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REPORT ON LEGISLATION BY THE COMMITTEE ON TRUSTS, ESTATES & SURROGATE'S COURTS

A.855 **M. of A. Weinstein**

Requires prior disclosure of income, assets, financial obligations of decedent to enforce surviving spouse's waiver of right of election.

THIS BILL IS DISAPPROVED

Bill A.855 is identical to the 2010 version of this bill, A.2873/S.2971, which was vetoed by former-Governor Paterson in March of 2010, and A.4440, which was introduced in the Assembly in 2001. We disapproved the 2001 version of this bill for the reasons set forth in our report of May 21, 2001, which is annexed hereto as Exhibit 1. We hereby endorse again the reasoning and findings of our 2001 report and reiterate the view expressed therein that (i) the statute would not afford additional protection beyond that implicit in the current knowing-and-intelligent-waiver standard to spouses waiving the right of election, and (ii) the statute would make litigation more likely by allowing spouses to litigate over what constitutes "fair and reasonable" disclosure independently of whether there was a knowing and intelligent waiver. In addition, we wish to outline further reasons for our disapproval of the bill.

The bill permits nullification of a waiver of a right of election based solely on the basis of the absence of fair and reasonable disclosure. This provision fails to take into account any bargained-for exchange that had occurred in order to secure the waiver of the right of election. The bill further fails to take into account any provisions that might have been made for the surviving spouse by the decedent during his or her lifetime. It is not uncommon for one spouse to make lifetime transfers to the other spouse or to make that spouse the beneficiary of life insurance in order to provide for that spouse in the event of death. These transfers to or provisions for the surviving spouse may well not be within the existing statutory definition of "testamentary substitutes" that are taken into account in calculating the elective share (unlike, say, joint accounts, which are taken into account), even though as a matter of fairness, economics and the policy behind the statute, they constitute an appropriate quid pro quo for the waiver. Moreover, this type of waiver often is part of an integrated joint estate plan intended to reduce estate taxes at the death of both spouses, or to provide fairly for the various members of a blended family, which constitute indirect but real benefits to the waiving spouse that the proposed legislation would ignore.

The "fair and reasonable" standard contained in the bill changes existing common law, which provides that a waiver of the right of election is valid unless the surviving spouse can prove such a waiver was unconscionable, involuntary, or the product of fraud or overreaching. Thus, the statute would replace a well-established standard with language that is overly subjective and that could, as noted in our 2001 report, invite vexatious litigation. Former-Governor Paterson agreed with these arguments in his veto memo for A.2873/S.2971[1]. For the foregoing reasons, the bill is disapproved.

Sharon Klein, *Chair*
Committee on Trusts, Estates and Surrogate's Courts

Reissued May 2013

[1] Veto message 6 for S.2971, March 30, 2010.

EXHIBIT 1

COMMITTEE ON TRUSTS, ESTATES AND SURROGATE'S COURTS

A. 4440 **M. of A. Weinstein**

An Act to amend the Estates, Powers and Trusts Law, in relation to the waiver of a right of election by a surviving spouse.

THE BILL IS DISAPPROVED

Section 2 of the bill makes waivers of the right of election unenforceable if the surviving spouse proves by a preponderance of the evidence that the spouse did not receive a "fair and reasonable disclosure of the income, assets, and financial obligations of the decedent prior to the execution of the waiver or release . . ." The waiver or release will be upheld, however, if the deceased spouse's estate shows that the surviving spouse expressly waived the right to disclosure beyond whatever disclosure was provided, or that the surviving spouse "had sufficient knowledge" of the financial status of the decedent prior to execution of the waiver or release.

The memorandum in support of the bill states:

> Under current law a waiver will not be effective if unconscionable, involuntary, or the product of fraud or overreaching by the decedent spouse. Current law does not, however, require financial disclosure as a condition to the enforceability of such a waiver. In changing the law to require such disclosure, this bill would render the law of New York consistent with the common law requirements of fundamental fairness prevailing in other states and with the three uniform acts on the subject (the Uniform Probate Code, the Uniform Premarital Agreement Act, and the Uniform Marital Property Act.) At the same time, the bill would preserve to the surviving spouse the right to assert existing common law defenses such as fraud, involuntariness, and unconscionability.

Although there is no *per se* requirement of financial disclosure in the EPTL, it is well-settled law that a waiver of any right must be knowing and intelligent in order to be enforceable. Therefore, it is difficult to see how a waiver of an elective share could be upheld under existing law in the absence of reasonable financial disclosure or knowledge. In practice, however, the bill would foster litigation and would make it easier for a spouse who had in fact executed a knowing and intelligent waiver to repudiate it. On the other hand, the statute can easily be circumvented by adding a "boilerplate" waiver of the right to disclosure.

The bill would have little impact in connection with waivers of elective rights in prenuptial agreements, where practitioners universally include financial disclosure. It would,

however, materially change the practice in connection with post-nuptial waivers executed in connection with Wills. For example, in a second marriage, a spouse with children from a previous marriage might leave her entire estate to a QTIP trust that would ultimately pass to her children; in such cases, waivers are frequently executed simultaneously with execution of the Will. The level of financial disclosure is often much less than that found in prenuptial agreements (understandably so where both spouses are privy to the couple's financial information). The bill would make it possible for a surviving spouse to repudiate such a waiver, even though the waiver was indeed knowing and intelligent when made, thus shifting the burden to the deceased spouse's estate to demonstrate the actual extent of the surviving spouse's knowledge of the financial situation at the time the waiver was executed. This burden would be almost impossible to meet.

The bill would still not necessarily increase the protection afforded to the waiving spouse, since it provides that a waiver will be upheld where the surviving spouse has expressly waived the right to further disclosure. Practitioners would simply include such a waiver in their "boilerplate."

It is respectfully submitted that the appropriate inquiry continues to be the one posed by existing law: was the waiver knowing and intelligent? If so, the waiver should stand. If not, it will not be upheld. We do not believe that the statute would afford additional protection to waiving spouses beyond that implicit in the knowing-and-intelligent-waiver standard, but it would make litigation more likely by allowing spouses to litigate over what constitutes "fair and reasonable" disclosure independently of whether there was a knowing and intelligent waiver.

For the foregoing reasons, the bill is disapproved.

May 21, 2001

RESPECTFULLY SUBMITTED

Mal L. Barasch, Esq., Chair