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Applying Equitable Estoppel To Deathbed Marriages

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"Elder abuse, including the financial exploitation of elderly individuals who have become mentally incapacitated is an often well-hidden problem."¹

Several recent decisions have highlighted a specific type of elder abuse where a person takes unfair advantage of an individual who lacks the capacity to enter into a marriage or otherwise utilizes fraud and undue influence to secretly marry the individual for the purpose of obtaining a portion of his or her estate at the expense of the intended heirs.



New York Estates, Powers and Trusts Law (EPTL) 5-1.1-A allows a surviving spouse a personal right of election to take a share of a decedent's estate when the parties are in fact married on the date of the decedent's death. A husband or wife is a surviving spouse within the meaning of EPTL 5-1.1-A unless it can be established satisfactorily to the court that any of the grounds for disqualification contained in EPTL 5-1.2 exist.

This article specifically addresses post-death annulment of marriages and an inconsistency in the law based upon a strict reading of the statute. Essentially, under DRL §140, a voidable marriage may be annulled post-death. However, under EPTL 5-1.2, the disqualification statute, status as a surviving spouse and any disqualification from taking an elective share is determined at the time of death of the decedent. Thus, a marriage may be annulled post-death, yet the former spouse will still be able to take their elected share of the decedent's estate. A strict reading of the statutes thus leads to an inequitable result.

However, in two recent cases, *Matter of Berk* and *Campbell v. Thomas*, the court has looked to equity and estopped these perpetrators from profiting from their wrongs and receiving their elective share. This equitable result was warranted in each of the cases; however, the Legislature should still re-examine the relevant portions of the EPTL and revise the statute to prevent this unjust enrichment at the expense of the decedents and their intended beneficiaries.

Post-Death Annulments

Section 140 of the Domestic Relations Law provides for the commencement of an action to annul a marriage. This action may be brought by one of the parties to the marriage or, under certain circumstances by a guardian of the person, guardian ad litem, parent, or a relative or friend who has an interest to void the marriage.² Further, as demonstrated by the cases below, it is possible and permissible to bring this action after the death of one of the spouses.

However, the term "surviving spouse" in EPTL 5-1.1-A presupposes that a valid marriage existed at the time of death. EPTL 5-1.2 then sets forth circumstances in which a surviving spouse may be disqualified from taking an elective share. In particular, EPTL 5-1.2(a)(1) states a

surviving spouse is disqualified if it is satisfactorily established to the court having jurisdiction of the action or proceeding that:

A final decree or judgment of divorce, of annulment or declaring the nullity of a marriage or dissolving such marriage on the grounds of absence, recognized as valid under the laws of this state, *was in effect when the deceased died.* (emphasis added).

Thus, a post-death annulment would not disqualify a surviving spouse from taking an elective share.

The distinction between void marriages and voidable marriages has proven interesting in this context of survivor rights and an elective share. Void marriages, as defined by DRL §§5 and 6 including bigamous marriages, incestuous marriages and those involving minors, are a legal nullity that never existed in the first place and the parties can treat the marriage as a nullity without court intervention. Because the marriage never legally existed, it did not exist at the time of the decedent's death, and thus, the surviving spouse is unable to take an elective share. Conversely, voidable marriages, as defined in DRL §7 as including those where one of the parties was incapable of consenting to a marriage for want of understanding, or by reason of force, duress or fraud, are valid unless and until they are attacked in an annulment proceeding.³

Currently, New York is one of the few states where after-death challenges are permitted under the DRL, yet, this status change has no effect on property rights to the decedent's estate. This is so because of the explicit requirement within the disqualification statute that an annulment or declaration that the marriage was a nullity must have been in effect when the deceased died. Thus, a voidable marriage due to force, duress, or incompetence may be annulled after death, but a so-called scoundrel spouse or death-bed bride or groom will still be able to take an elective share of the decedent's estate. However, recent cases illustrate the court's use of equity to estop these perpetrators from benefiting from their wrongs.

'Campbell v. Thomas'

In *Campbell v. Thomas*,⁴ while the decedent's primary caretaker was away on a one-week vacation, the defendant, the alleged surviving spouse, married the decedent in a secret ceremony and subsequently proceeded to transfer the decedent's assets into her own name or jointly.

After the decedent passed away, the intended beneficiaries of his estate commenced an action in the Supreme Court, Putnam County, seeking a judgment declaring the marriage between the defendant and the decedent null and void because the decedent lacked the capacity to enter into the marriage due to his severe dementia. The intended beneficiaries also sought a judgment declaring that the various account changes were null and void for the same reasons.

Despite the substantial evidence of the decedent's mental incapacity, the Supreme Court denied summary judgment for both sides finding there were triable issues of fact. However the Second Department concluded on this same evidence that the plaintiffs had made a prima facie showing of their entitlement to judgment as a matter of law. The Second Department remitted the matter to the Supreme Court for the entry of a judgment declaring null and void the marriage between the defendant and the decedent, as well as the changes to the accounts. Subsequently, the Supreme Court issued an order consistent with the Second Department's findings, but included a declaration that the defendant "shall have no legal rights and can claim no legal interest as a spouse." *Id.* at 465.

Although this judgment declared the marriage null and void, the defendant still attempted to claim her elective share because of the technical language of the statute that a surviving spouse may take their share unless they disqualify under EPTL 5-1.2. Because this judgment was post-death, under a strict reading of the statute, the defendant claimed she should still be able to claim her elective share because the judgment was not before the decedent's death.

However, upon review, the Second Department found that the literal terms of the statute should not be "rigidly applied if to do so 'would be to ordain the statute as an instrument for the protection of fraud.'" Id. at 469. The court cited to the well-known equitable principle that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong or to found any claim upon his own iniquity, or to acquire property by his own crime." Id. at 469-470. Indeed, the wrongdoer is deemed to have forfeited the benefit that would flow from his or her wrongdoing.

Looking to the case therein, the Second Department found that the foregoing facts provided ample support for an inference that the defendant procured the marriage through overreaching and undue influence. The court concluded that the Supreme Court properly directed the entry of a judgment declaring that the defendant had no legal rights and can claim no legal interest as a spouse, and that in light of the defendant's lack of any legal right or interest as a spouse of the deceased, she did not have standing to challenge the Supreme Court's directive concerning the distribution of the estate.

'Matter of Berk'

In *Matter of Berk*,⁵ a recent case out of the Surrogate's Court, Kings County, the petitioner had served as the decedent's caretaker for the last 10 years of his life and secretly married him just one year before he died. Procedurally, the petitioner filed a petition seeking a decree determining that she was entitled to take her elective share against the estate and that her Notice of Election was properly served, filed and recorded as required by law. Respondents, the co-executors of the estate and the decedent's sons, filed a verified answer alleging various affirmative defenses and counterclaims, including those seeking to have the marriage between the decedent and the petitioner deemed null and void ab initio, to annul the marriage nunc pro tunc based upon the decedent's mental state, and otherwise to dismiss the petition and vacate the Notice of Election. Alternatively, the counter-claims sought a finding that if the decedent was not disqualified as a surviving spouse, an award of compensatory damages equal to the elective share should be granted to the estate for the resulting loss from petitioner's fraudulent conduct. Petitioner moved for summary judgment on her entitlement to take an elective share of the estate.

In examining the motion, the Surrogate's Court followed a strict reading of the statutes and stated that it was established law that a voidable marriage is only void from the time its nullity is declared by a court. Thus, even if the marriage were annulled, it would be declared a nullity as of the date of the annulment, and the decedent and the petitioner would have been deemed married at the time the decedent died. In addition, the court declined to apply equitable estoppel.

The Second Department, citing specifically to the *Campbell v. Thomas* decision, which was decided the same day, found a triable issue of fact existed as to whether the petitioner forfeited the statutory right of election. If the trier of fact found that the surviving spouse knowingly took unfair advantage of a person who was incapable of consenting to a marriage, for the purpose of obtaining pecuniary benefits as a surviving spouse, equity will intervene to prevent the petitioner from becoming unjustly enriched from her wrongdoing. The court determined the petitioner was

not entitled to summary judgment, and the counterclaims, including equitable estoppel and damages, should not have been dismissed.

Proposed Legislation

While the court's ability to invoke equity in these cases saved the estates and intended heirs from an inequitable result, New York does not have a statute that specifically addresses this situation where a person takes unfair advantage of an individual who clearly lacks the capacity to enter into a marriage by secretly marrying him or her for the purpose of obtaining a portion of their estate.⁶

Even though the court in *Campbell v. Thomas* properly invoked equity, the court also noted the intent of the Legislature when it enacted EPTL 5-1.2 in 1966 and called upon the Legislature to reexamine the statute to consider whether it might be appropriate to make revisions that "would prevent unscrupulous individuals from wielding the law as a tool to exploit the elderly and infirm." *Campbell*, at 473.

Previously, courts have been reluctant to apply equity and veer from the strict reading of the statute for policy reasons including the need for finality concerning status.⁷ This policy reason may be the rationale behind establishing status as of the date of death.

As a potential solution to this inequity, the Uniform Probate Code bases the elective share on marital property, giving a surviving spouse very little or nothing by right if the marriage lasts less than a certain amount of time.⁸ This is similar to the federal government's requirement that a valid marriage must last for nine months prior to death in order for a surviving spouse to receive federal Social Security benefits.⁹ Although changes instituting these time limit concepts may alleviate the inequities of "deathbed marriages" by making these marriages less beneficial for disingenuous individuals, these changes could create other inequities where deaths are untimely and/or accidental.

Instead, the EPTL should be amended to make it compatible with the remedial actions authorized under the DRL, while maintaining the appropriate right of election statute of limitations under EPTL 5-1.1-A. Such an amendment should provide consistency, while still being mindful of the policy need for finality. Moreover, it should embody the concept that the timing requirements for filing a right of election can also apply to challenges to status within the confines of that proceeding. Accordingly, we propose that subsection (1) of EPTL 5-1.2(a) be redrafted to state:

A final decree or judgment of divorce, of annulment or declaring the nullity of a marriage or dissolving such marriage on the grounds of absence, recognized as valid under the laws of this state, whenever effected.

This change would provide consistency, alleviate concerns regarding finality and still provide some recourse for the estate.

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Endnotes:

1. *Campbell v. Thomas*, 897 NYS2d 460 (2010) quoting Bailly, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law §81.14 , 2010 Pocket Part, at 36.
2. See N.Y. Domestic Relations Law §5-7 & 140 (DRL) (West McKinney's & Supp. 2009) (and the cases cited therein).
3. This concept is addressed more fully in the *Campbell v. Thomas* decision whereby the court noted that void and voidable marriages are void ab initio; however, the Legislature and the courts have sometimes attached to annulled marriages, for certain purposes, the same significance that a valid marriage would have when it achieves a more desirable result, i.e., legitimatizing any children born of the union. *Campbell v. Thomas*, 897 NYS2d at 466.
4. *Campbell v. Thomas*, 897 NYS2d 460 (2010).
5. 20 Misc.3d 691; 864 N.Y.S.2d 710 (Sur. Ct. Kings Co. 2008).
6. *Campbell*, 897 NYS2d at 462.
7. See e.g., *Matter of Creighton*, NYLJ, 7/23/08, p. 32, col. 5 (Sur. Ct. Suffolk Co.).
8. Uniform Probate Code §2-202.
9. 42 USC §402(e) & (f). For a further discussion of this concept, see Terry L. Turnipseed, "How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in New York," 96 K.L.J. 275 (Kentucky Law Journal) (2007-2008).