Advisory Committee: Recommendations on Right of Election Statute

By C. Raymond Radigan

Within the Fifth Report to the Legislature, the Advisory Committee to the Legislature on the EPTL and SCPA included in our study and recommendations regarding the Right of Election Statute.* The Advisory Committee reviewed the existing statute that was in place prior to 1992 to determine whether there should be changes concerning how a right of election may be satisfied; whether testamentary substitutes should be expanded; whether there should be any technical corrections or modifications concerning the method of making such an election; and in what instances a surviving spouse would be disqualified from making an election.

There were two particular areas of concern that the Advisory Committee felt had to be addressed to modernize the Statute. The first was the issue of lifetime arrangements created to weaken the protection of the statute. These included life insurance contracts, pension plans, United States savings bonds and transfers with retained life estates that were not considered "testamentary substitutes" and thus outside the reach of the statute. This led to inequities, regardless of whether the arrangements benefited the surviving spouse or were in favor of third parties. For the spouse, it ignored those assets in computing the spouse's elective share when they should have been included. For others, they were not included in determining what the surviving spouse actually received. The Advisory Committee felt all of these arrangements should be considered as testamentary substitutes.

In addition, although the then existing statute, EPTL § 5-1.1, defined the elective share of the surviving spouse as "one-third of the net estate" (or one-half of such estate if there were no issue of the decedent), that was not really the case, since the decedent, even without the use of testamentary substitutes, could effectively reduce the elective amount and, in many cases, render it meaningless. For example, if a decedent died with a net estate of $150,000, and left all of his estate to someone other than the surviving spouse, the survivor would be entitled to an elective share of $50,000

outright. If, however, the decedent had been given "proper" advice, he or she would know that they could limit the survivor to $10,000 plus the life income from $40,000. The decedent would also know that if he or she provided the survivor with a traditional life estate in the $40,000 trust, there was no requirement that the corpus earn any particular amount of income as long as the $40,000 consists of a fair cross-section of the decedent's assets. (Matter of Clark, 169 Misc. 202, Matter Niedelman, 175 NYS2d 694, 6 AD2d 291, affd 185 NYS2d 802, 5 NY2d 1043, 158 NE2d 498; Matter of Shupack, 154 NYS2d 441, 1 NY2d 482, 136 NE2d 513). Thus, if the bulk of the decedent's estate consisted of closely-held essentially no-dividend stock, the survivor's income right from a $40,000 corpus would have little, if any, value.

The Committee concluded that the feature of the existing statute which permitted satisfaction of the elective share by an income only trust, which was virtually unique to New York law, should be eliminated because it substantially lessened the value of the elective share. Additionally, since the elective share could be restricted to an income-only interest for life, it gave the surviving spouse no dispositive power over the elective share, whatever its value. The Committee's recommendation was that the elective share should be one-third of the estate, outright and not be satisfied by a trust.

When a decedent creates a qualified terminable interest trust (QTIP) in an amount more than one-third of the estate, the Committee recommendation, as adopted in EPTL § 5-1.1A, gives the surviving spouse a true election to either accept that which is provided by the decedent or, to forego it and opt for the one-third outright. This is a true right of election. Many testators who may wish not to leave their estates outright to a surviving spouse but wish to avoid estate tax might leave more than one-third of the estate in a QTIP trust. The surviving spouse can evaluate whether it is in his or her best interest to accept the trust or forego it in favor of one-third of the estate outright.

Other features of the EPTL § 5-1.1 regime were troublesome for some advocates for change. For instance, the statute did not distinguish between assets acquired during the marriage ("marital property") and assets owned by the decedent spouse before the marriage ("separate property"). Nor did the statute consider the size of the estate of the surviving spouse. Such

features could result in what some viewed as larger than equitable elective shares in some cases and smaller than equitable elective shares in others. The Advisory Committee was aware that those features were present in the New York's Equitable Distribution Law that governs divorce. However, the Committee found equitable distribution attendant upon divorce basically involves a discretionary distribution system requiring the court to consider a multitude of factors and many of those factors assumed the continued existence of both parties. Division at death, by definition, is different and involves the continued existence of only one of the parties, which would make discretionary distribution, upon application of a multitude of factors, difficult, if not impossible, especially in light of evidentiary prohibitions. In addition, a system such as equitable distribution, which requires both the classification of the assets as marital or separate and evaluation of the assets of both spouses involved questions of commingling and commutation of separate and marital property, problems which would be even greater at death than they would be at divorce. More important, an equitable distribution system was considered so subjective as to make estate planning most difficult, especially with our complex estate transfer tax system.

The Committee also considered the attempt of the Uniform Probate Code (1990 version) to simulate a deferred community property system like equitable distribution at divorce. The Committee concluded, however, that the UPC approach not only fell short of its objective in several instances, but also introduced an undesirable feature, i.e., an elective share whose percentage increases as the length of the marriage increases. This latter feature essentially valued spousal rights by reference only to the length of a marriage, ignoring both the source of the marital assets and the fact that even in marriages of short duration a surviving spouse may have contributed substantially to the acquisition of family assets.

In the end, the Committee concluded that the complete elimination of these two troubling features (failure to distinguish between "marital" and "separate" property and failure to evaluate the assets of both spouses) could only be accomplished by (a) the complete repeal of New York's present marital property law system, not only with respect to spousal rights at death, but also with respect to such rights at divorce, and indeed, during the existence of the marriage, and (b) the replacement of such system by a community property system modeled on the Uniform Marital Property Act

which basically gives each spouse a vested one-half interest in all property acquired by either spouse during the marriage – an interest that vests as the property is acquired and thus affects the rights of both spouses during marriage, at divorce, or at death. After careful review, the Committee opposed such a radical change in New York law and did not provide for it in the draft and limited its recommendation to those revisions that would substantially improve the strength and equity of the then existing elective share system.

The elective share, as provided in the new section (EPTL § 5-1.1A), is now one-third of the net estate regardless of whether or not the decedent was survived by any issue. The first and most important recommendation the Committee made and enacted into legislation was the elimination of the elective share trust as a means of satisfying the Right of Election. The Committee carefully studied and rejected the approach taken by the proposed Uniform Probate Code which would permit the elective share to be satisfied by the income-only trust but which credits satisfaction of the elective share only to the extent of the actuarial value of the surviving spouse's life estate.

After much deliberation the Committee members favored increasing the absolute amount a surviving spouse may take and to expand the list of testamentary substitutes. Thus, it was the conclusion of the Committee that an elective share of one-third outright, inclusive of the new testamentary substitutes was favorable for two reasons: first, it clearly simplified the Right of Election Statute, and secondly, it provided to the surviving spouse who is left a legacy in trust a true election; either accept the income only trust or elect to take the elective share outright, forfeiting the benefits provided by the trust or any other testamentary provision.

The new bill also provides for a statute of limitations within which to exercise the right of election; such election must be made six months after issuance of letters but in no event later than two years from the date of death. This issue was not dealt with regarding testamentary substitutes under the then existing law.

In the next article, I will discuss both testamentary substitutes and other new provisions that were enacted to modernize the Right of Election Statute.

*It should be noted that if one would wish to review the five (5) reports that I submitted as Chairman of the Committee to the Legislature, together with their supplements, they can be found in Warren's Heaton on Surrogates Courts, Vol. 14, 6th Edition, Revised.

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