Surviving Spouse's Right of Election in New York Where Trust Income May Be Diverted: The Need for a Further Change

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SURVIVING SPOUSE’S RIGHT OF ELECTION IN NEW YORK WHERE TRUST INCOME MAY BE DIVERTED: THE NEED FOR A FURTHER CHANGE

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The 1965 New York Legislature, pursuant to the recommendation of the Commission on Estates, enacted important amendments and additions to the sections of the Decedent Estate Law dealing with the right of the surviving spouse of a decedent dying after August 31, 1966, to elect to take a share of the decedent’s estate as in intestacy. While, on the whole, these changes in the law constitute a much needed reform, there is one area in which the new statute would appear to create a trap for the unwary draftsman and to frustrate needlessly the intent of a married testator, without benefiting to any commensurate degree the surviving spouse whose rights Section 18 of the Decedent Estate Law was originally designed to protect.

The pertinent section of the new law reads as follows:

The grant of authority in any instrument providing for a form of income for the benefit of the surviving spouse for life which otherwise qualifies under this section shall give the surviving spouse an absolute right of election to take his or her elective share if such power or powers permit:

i. the reduction of any such trust by invasion of principal in favor of another or others;

ii. the termination of any trust or legal life estate or annuity prior to the death of the surviving spouse by payment of the capital thereof to another or others;

iii. the trustee to pay or apply to the use of the surviving spouse less than all the net income from any trust, legal life estate or annuity.

If the instrument contains powers other than those enumerated, the surrogate’s court having jurisdiction of the estate shall have power in an appropriate proceeding by the surviving spouse or upon an accounting to direct and enforce for the protection of the surviving spouse an equitable distribution, allocation or valuation of the assets; to enjoin any fiduciary, whether appointed by will or otherwise from exercising any power, statutory or otherwise, which would be prejudicial to the interest of the surviving spouse; to enforce the lawful liability of a fiduciary, and shall have power

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2. N.Y. Deced. Est. Law § 18-a concerns the surviving spouse’s rights with reference to certain non-testamentary transfers, such as gifts causa mortis, joint bank accounts, Totten trusts, etc. N.Y. Deced. Est. Law § 18-b, in effect, amends § 18 with respect to testators dying after August 31, 1966.
also to make such other direction consistent with the provisions and purposes of this section as the court may deem necessary for the protection of the surviving spouse.\(^9\)

The first paragraph above is a codification of existing case law. The italicized subdivision, with which this article will be principally concerned, codifies recent court decisions (of which the bar in general may not be informed) which have caused considerable concern to estate lawyers and trust officers. The first two subdivisions represent sound decisional law which, for the most part, is uncomplicated.\(^4\) The second paragraph above constitutes a significant change in the statutory law and serves to reinforce the likelihood that the testamentary intent of an uninformed married testator may be substantially defeated.

I. THE PROBLEM

Section 18 and the recently enacted Sections 18-a and 18-b of the New York Decedent Estate Law grant to a surviving spouse the right, subject to certain limitations, to take a share of the decedent's estate which the surviving spouse would have taken if there had been no will or testamentary provision.\(^6\) A principal limitation is that the surviving spouse's right of election may be barred, either absolutely or partially, if the deceased spouse makes certain minimal testamentary provisions in favor of the surviving spouse. One of such provisions, commonly used by a spouse who does not wish to grant to a surviving spouse an outright gift of an amount at least equal to the intestate share (termed the "elective share" in the new statute), is a trust with income thereof payable to the surviving spouse for life.\(^7\)

Where such a trust is established, the surviving spouse will have a

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3. N.Y. Deced. Est. Law § 18-b(1-j). (Italics added.)
4. Many decisions have held that the possible reduction of the corpus of a trust by a power of invasion in favor of persons other than the surviving spouse renders the trust illusory. E.g., In the Matter of Estate of Wittner, 301 N.Y. 461, 95 N.E.2d 798 (1950); In the Matter of Estate of Aaronson, 20 App. Div. 2d 133, 246 N.Y.S.2d 61 (2d Dep't 1963); In the Matter of Matthews, 255 App. Div. 80, 5 N.Y.S.2d 707 (2d Dep't 1938), aff'd mem., 279 N.Y. 732, 18 N.E.2d 683 (1939); In the Matter of Estate of Sheppard, 189 Misc. 367, 71 N.Y.S.2d 340 (Surr. Ct. 1947). The leading case on termination of a trust prior to the death of the surviving spouse is In the Matter of Byrnes, 260 N.Y. 465, 184 N.E. 56 (1933), where the trust was to terminate upon the widow's remarriage.
5. The phrase "testamentary provision" is used in this article in the sense in which it is defined in § 18-b(1-c), as including non-testamentary transfers described in § 18-a.
7. Such trust provisions are regulated by N.Y. Deced. Est. Law §§ 18(1)(b), (d)-(f), 18-b(1)-d, f-h. Very often, the surviving spouse is also given a full power of appointment over the remainder in order to obtain the marital deduction of the amount of the trust for estate tax purposes.
limited or an absolute right of election, depending, in the first case, upon
the presence or absence of other testamentary provisions in favor of the
surviving spouse, and, in the second case, upon provisions governing the
trust. For example, where there is such a trust and there is no testa-
mentary provision in favor of the surviving spouse amounting to 2,500
dollars (10,000 dollars after August 31, 1966), the surviving spouse, as
in intestacy, will be entitled to take under a right of election the above
limited amount, which will be deducted from the principal of the trust; or,"where the aggregate of the testamentary provisions for the benefit of
the surviving spouse including the principal of a trust . . . is less than the
elective share, the surviving spouse [has] . . . the limited right to elect to
take the difference between such aggregate and the amount of the elective
share . . ." No right of election exists where at least 2,500 dollars (10,000
dollars after August 31, 1966) is given outright and a trust for the benefit
of the surviving spouse for life is provided, both gifts amounting in the
aggregate at least to the amount of the elective share.10

Accordingly, where there is an insufficiency in the corpus or principal
of the trust, a mere limited right of election exists. However, where the
trust is held to be "illusory," in that it fails in other respects to satisfy
the statutory norm, i.e., a trust for the life of the surviving spouse with
net income thereof payable to the spouse during that period, the surviving
spouse is granted a general or absolute right of election.

The problem may be highlighted by a simple illustration substantially
close to the facts of an actual case.11 Assume that the elective share of a
surviving spouse without children is 400,000 dollars. The testator estab-
ishes a testamentary trust in that amount with all net income thereof
payable to the wife and gives her a full power of appointment over the
principal. The will also contains a direction that all dividends in the form
of stock be allocated to principal. Because of the remote possibility that a
particular type of stock dividend, known popularly as a "spin off," may be
received by the trustee, the wife is accorded an absolute right of election
to take the entire 400,000 dollars outright, free of any trust. Had the prin-
cipal of the trust amounted to only 300,000 dollars and the will contained
no direction as to allocation of stock dividends, the widow would have been
entitled only to a limited right of election to take 100,000 dollars outright,
and the trust would have continued in a reduced amount.12

8. N.Y. Deced. Est. Law §§ 18(1)(b), 18-b(1)d.
11. In the Matter of Estate of Kunc, 43 Misc. 2d 387, 251 N.Y.S.2d 112 (Surr. Ct.),
12. All legatees, including the trust, except remaindermen, must contribute ratably to
It is interesting that, just about the time that the most important and significant of the cases dealing with this problem were first decided by the courts, an article appeared which anticipated the question involved in the problem. The authors, Surrogate Christopher C. McGrath and Myles B. Amend, Jr., in discussing the new statutory provisions dealing with the rule of apportionment of corporate stock distributions between principal and income (now known as the Uniform Principal and Income Act), made the following statement:

Where a trust is created which gives a surviving spouse the minimum required by section 18 of the Decedent Estate Law, it might be best to remain silent on the subject and allow the law to apportion the distribution. A direction that principal is to receive all such distributions might result in a contention that the surviving spouse will not receive "all the income" from the trust and thereby gives an absolute right of election. While the authors do not believe such a contention will be successful, it would seem best to avoid the situation by remaining silent on the subject.

While the authors' recommendation that draftsmen would be well advised to remain silent on the subject of apportionment has proven to be very sound indeed and is, as shall be seen, the only safe course to follow today, their belief that those contending for an absolute right of election would not succeed in a case such as the one used above has not been borne out by the decisions.

II. The Decisions

The following discussion will concern only those cases in which an absolute right of election by a surviving spouse has been exercised on the ground that the spouse may be deprived by some testamentary provision of merely a part of the income of a trust which in all other respects satisfies the statutory norm. As previously observed, the trust may be declared illusory for other, more substantial, reasons, now also codified in section 18-b, such as possible invasion of the trust's principal in favor of someone other than the surviving spouse, or termination of the trust prior to the surviving spouse's death. Such cases will not be discussed. Those cases which will be discussed may be roughly classified, in the extent necessary to make up the amount of the elective share which the surviving spouse has not otherwise received by testamentary provision. The elective share is charged with the capital and not the life value of the trust. Third Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, Rep. No. 1.10B, app. A at 195 n.24, N.Y. Leg. Doc. No. 19, p. — (1964).

14. Id. at 75.
15. Cases cited note 4 supra.
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inverse order of their significance and importance to the problem under consideration, into three categories: (1) those dealing generally with diversion or reduction of income; (2) those involving stipulations against apportionment of income accrued upon the deceased spouse's death; (3) those involving allocation of dividends, whether in the form of cash or stock.

A. Decisions Dealing Generally With Trust Income

Before discussion of lower court decisions is undertaken, it may be well to refer to language of the New York Court of Appeals in two cases, in order to furnish some insight into the attitude of that court on the problem generally.

In In the Matter of Will of Clark,10 the testator's widow contended that the trust was illusory because the trustee was authorized to exercise unrestricted discretion in appraising and evaluating assets, including those allocable to the trust established in lieu of dower and all rights of election. The court held that the surrogate would have jurisdiction to direct an equitable distribution to insure to the widow a principal amounting to her intestate share, and stated:

Nothing in this will indicates an intent by the testator to establish such a trust as will yield little or no income or otherwise ingeniously to deprive the widow of her intestate rights. "A testamentary gift of an equal sum with the intestate share, or a gift in trust of such a sum for the use of the surviving spouse for life, or a combination of such gifts providing in the aggregate at least such a sum, should constitute an equivalent of the intestate share. * * * We conceive its [the legislature's] 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."

In In the Matter of Will of Shupack,18 the widow claimed that the trust was illusory and inadequate since the trust corpus comprised stock in close corporations and, as a minority stockholder, she would be at the mercy of the holders of the majority stock for the declaration of dividends and their amount. The majority opinion, in reversing a holding by the appellate division that the trust was illusory, stated:

Contrary to respondent's argument, the statute was not, and rationally could not have been, designed to guarantee any particular income or any particular standard of living to the surviving wife. The widow must accept her share of what her husband owned.

The possibility which she fears, that her income may be impaired by hostile

16. 275 N.Y. 1, 9 N.E.2d 753 (1937).
17. Id. at 5, 9 N.E.2d 754, quoting from In the Matter of Byrnes, 260 N.Y. 465, 470, 474, 184 N.E. 56, 57, 58-59 (1933). (Emphasis omitted.)
majority owners, results from the character of the property left by her husband rather than from any attempt to deprive her of her lawful share in the estate. . . .

This is not to say, though, that a testator, who dies possessed of both income producing and non-income producing property, may so divide his estate as to bequeath to his wife only the unproductive portion. When we are confronted with such a case, we shall deal with it.19

Two judges dissented in an opinion which stated, *inter alia*, that "a trust will be deemed illusory where, because of the peculiar nature of the property, or the imposition of some term of condition, the surviving spouse's right to receive income might possibly be negated, impaired or rendered insecure."20

Except for a matter next to be discussed, the decisions in this first category of cases are really unexceptional. For example, it is quite properly held that, if the trust income is subject to the payment of charges which are not the obligation of the surviving spouse as life beneficiary or if a portion thereof is first to be paid to others, the spouse's right to all of the trust income is thereby diminished and an absolute right of election exists.21 Similarly, if the installments of income payable to the surviving spouse are set at a fixed monthly or yearly sum which may or may not equal the net income of the trust fund, such an income provision fails to satisfy the statute, even though there may be some other compensatory features favoring the spouse.22

At this juncture, a very pertinent question appears to be warranted. Why in these cases is the widow given an absolute right of election? Where the amount of the probable reduction or diversion of trust income from the surviving spouse is reasonably ascertainable, why is the spouse not adequately protected by capitalizing such income and granting the spouse such capitalized amount under a limited right of election? The question

20. Id. at 494, 136 N.E.2d at 519, 154 N.Y.S.2d at 450 (dissenting opinion).
has been answered in *In the Matter of Estate of Schmidt*, which, relying upon a provision of the statute, held, in effect, that capitalization of the value of a specified annuity for life is not permissible. There is, therefore, no formula in the statute or in the decided cases for computing the capital value of the minimum annual gift in trust for the surviving spouse.

**B. Accrued Income Cases**

Section 204 of the Surrogate’s Court Act provides, in effect, that certain income, such as rents, annuities, and dividends, payable to a decedent must be apportioned between the estate of the decedent and the person who, upon his death, becomes entitled to such income, unless the will or other governing instrument expressly stipulates that no apportionment be made.

In *In the Matter of Estate of Sernau*, the testator’s will set up a trust with income payable to his wife, the principal to consist of as much of his net estate as his wife would have the right to elect to take by virtue of the New York laws. Upon her death, the principal “and any undistributed income” was to be paid into the testator’s residuary estate. Surrogate Cox of New York County, after reviewing decisions which held that provisions directing payment to remaindermen of “undistributed income,” “accrued income,” or “income not paid over” constituted stipulations against apportionment in conformity with Section 204 of the Surrogate’s Court Act, held that such a stipulation against the statutory apportionment-

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24. N.Y. Deced. Est. Law § 13(1)(g), which provides, in part: “In the computation of the value of the provisions under the will the capital value of the fund or other property producing the income shall be taken and not the value of the life estate.”

25. N.Y. Surr. Ct. Act § 204. The provisions of § 204 which are pertinent to the textual discussion are now substantially contained in the Uniform Principal and Income Act (Article 2-A of the Personal Property Law, see note 26 infra).

26. N.Y. Pers. Prop. Law § 27-c(4) reads as follows: “On termination of an income interest, the income beneficiary whose interest is terminated or his estate is entitled to (a) income undistributed on the date of termination; (b) income due but not paid to the trustee on the date of termination; (c) income in the form of periodic payments (other than corporate distributions to stockholders and savings bank and savings and loan association dividends) such as rent, interest or annuities, not due on the date of termination accrued from day to day.”


28. Id. at 349, 233 N.Y.S.2d at 192.

29. Id. at 350-52, 233 N.Y.S.2d at 194-95.
ment deprived the widow of the undiminished income from the trust and, accordingly, entitled her to an absolute right of election.

This decision was cited with approval and followed by the appellate division in In the Matter of Estate of Aaronson, although it should be pointed out that, aside from the direction that the undistributed income be paid to the remainderman, there were, in the court's interpretation of the will, more substantial reasons for according to the surviving spouse an absolute right of election, namely, the trustee's power to invade the principal of the trust on behalf of testator's son.

Considering the history and purpose of section 18—at least until the enactment of section 18-b(1)j(iii), applicable to testators dying after August 31, 1966—it might well be argued that a surviving spouse has not been deprived of the enjoyment of income in such a case in any real or substantial degree sufficient to entitle the spouse to an absolute right of election even where income has been received by the trustee but has not been paid over to the spouse prior to the spouse's death. This, of course, would be particularly true if, as is often the case in order to preserve the full marital deduction for estate tax purposes, the surviving spouse has been given an absolute power of appointment over the remainder of the trust.

Such an approach appears to have been adopted by Surrogate Clancy in Queens County in Matter of Baileson. The will provided that "income accrued but not due at the time of the termination of any estate hereunder shall, when due, belong to and be payable to the beneficiary entitled to the next eventual estate." The surrogate stated:

In the instant case, the trust for decedent's widow failed to comply with section 18 only with respect to income accrued and not yet due at the date of her death. Obviously, therefore, the trust was not illusory because it would only be upon her death that she could have been deprived of anything.

Because of the failure to give the accrued income to the wife, or her estate upon her death, the trust herein falls short of meeting the requirements of section 18 but the wife's right of election is limited to taking the income accrued at the date of her death. This she may dispose of in her own will.

The latter part of the surrogate's decision is unique and, on the surface, strikes one as sensible and practical. However, as previously pointed out, no statutory or decisional law supports such a limited right of election.

31. Id. at 137-38, 246 N.Y.S.2d at 66-67.
32. See text accompanying note 3 supra.
34. Id. at 16, col. 8.
35. Ibid.
The testator's intention was clearly to avoid the statutory apportionment required by section 204; to give to the wife a right to dispose by her will of income which might be accrued at the time of her death would appear to be rewriting the testator's will in order to conform to section 18. This the courts are not permitted to do.\textsuperscript{38}

On appeal, the appellate division modified,\textsuperscript{27} holding (1) that the stipulation against apportionment reduced the testamentary bequest to the widow to less than the minimum prescribed by the statute, and (2) that her right of election entitled her to "the difference between the aggregate of the testamentary provisions and her intestate share of one third of the net estate outright, and not (as the Surrogate held) merely to the difference between the aggregate of the testamentary provisions and the statutory equivalent of her intestate share provided by section 18 of the Decedent Estate Law . . . ."\textsuperscript{39,40} The quoted expression appears to be somewhat obscure, but the court seems to be saying that giving to the widow the income of which she has been deprived by the will is not a substitute for the portion of the intestate share to which she is entitled.

In any event, upon further appeal as a matter of right, the court of appeals reversed\textsuperscript{40} the appellate division, Chief Judge Desmond alone dissenting. The memorandum decision of the majority read, in part, as follows:

\begin{quote}
We hold that a stipulation against the apportionment of accrued income, i.e., income earned by the corpus, but not yet payable to the trustee, does not, in and of itself, deprive the widow of the benefit of the income from a trust for life under section 18 of the Decedent Estate Law . . . so as to give her a right of election.\textsuperscript{41}
\end{quote}

The court of appeals remitted the matter to the surrogate's court for the entry of a decree consistent with its decision. Chief Judge Desmond dis- sented because he voted to reinstate the surrogate's order.

At the time that the court of appeals was deciding \textit{Bailesen}, pending before Surrogate Herman of Westchester County was a similar proceeding involving a stipulation against apportionment of "all accrued but unpaid income."\textsuperscript{41} The surrogate held up his decision, awaiting the out-

\begin{itemize}
\item \textsuperscript{36} In the Matter of Estate of Wittner, 301 N.Y. 461, 465, 95 N.E.2d 793, 799 (1950); In the Matter of Matthews, 255 App. Div. 80, 85, 5 N.Y.S.2d 707, 713 (2d Dep't 1939), aff'd mem., 279 N.Y. 732, 18 N.E.2d 683 (1939). It should be observed, however, that the statutory right of election itself often constitutes a drastic rewriting of a testator's will.
\item \textsuperscript{37} In the Matter of Estate of Bailesen, 22 App. Div. 2d 501, 254 N.Y.S.2d 140 (2d Dep't 1964) (memorandum decision).
\item \textsuperscript{38} Id. at 502, 254 N.Y.S.2d at 142.
\item \textsuperscript{39} 16 N.Y.2d 757, 209 N.E.2d 810, 262 N.Y.S.2d 487 (1965) (memorandum decision).
\item \textsuperscript{40} Id. at 759, 209 N.E.2d at 811, 262 N.Y.S.2d at 488. (Citations omitted.)
\item \textsuperscript{41} In the Matter of Estate of Schlinger, 48 Misc. 2d 345, 265 N.Y.S.2d 32 (Surr. Ct. 1965).
\end{itemize}
come of the *Baileson* case. The widow's attorney argued that the expression used by the testator meant "accumulated income." The court disagreed and correctly held that the cases were undistinguishable, and properly stated and applied the exact holding in *Baileson*. However, at one point in its opinion, through an apparent inadvertence, the court overstated the *Baileson* holding:

In essence, the Court of Appeals held that a stipulation against the apportionment of income, in and of itself, did not so deprive the widow of the benefit of the income of a trust for her lifetime as to afford her a right of election.

It is necessary to understand the more narrow scope of the *Baileson* decision. It does not apply to a stipulation against apportionment of *undistributed* income received by the trustee prior to the life tenant's death but only accrued income, earned and *not yet payable* to the trustee. The court seems merely to have decided that a testator's denial of the latter income to the surviving spouse does not per se give the spouse a right of election.

**C. Allocation of Dividends Cases**

One conclusion appears to be inescapable from the second category of decisions just discussed. The stipulation against apportionment of income, commonly found in many wills, can hardly be said to have been intentionally used as a device whereby the surviving spouse's right of election is "whittled down by the ingenuity of the draftsman of a will or by the design of the husband to deprive the wife of her lawful rights." No such sinister intent can be inferred from the use of such a customary, routine administrative provision found in the suggested forms of many trust instruments. Moreover, the pecuniary effect upon the surviving spouse is normally of relatively minor importance, especially where the spouse is given a power of appointment over the remainder.

The same conclusion may also be drawn from the next category of cases. The trust provisions involved are likewise found in the form books and, undoubtedly, are being utilized even now by general practitioners who are uninformed as to the effect of these recent decisions upon the testamentary disposition which they are drafting. Of even graver concern is the fact that many testamentary provisions of the kind that will be considered have already become irretrievably effective by the death or incapacity of the testator.

42. Id. at 346, 265 N.Y.S.2d at 35.
43. Ibid.
The cases to be discussed involve the allocation of corporate distributions between the principal and income of a trust, a problem which has plagued fiduciaries and bothered the courts for many years, causing extensive litigation and, finally, resulting in the adoption of legislation which has only recently been revised extensively. We shall see that the nuances distinguishing one decision from another and the changes in the statutory law have a vital bearing upon the effect which a trust provision may have upon a surviving spouse's right of election. In this respect, the decisions open up an entirely new area of this long-standing problem.

First to be considered are the cases involving cash dividends. In *In the Matter of Estate of Hyma,* the will creating the trust allocated all "'extraordinary stock or cash dividends'" to principal. Citing *In the Matter of Osborn,* which held that extraordinary cash dividends are to be considered income, at least to the extent that they represent earnings accumulated during the time that the stock is held by the trust, and also citing Section 17-a of the Personal Property Law (enacted at the time of the court's decision but not yet in effect, and which, in any event, appears to have antedated the probate of testator's will), which assigned all cash dividends to the income beneficiary, the surrogate held that the above allocation deprived the widow of income to which she would normally be entitled. Accordingly, the widow's absolute right of election to take free of the trust was upheld. The court quoted from in *In the Matter of Estate of Bommer.*

"How great an invasion of her rights this would effect is unpredictable and immaterial. All that is important is that the variety of trust here attempted to be erected, by reason of the fact that a portion of its income is not directed to be paid to the widow, does not comply with the statutory description of the sort of trust which the Legislature has provided shall alone defeat the primary right of the surviving spouse to elect to take her intestate share."

47. 41 Misc. 2d at 940, 246 N.Y.S.2d at 643.
48. 209 N.Y. 450, 103 N.E. 723 (1915).
Shortly thereafter, the same surrogate reached the same result in respect to a provision allocating to principal cash dividends in liquidation.\textsuperscript{52}

The stock distribution cases are somewhat more complex. Not long after section 18 was enacted, a widow, in \textit{In the Matter of Estate of Herts},\textsuperscript{53} claimed that a provision in her deceased husband's will, allocating to trust principal dividends payable in the stock of the corporation declaring the same, entitled her to exercise her right of election. The surrogate denied the claim, citing old Section 17-a of the Personal Property Law which directed that, unless a will provided otherwise, all such stock dividends were to be principal.\textsuperscript{54}

In \textit{In the Matter of Estate of Kunc},\textsuperscript{55} the will directed the allocation to trust principal of all dividends payable in the stock of the corporation declaring the same "or in stock of other than the issuing corporation ...."\textsuperscript{55}\textsuperscript{56} Apparently, because of the earlier decision in the \textit{Herts} case, no contention was made by the widow that a true stock dividend, \textit{i.e.}, one in the stock of the corporation declaring the same, constituted income. However, the widow claimed an absolute right of election because of the provision quoted above, arguing successfully that dividends payable in the stock of corporations other than the corporations declaring the same are not true stock dividends but are the equivalent of a cash dividend\textsuperscript{57} and, accordingly, belong to the income beneficiary. The court, in reluctantly upholding the widow's claim, stated:

The testator's will devised and bequeathed all his personal effects, tangible property and his residential real property to his widow; his books and photographic equipment were left to his brother George. The residue and remainder were divided into two parts—the marital trust (A) for the widow, and the other part (B) in trust for his brothers. All estate and similar taxes, including possible tax penalties and interest, and any taxes on nontestamentary assets, were to be paid, only out of the trust (B) for the decedent's brothers. The widow also has a power of appointment as to her trust. She has also received substantial sums from the decedent's employers. There is no controversy as to the amount she would receive under the will. The above sentence

\footnotesize{\textsuperscript{52} In the Matter of Austin (Surr. Ct.) in N.Y.L.J., Nov. 13, 1964, p. 19, col. 3.}
\footnotesize{\textsuperscript{53} 165 Misc. 738, 1 N.Y.S.2d 528 (Surr. Ct. 1937).}
\footnotesize{\textsuperscript{54} Id. at 744-47, 1 N.Y.S.2d at 534-36.}
\footnotesize{\textsuperscript{55} 43 Misc. 2d 387, 251 N.Y.S.2d 112 (Surr. Ct.), aff'd mem., 22 App. Div. 2d 852, 255 N.Y.S.2d 467 (2d Dep't 1964). In this case no motion was made for leave to appeal to the court of appeals from the unanimous affirmance by the appellate division. However, the basic argument upon behalf of the executor was the same as that later made in the brief to the court of appeals in In the Matter of Estate of Hyman, 16 N.Y.d 484, 211 N.E.2d 654 (1965). The motion for leave to appeal was, however, denied.}
\footnotesize{\textsuperscript{56} Id. at 387, 251 N.Y.S.2d at 113. (Emphasis omitted.)}
\footnotesize{\textsuperscript{57} City Bank Farmers Trust Co. v. Ernst, 263 N.Y. 342, 346, 189 N.E. 241, 242-43 (1934); In the Matter of Rogers, 22 App. Div. 428, 432, 48 N.Y. Supp. 175, 178 (2d Dep't 1897), aff'd, 161 N.Y. 108, 55 N.E. 393 (1899).}
as to the allocation of stock dividends and “spin off” stock dividends to principal rather than income, unfortunately, makes the will vulnerable and results in a complete defeat of the testator’s desires and intentions. For reasons best known to the testator he desired to confine her future maintenance to income rather than to have her receive outright more than $400,000 (which is about her intestate share). The possibility of stock dividends and “spin off” stock may never materialize. But this court is confronted with the statute and the strict interpretation by the courts. It is unfortunate that the Surrogate is not empowered to act otherwise so as to further the well-planned intentions of the testator.58

In other words, because of a technical distinction in the law relating to corporate distributions, and despite, as the court admitted, the remoteness of the possibility of a diversion of income from the life beneficiary to trust principal, the court was compelled by statute and precedent to award outright to the widow one-half of the net estate. The fact that the widow possessed a full power of appointment over the remainder only emphasizes the unintended windfall to the widow.

Nevertheless, not only do the decisions and the statute, especially in its recently revised form, support the result in Kunc, but, as a matter of fact, a further argument may be made in support of the widow’s right of election in this type of case. This argument, a logical development from the theory of the decided cases, goes somewhat beyond the rather narrow grounds of the decisions in Kunc and Hyman, and constitutes a real threat to testamentary provisions which attempt to limit a surviving spouse to trust income in lieu of an elective share. A testator is free to direct the allocation of corporate distributions between income or principal of a trust as he or she sees fit, without reference to the apportionment otherwise prescribed by statute, but, if this is done concerning a trust established as a substitute for the spouse’s elective share, the Hyman and Kunc decisions give to the spouse the option to defeat the testator’s plan. But even if the testator directs an apportionment in accordance with the statute, what happens if the statutory rules later change once more?

As previously mentioned, the statutory law of New York in respect to allocation of corporate distributions, whether in the form of stock or cash, has been changed substantially a number of times within the last few years. The latest changes are contained in the Uniform Principal and Income Act, which is Article 2-A of the Personal Property Law.59 Section 27-e of that law, governing corporate distributions, provides that, except in respect to distributions by certain investment companies, the section’s provisions “shall apply to any trust, whether created or declared before

58. 43 Misc. 2d at 359-90, 251 N.Y.S.2d at 115-16.
or after the effective date" of the statute, i.e., June 1, 1965. The theory underlying the Hyman and Kunc decisions is that a testator may not deprive the surviving spouse of trust income to which that spouse would be entitled under law. Law existing at what time? At the time the will is drawn? At the time the testator dies and the ambulatory instrument becomes unalterable? Or at any time in the future during the lifetime of the trust beneficiary? The statutory equivalent of the elective share is nothing less than a trust for the life of the surviving spouse with the totality of income from the trust payable to the spouse during such life. A logical argument may be made that, if, at any time during that life, a testamentary provision operates to deprive the surviving spouse of any portion of the entire income which the law prescribes that a life beneficiary should receive, the statutory equivalent has failed of fulfillment. After all, the extraordinary cash dividends in the Hyman case and the stock spin-offs in the Kunc case undoubtedly would not come to the trust until years later, and the problem of undistributed income would not arise until the very end of the trust.

Let us apply the argument to the facts of the Kunc case. The will directed allocation of stock dividends to trust principal. At the time of the testator’s death on October 25, 1963, section 17-a provided that, where the will is silent, stock dividends belonged to trust principal. However, the section had previously been amended on May 3, 1963, to provide

61. This very argument was made without success in a recent case. In the Matter of Estate of Skidell, 49 Misc. 2d 147, 266 N.Y.S.2d 868 (Surr. Ct. 1965), aff’d mem., 25 App. Div. 2d 420, 266 N.Y.S.2d 528 (1st Dep’t 1966) (two judges dissenting). The appellate court made no reference to this argument. The surviving spouse claimed that the restriction contained in her deceased husband’s will against the assignment of income from the trust was inconsistent with the 1965 amendment to Section 15 of the Personal Property Law permitting a limited assignment of trust income. In denying the widow’s claim to an absolute right of election, the surrogate said: “It is to be concluded that, in regard to the assignment of trust income, the will imposed no restriction not otherwise existing in the law at the date of the testator’s death and, this being so, the twelfth article of the will did not give rise to a right of election at the date of the testator’s death or at any time thereafter. The fact that an amendment to the Personal Property Law . . . effective June 1, 1965, will permit the limited assignment of trust income in excess of $10,000 annually, does not affect the interpretation of the will vis-à-vis section 18 of the Decedent Estate Law. If a particular clause of the will did not constitute a basis for the exercise of the right of election at the testator’s death, a later statutory amendment, not aimed at the creation of such a right, could not have such an incidental effect. The validity of the testamentary provisions and their operative effect as permitting or excluding the right of election must be considered as of the time of the testator’s death.” 49 Misc. 2d at 151, 266 N.Y.S.2d at 873.
that, commencing on June 1, 1964, stock dividends, to the extent that they equal, in any trust year, six per cent or less on the number of shares of such stock held in trust, shall be income, the excess to be principal. The effective date of the statute was later moved to June 1, 1965. While the widow in Kunc successfully challenged the allocation to principal of stock spin-offs, she made no effort to question the testator's similar allocation of true stock dividends. Yet, the likelihood of her being deprived of income in the latter form would appear to be much stronger than the possibility of losing income in the form of stock spin-offs. Under the terms of the Kunc will, all stock dividends received by the trust were to go to trust principal, even though those received after June 1, 1965, would, by law, belong in part to income.

Undoubtedly, there are many other wills executed in the context of the law which existed before June 1, 1965, some of which have become final by death or incapacity, and, therefore, are just as vulnerable as the Hyman and Kunc wills. In fact, as we shall immediately see, existing wills may also be vulnerable because of the recent amendments which apply in the case of persons dying after August 31, 1966.

III. SUPERVISORY POWER OF THE SURROGATE

The recent decisions of the courts constitute an open invitation to dissatisfied spouses and astute counsel to subject every testamentary disposition, ostensibly conforming to the requirements of section 18, to a minute examination for purely technical deficiencies. As the court observed in In the Matter of Estate of Uhlfelder, "it is indeed a rare occasion that a will is drawn in which some grant of power is given to executors and trustees which cannot be said to impinge upon the widow's rights." The court held that a provision in a will authorizing the trustees, in their absolute discretion, to make payment of income payable to the widow, either directly or to others for her benefit, did not entitle her to exercise an absolute right of election, because of the provisions in subdivision 1(h) of section 18, which grant to the surrogates broad supervisory powers to protect the interest of the surviving spouse.

66. If the testator in the Kunc case had died after June 1, 1965, then there is no doubt that the allocation of true stock dividends could have been questioned.
68. 29 Misc. 2d at 42, 217 N.Y.S.2d at 775.
Subdivision 1(h) was enacted as a direct result of the furor created by the decision in *In the Matter of Estate of Curley*,⁷⁰ which held that any grant of powers by a testator to his executors or trustees which served to diminish the rights of a surviving spouse gave her an absolute right of election. The subdivision provides that the purported grant of authority to an executor or trustee to do certain things, such as to act without bond, to invest in non-legals, to retain investments, to distribute in kind or to allocate assets either outright or in trust for the life of a surviving spouse, shall not entitle the surviving spouse to an absolute right of election. The surrogate, notwithstanding the terms of the will, is given the power, in an appropriate proceeding, to direct and enforce an equitable distribution, allocation or valuation of assets, to enforce the lawful liability of a fiduciary, and "also to make such other direction consistent with the provisions and purposes of this section as the court may deem necessary for the protection of the surviving spouse."⁷¹

In *In the Matter of Estate of Edwards*,⁷³ the court utilized the statutory provision to deny a right of election to a widow who based her claim for the election upon a power, given by the testator to his executors, to dissolve a corporation which was part of a testamentary trust, and to distribute the extraordinary and liquidating dividends between trust principal and income. The court held that the supervisory power conferred by subdivision 1(h) was not limited to those powers enumerated therein, but "is one of general equitable supervision to assure both the testamentary scheme proposed by the decedent and fair participation of the spouse . . . ."⁷⁴

In *In the Matter of Estate of Greene*,⁷⁶ the court applied the subdivision in a situation where the trustees were authorized to set up reserves out of income for various expenses, including depreciation and obsolescence, in connection with real estate, and to allocate receipts and expenses between principal and income.

In *Hyman*, the attorney for the executor argued that the court should apply the provisions of subdivision 1(h), but the court refused to do so because the testator in that case had mandated capitalization of all ex-

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⁷². Ibid.
⁷⁴. 2 Misc. 2d at 567, 152 N.Y.S.2d at 11.
traordinary cash dividends. It was not a question of a mere grant of authority. The same was true in Kunc. The clause in reference to the allocation of dividends happened to be in a portion of the will preceded by language of command and direction. Had the particular clause in question been found in an earlier portion of the will which merely authorized and empowered the executor and trustee to perform the usual, routine functions in connection with the administration of the trust and estate, as was the case in Edwards and Greene, subdivision 1(h) would apply and the entire result of the case would have been different. The clause might just as effectively, from the viewpoint of the testator and trustee, have been located in the earlier portion. Its location elsewhere, however, made a tremendous difference.

The broad supervisory power of the surrogate to govern allocations between trust principal and income has been drastically changed by the enactment of the second paragraph of subdivision 1(j) of section 18-b. Hereafter, as to testators dying after August 31, 1966, the surrogate's court is deprived of the power to give directions to the trustee for the protection of the surviving spouse, and, thus, to deny the spouse an absolute right of election, where there is a claimed possibility of diversion or reduction of trust income. The amendment categorically directs that the surviving spouse shall have an absolute right of election where a grant of authority permits "the trustee to pay or apply to the use of the surviving spouse less than all the net income from any trust ...." The Edwards and Greene decisions are, in effect, overruled. This is so even though it was the apparent purpose of the Commission on Estates, which recommended the new legislation, to liberalize subdivision 1(h) in other respects. This new legislation makes it even more imperative that testamentary dispositions be carefully reviewed where it is desired to avoid the surviving spouse's right of election.

IV. THE RELEVANCE OF THE MARITAL DEDUCTION

In the Kunc case, the attorneys for both the widow and the executor, for different reasons, appealed to the provisions of the Internal Revenue Code and the regulation thereunder which allow a marital deduction.

for federal income tax purposes where there is an estate in trust for the life of the surviving spouse who is "entitled for life to all of the income" from the trust.

The attorney for the widow argued, as a matter of collateral importance, that the estate ran the risk of losing the benefit of the marital deduction if the trust for the widow were upheld by the court, since the Internal Revenue Service might successfully contend that, despite such holding, the widow would not be entitled to all of the income from the trust;81

(1) If an interest is transferred in trust, the surviving spouse is 'entitled for life to all of the income from the entire interest or a specific portion of the entire interest', for the purpose of the condition set forth in paragraph (a)(1) of this section, if the effect of the trust is to give her substantially that degree of beneficial enjoyment of the trust property during her life which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust. Such degree of enjoyment is given only if it was the decedent's intention, as manifested by the terms of the trust instrument and the surrounding circumstances, that the trust should produce for the surviving spouse during her life such an income, or that the spouse should have such use of the trust property as is consistent with the value of the trust corpus and with its preservation. The designation of the spouse as sole income beneficiary for life of the entire interest or a specific portion of the entire interest will be sufficient to qualify the trust unless the terms of the trust and the surrounding circumstances considered as a whole evidence an intention to deprive the spouse of the requisite degree of enjoyment. In determining whether a trust evidences that intention, the treatment required or permitted with respect to individual items must be considered in relation to the entire system provided for the administration of the trust.

"(2) If the over-all effect of a trust is to give to the surviving spouse such enforceable rights as will preserve to her the requisite degree of enjoyment, it is immaterial whether that result is effected by rules specifically stated in the trust instrument, or, in their absence, by the rules for the management of the trust property and the allocation of receipts and expenditures supplied by the State law. For example, a provision in the trust instrument for amortization of bond premium by appropriate periodic charges to interest will not disqualify the interest passing in trust even though there is no State law specifically authorizing amortization, or there is a State law denying amortization which is applicable only in the absence of such a provision in the trust instrument.

"(3) In the case of a trust, the rules to be applied by the trustee in allocation of receipts and expenses between income and corpus must be considered in relation to the nature and expected productivity of the assets passing in trust, the nature and frequency of occurrence of the expected receipts, and any provisions as to change in the form of investments. If it is evident from the nature of the trust assets and the rules provided for management of the trust that the allocation to income of such receipts as rents, ordinary cash dividends, and interest will give to the spouse the substantial enjoyment during life required by the statute, provisions that such receipts as stock dividends and proceeds from the conversion of trust assets shall be treated as corpus will not disqualify the interest passing in trust. Similarly, provision for a depletion charge against income in the case of trust assets which are subject to depletion will not disqualify the interest passing in trust, unless the effect is to deprive the spouse of the requisite beneficial enjoyment. The same principle is applicable in the case of depreciation, trustees' commissions, and other charges."

81. The trust will not qualify for the marital deduction if the surviving spouse is not
whereas, if she were allowed to take her elective share outright, the estate
to that extent would be assured of the marital deduction. Of course, the
question of the allowance of the marital deduction was not before the
state court and became academic by reason of the court's decision. Nevertheless, the argument advanced by the widow's attorney suggests an
additional reason for care and abnegation in the drafting of clauses affect-
ing trust income and principal.

The attorney for the executor, on the other hand, argued that the regu-
lation, in its interpretation of the Code requirement, was fair, reasonable,
and practicable, and would definitely not result in a disallowance of the
marital deduction, since the trust substantially gave to the widow the
beneficial enjoyment of the trust property during her life. The argument
was that section 18 should receive a comparable interpretation; in short,
that fairly routine provisions in the instrument creating the trust govern-
ing its administration in respect to the allocation and apportionment of
receipts and disbursements between income and corpus should have no
effect upon the surviving spouse's right of election.

V. SUGGESTED STATUTORY CHANGES

The Report of the Commission on Estates, which recommended that
the legislature enact subdivision 1(j) of section 18-b, does not indicate
that the particular problem discussed herein was considered. This is not
surprising since the full impact of the problem was not discernible until
Hyman and Kunc were finally decided. The writer is informed that the
problem is now under study by the Commission with a view to recom-
mending corrective legislation. There appears to be little reason to ques-
tion that such legislation is needed.

Legislation could take any one or more of the following several forms,
singly or, possibly, in combination: (1) The second paragraph of sub-
division 1(j) of section 18-b could be amended to restore to the surrogate
supervisory jurisdiction over claims by surviving spouses that a grant of
testamentary powers pertaining to apportionment of receipts and expenses
entitled to receive all of the income for life. See, e.g., Estate of Allen L. Weiberger, 29
T.C. 217 (1957). However, for examples of cases where there was a diversion of some of
the income from the spouse, and the trust still qualified for the marital deduction, see Annot.,

S2. The executor and remaindermen of a trust, where there is no power of appointment
to qualify the surviving spouse's interest for the marital deduction, may not be averse to
the surviving spouse's right of election being upheld, since the elective share will then un-
questionably qualify for the marital deduction.

S3. Third Report of the Temporary State Commission on the Modernization, Revision
between trust income and principal deprives them of a portion of the income to which life beneficiaries would normally be entitled. Any such legislation should eliminate the distinction between a grant of mere discretionary power and a testamentary direction. (2) The federal estate tax regulation relating to the allowable marital deduction in the case of a trust for the life of the surviving spouse could be used as a model for a similar provision briefly delineating the requirement of sections 18 and 18-b that the spouse receive all of the net income of the trust. In this connection, the fact that the surviving spouse is given a full power of appointment over the remainder might be accorded weight. (3) A mere limited right of election could possibly be provided for in the form of a capitalization of such income as the surviving spouse claims is being diverted during his or her life expectancy, where the amount of such income is reasonably ascertainable, and the capitalized amount included in the elective share. (4) A date should be fixed by statute, preferably the date of the testator's death, which should determine the effect of a testamentary provision as permitting or precluding the right of election.

Whatever form any legislation takes, the guiding principle in its enactment should be the elimination of the absolute right of election as a windfall and complete frustration of the testamentary intent, when the only departure from the statutory norm is a routine administrative grant of power or direction in respect to the allocation of receipts and expenses of a trust between principal and income. To the argument that such legislation will amount to a rewriting of the testamentary provision, the simple answer is that sections 18, 18-a, and 18-b already have that effect to a greater or lesser degree.

A prime difficulty which any draftsman of such legislation will encounter will be drawing the line between a grant of power or direction of the type mentioned above and testamentary provisions which actually defeat the purpose which the legislature had in mind in originally enacting section 18. This is the reason why several approaches have been suggested above.

Until new legislation is enacted or the court of appeals modifies the decisional law, the only safe path for attorneys to follow in drafting new, or redrafting existing, trust instruments is to comply with the suggestion made in early 1964 by Surrogate McGrath and Mr. Amend, namely, to remain silent on the subject of apportionment and allow the law to take its course.84

84. See text accompanying note 14 supra.