriage Tables<sup>38</sup> it must be measured under subdivision 1 (f) as some "form of testamentary provision."<sup>39</sup>

With these contentions the courts did not agree. The Court of Appeals held that subdivision 1 (f) did not apply. As to subdivision 1 (e), it conceded that "Undoubtedly, at common law, an estate during widowhood is classed as an

such legacy or devise and the sum of \$2,500 shall be deducted from the principal of such trust fund and the terms of the will shall otherwise remain effective."—Subd. 1 (e).

(5) If the aggregate of the provisions under the will for her benefit, "including the principal of a trust, or a legacy or devise, or any other form of testamentary provision," is less than her intestate share, she has "the limited right to elect to take the difference between such aggregate and the amount of the intestate share, and the terms of the will shall otherwise remain effective."—Subd. 1 (f).

The courts are called upon to decide, as each case arises, to which of the above groups a testator's will belongs. The Surrogate held that the Byrnes will "entirely failed to comply with the statutory plan"; that it "ran counter to the law"; that the inclusion of the condition against remarriage destroyed "the statutory immunity of the will against attack"; and that the widow might "take all the statutory benefits outright." It would appear, therefrom, that such wills must be classified under Group A, just as if no provision had been made for the widow.

<sup>36</sup> From time immemorial a trust during widowhood has been defined as "a trust for life," and an estate during widowhood as a "life estate." Matter of Schriever, 221 N. Y. 268, 272, 116 N. E. 995 (1917); Durfee v. Pomeroy, 154 N. Y. 583, 49 N. E. 134 (1898); Giles v. Little, 104 U. S. 291, — Sup. Ct. — ( ); Co. LIT. 42A; 2 BL. COMM. 121; 24 HALSBURY, LAWS OF ENGLAND 174.

<sup>37</sup> N. Y. REAL PROP. LAW (1909) §30; N. Y. TAX LAW (1928) §230, and Matter of Plum, 37 Misc. 466, 75 N. Y. Supp. 940 (1902); N. Y. DECEDENT ESTATE LAW (1929) §17, and Matter of Smallman, 141 Misc. 796, 253 N. Y. Supp. 628 (1931).

<sup>38</sup> Laws of 1917, c. 705, p. 2281; Matter of Wagner v. Wilson, 251 N. Y. 67, 69, 167 N. E. 174 (1929); Adams v. N. Y., O. & W. Ry. Co., 220 N. Y. 579, 581, 114 N. E. 1046 (1917) (dissenting opinion by Judge Pound). (Measured by these tables, the "present worth" of the widow's interest, on a 4% basis, was \$190,769.64, and on a 3½% basis \$166,523.44.)

<sup>39</sup> Subdivision 1 (f) of §18 provides as follows: "Where the aggregate of the provisions under the will for the benefit of the surviving spouse, including the principal of a trust, or a legacy or devise, or *any other form of testamentary provision*, is less than the intestate share, the surviving spouse shall have the limited right to elect to take the difference between such aggregate and the amount of the intestate share, and the terms of the will shall otherwise remain effective."

estate for life, determinable by remarriage";<sup>40</sup> but held that in adopting Section 18 the legislature did not use the words "trust for her benefit for life" in a "technical sense, but in the sense with which common usage would ordinarily invest them."<sup>41</sup>

Its decision held in effect that nothing would satisfy the statute unless it was the substantial, undiminishable equivalent of the intestate share. "The question involved here," it said, "is whether or not a testamentary gift in trust for the life of a surviving spouse or until she remarries is in fact a trust for life within the meaning of Section 18."<sup>42</sup> \* \* \* We think that the legislature had no thought to deprive a surviving spouse of an election where a will made gifts in trust for life for the use of the spouse, which, while technically life estates, could not reasonably be regarded as substantial equivalents for the intestate share."<sup>43</sup>

In the *Greenberg* case, decided four months later, the Court of Appeals showed the same desire to give section 18 a liberal interpretation.

These decisions by our highest Court, the numerous decisions by the surrogates of the state, the language of the statute and the Commission's recommendations warrant the terse summary by the Surrogate of Rensselaer County: "*All other things being equal, the decision should be in favor of the widow.*"<sup>44</sup>

#### *Who Pays the Widow's Share?*<sup>45</sup>

After the widow has elected to be paid her one-half or one-third of the estate outright, what next? Which legatees are to pay her? Are the general legatees, who are generally

<sup>40</sup> 260 N. Y. 465, 471, 184 N. E. 56, 58 (1933).

<sup>41</sup> *Id.* at 473. "In the construction of a statute, adherence to the written word will not be suffered to 'defeat the general purpose and manifest policy intended to be promoted.' \* \* \* The intent, when discovered, will prevail over the letter."—Cardozo, *Ch. J.*, in *City Bank Farmers Trust Co. v. N. Y. C. R. R. Co.*, 253 N. Y. 49, 56, 170 N. E. 489, 492 (1930).

<sup>42</sup> *Id.* at 471.

<sup>43</sup> *Id.* at 472.

<sup>44</sup> *Matter of Leger*, 147 Misc. 286, 289, 264 N. Y. Supp. 452, 456 (1933), Surrogate Wager.

<sup>45</sup> *Supra* note 24.

only friends, distant relatives and charities, to contribute? Or are the residuary legatees, who in most instances are the children and dependent and near relatives of the testator, to bear the entire burden?

The Commission gave serious consideration to this problem.<sup>46</sup> It foresaw the countless difficulties that might arise and the great injustice that would result if any hard and fast rule was laid down. It recognized that every will is unique and that each presents its own intimate problem. "It preferred to leave the questions in each case to be decided on equitable principles in the light of the testamentary scheme of the individual will."<sup>47</sup> It made provision for so doing by including in Section 18, subdivision 2 which reads as follows: "Where any such election shall have been made the will shall be valid as to the residue remaining after the elective share provided in this section has been deducted, and the terms of the will shall as far as possible remain effective."

This subdivision was an essential part of the new public policy expressed by Section 18. It was doubtless inserted to avoid the effect of the New York decisions holding that *ordinarily* residuary legatees cannot call upon general legatees to share proportionately with them where there has been a shrinkage of assets.<sup>48</sup>

In the original Byrnes proceeding (September, 1931), the Surrogate had concluded his opinion with the statement, "The effect upon the terms of the will of the withdrawal of her elective share by the widow is reserved for the accounting or some other proper proceeding."<sup>49</sup>

In 1933 the executors rendered their final account and asked the court for instructions as to how to distribute that part of the estate that remained after withdrawal of the widow's share. Due to the collapse in the securities market the estate had greatly shrunk in value. The widow had taken one-half of the diminished amount; and if the charities were allowed to take the full \$40,000 bequeathed to them there

---

<sup>46</sup> Matter of Byrnes, 149 Misc. 449, 451, 267 N. Y. Supp. 627, 630 (1933).

<sup>47</sup> Matter of Devine, 147 Misc. 273, 263 N. Y. Supp. 670 (1933), Surrogate Delehanty.

<sup>48</sup> Matter of T. G. & T. Co., 195 N. Y. 339, 88 N. E. 375 (1909); Clark v. Truslow, 161 App. Div. 675, 146 N. Y. Supp. 750 (2d Dept. 1914).

<sup>49</sup> 141 Misc. 346, 351, 252 N. Y. Supp. 587, 592 (1931).

would have been little left to set up the trusts for the benefit of the nephews and nieces.

This second proceeding was argued before Surrogate Foley in August, 1933. At the outset some of the parties suggested that the election by the widow created an intestacy and that therefore the part not taken by her should pass as intestate property. This contention was later withdrawn. Indeed, in view of the express terms of subdivision 2, quoted above, and the decisions in other states whose statutes grant a widow the right of election to take against the will, it could not have been advanced with success.<sup>50</sup>

The Surrogate also rejected the contention that the widow's share should be charged wholly against the residuary estate. He said that subdivision 2 "was purposely drawn in general terms with a deliberate design to vest in the courts an equitable authority for the apportionment of the charge caused by the withdrawal by the surviving spouse."<sup>51</sup> "By the equitable plan adopted," he said, "it was believed that just treatment of all the beneficiaries named in the will would be secured. By making the method of contribution elastic and based upon equitable principles, injustice and discrimination against any of the beneficiaries of an estate would be avoided."

He propounded two questions: "Shall the amount withdrawn, by reason of the election of the widow, be charged wholly out of the residuary trust fund? Or shall the amount withdrawn by the widow be equitably apportioned out of the pecuniary legacies, the charitable trust funds and the residuary fund?" and answered them as follows: "I hold that the latter method should be adopted and that each of the pecuniary legatees, the charitable trusts and the remaindermen must *ratably contribute* to the withdrawn share of the widow."<sup>52</sup>

By this method, he said: "Equity will be accomplished, and in the language of the section 'the terms of the will shall,

---

<sup>50</sup> Dean v. Hart, 62 Ala. 308, 310 (1878); McGee v. Vandeventer, 326 Ill. 425, 432, 158 N. E. 127, 130 (1927); Fox v. Rumery, 68 Me. 121, 129 (1878); Brandenbury v. Thorndike, 139 Mass. 102, 28 N. E. 575 (1885); *In re Kerns' Estate*, 296 Pa. 348, 145 Atl. 824 (1929).

<sup>51</sup> 149 Misc. 449, 451, 267 N. Y. Supp. 627, 630 (1933).

<sup>52</sup> *Ibid.*

as far as possible, remain effective.' The intention of the testator will likewise be preserved as nearly as possible. If preliminary legatees were not required to contribute, injustice would result.<sup>53</sup> \* \* \* By apportioning the withdrawn share against *all* the beneficiaries the general plan of the will may be, to a great extent, preserved and the balance maintained between the respective preliminary and residuary beneficiaries. \* \* \* *I have accordingly adopted the method of equitable apportionment and ratable contribution.*"<sup>54</sup>

The two *Byrnes* cases are landmarks in judicial annals. The first subjected Section 18 to its baptism of fire—from which it came forth confirmed by our highest Court as a *new public policy* of the state.

The second came at a time of economic stress when most estates had shrunk to a small fraction of their former worth. Its wholesome rule is a welcome exception to the old practice that all general legacies must be paid before the residuary legatees receive anything.<sup>55</sup> It is in line with the recent trend in other legislation. For example, section 124 of the Decedent Estate Law now provides that inheritance taxes "shall be equitably pro-rated." Section 26 provides that a pretermitted child shall be entitled to recover his intestate share from the devisees and legatees "in proportion to" the parts bequeathed to them. Section 35 gives the surviving spouse of a testator whose will was made before the marriage the same rights she would have had if the will had not been made, and provides that she shall be entitled to receive her share of the estate from the devisees and legatees "in proportion to" the parts devised and bequeathed to them.

In those instances the legislature itself declared the rule. In cases under Section 18 it has empowered the courts to decide each situation in the light of the testamentary scheme. Thus the intention of the testator, expressed in his will, is allowed to prevail; which, said Chief Justice Mar-

---

<sup>53</sup> *Id.* at 452.

<sup>54</sup> *Id.* at 453.

<sup>55</sup> *Supra* note 48.

shall, is "*The first and great rule in the exposition of wills, to which all other rules must bend.*"<sup>56</sup>

Section 18 is working splendidly and carrying out effectively the intent of the Commission and the legislature that adequate support must be provided for the surviving spouse and, subject to that requirement, that the terms of a will shall as far as possible remain effective.

WILLIAM J. O'SHEA, JR.

New York, April 7, 1934.

---

<sup>56</sup> Smith v. Bell, 6 Pet. 68, 74 (U. S. 1832).