

Memorandum in Support

NYSBA # 16

February 17, 2016

S. 6711

By: Sen. Hannon
Senate Committee: Judiciary

**THE NEW YORK STATE BAR ASSOCIATION SUPPORTS THIS LEGISLATION,
WHICH WAS DEVELOPED BY ITS
ELDER LAW AND SPECIAL NEEDS SECTION**

This proposal would amend the Estates, Powers, and Trusts Law (EPTL) to enable a surviving spouse to waive his or her right of election in the estate of his or her deceased spouse after the passing of the deceased spouse. Under current law, the right of election can be waived only while both spouses are alive.

BACKGROUND

Current law provides spouses with a "right of election" in the estate of a deceased spouse. The right of election prevents spouses from being completely disinherited. Current law also permits spouses to waive the right of election as long as both spouses are alive, but the statute allows for the waiver to be done unilaterally and does not require that both spouses waive for the waiver to be effective.

Notwithstanding the foregoing, current law does not permit a surviving spouse to waive the right of election after the death of his or her spouse. A surviving spouse has an absolute right to exercise the right of election until six months from the date of issuance of letters testamentary or letters of administration by the surrogate's court, but no more than 2 years after the death of the deceased spouse.

THE PROBLEM WITH CURRENT LAW

The inability of the surviving spouse to waive the right of election after the passing of the decedent can unnecessarily delay the administration of an estate. As long as there is a potential for the exercise of a right of election, the other beneficial interests in an estate will remain uncertain until the right of election issues are resolved. The potential for the exercise of a right of election can also create uncertainty with regard to the need to file an estate tax return and with regard to the amount of tax that may be due. The current law also creates a level of uncertainty for Medicaid planning. Simply providing a surviving spouse with the option to waive the right of election after the death of the deceased spouse could largely resolve these issues.

CONCLUSION

Based on the foregoing, the New York State Bar Association **SUPPORTS** this bill, which was developed by its Elder Law and Special Needs Section, to amend the EPTL to permit a surviving spouse, on a voluntary basis, to waive his or her right of election after the death of the deceased spouse.