'Til Death Do Us Part: Post-Death Annulment of Marriage and the Right of Election

By Hon. C. Raymond Radigan and Jennifer F. Hillman

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 highlighted by several recent cases. 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 his or her elected share of the decedent's estate. This incongruous result should be remedied by the legislature.

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, relative who has an interest to void the marriage, or next friend of the party to the marriage.[1]

Further, it is possible and permissible to bring this action after the death of one of the spouses. For example, in *Bennett v. Thomas*,[2] the decedent's sons, suing individually and as executors of their mother's estate, alleged an interest in their mother's estate as grounds to void their mother's marriage to her surviving husband after her death. The court determined that such an allegation was sufficient to survive a motion for summary judgment. However, because the husband's "right to elect against his wife's estate became fixed and unalterable upon the wife's death," the sons would have to establish at trial an interest in the estate other than simply defeating the husband's right of election, in order to have the allegedly voidable marriage declared a nullity after the spouse's death.[3]

This is where the DRL and the EPTL begin to differ. The term "surviving spouse" in EPTL 5-1.1-A presupposes that a valid marriage existed at the time of death. Status has even been deemed a condition precedent to taking an elective share under the EPTL.[4] It has long been the rule in the Surrogate's Court that as a threshold issue, status of an objectant to a will, including a surviving spouse, should be determined in a preliminary hearing.[5]

In addition, EPTL 5-1.2 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.[6] 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. For example, in *Estate of Antonio Sgagliardich*, the court stated it was a question of fact whether there was a void bigamous marriage, and if the marriage was void, the alleged surviving spouse would be unable to take an elective share.[7] Conversely, voidable marriages are valid unless and until they are attacked in an annulment proceeding. Currently, only a few states allow after-death challenges of voidable marriages on

grounds of standing.[8] Thus, in most states the status as a surviving spouse and the right to an elective share are fixed at the time of death.

However, New York is one of the 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.

Essentially, 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. Recent cases illustrate this inequitable result.

Recent Case Law

In re Wang,[9] a recent case out of the Surrogate's Court, Kings County, highlights this inconsistency between the DRL and the EPTL. In *Wang*, the petitioner had served as the decedent's caretaker for the last ten years of his life and 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. Petitioner moved for summary judgment on her entitlement to take an elective share of the estate.

In examining the motion, the court first dismissed respondents' claims that the motion was premature and required discovery, finding that this could be determined on the legal issues raised. The court opined that pursuant to DRL § 7, a marriage is voidable, not void, if one of the parties was incapable of consenting to marriage for want of understanding, or if any defenses to the marriage existed including force, duress or fraud. The court stated that it is 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. Accordingly, the requirements for disqualification under EPTL 5-1.2 did not exist, and the petitioner was able to take her elective share. In addition, because the respondents had not provided any legal authority for the court to do so, the court declined to apply equitable estoppel.

While this result is clearly required by the law, it is facially unjust. Indeed, the court explicitly took note of this injustice:

> While this may appear incongruous and seemingly invite a plethora of surreptitious 'deathbed marriages' as a means of obtaining one third of a decedent's estate immune from challenge, this is simply the state of the law. It is not for this Court to write disqualifications into EPTL 5-1.2 or alter Domestic Relations Law § 7, which makes a voidable marriage void from the time its nullity is declared, rather than from the time of the marriage.[10]

This concept that status is determined on the date of death is a long-standing legal principle. For example, the court in *In re McKinley's Estate*,[11] a 1910 case from the Surrogate's Court of Cattaraugus County, came to the same result, nearly a hundred years earlier, as the court in *Wang*. In *McKinley*, the surviving spouse had remarried believing in good faith that her first husband was dead. He was not, but had been absent for seven years. Even though her second marriage was deemed voidable by the court, she was entitled to her dower on the death of her second husband because the marriage was merely voidable and because it was not annulled during the decedent's lifetime. "Such marriage remained in full force and effect down to the time of his death, and the rights of claimant must be determined by the conditions existing at the time of his death."[12]

As a policy issue, there is a need for finality concerning status. This need for finality concerning status may be the rationale behind establishing status as of the date of death. This issue was addressed recently by the Surrogate's Court, Suffolk County, in *In re Creighton*.[13] In *Creighton*, there was a pending motion to dismiss an answer filed to the petition for probate of a testamentary instrument based upon the petitioner's alleged lack of standing. The only issue before the court was the threshold issue of the decedent's marital status. Respondent argued the decedent's physical state at the time the marriage ceremony was performed made it unfair to allow the marriage to be deemed valid. The ceremony occurred while the decedent was in hospice shortly before his death. In its decision, the court opined that marriages that may be annulled after the death of one of the spouses for some purposes cannot be used to disqualify a surviving spouse under EPTL 5-1.2. In addition, the court stated that while it was

> [m]indful of its position as a court of equity, this court is not, however, inclined to begin looking behind the validity of every marriage entered into when the decedent

> may have been in a weakened or compromised state, particularly where, as here, the person performing the ceremony was satisfied as to the decedent's competence to do so.[14]

Agreeing with the rule that "marriages that may be annulled after the death of one of the spouses for some purposes cannot be used to disqualify a surviving spouse under EPTL 5-1.2(a)(1),"[15] the court determined the son did not have standing to file objections to the testamentary instrument.

Proposed Legislation

As discussed above, EPTL 5-1.2, as drafted, leads to inequitable results. More importantly, however, it is inconsistent with the DRL on this issue. While the DRL allows voidable marriages to be annulled after death, the EPTL does not provide any recourse under similar circumstances.

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.[16] 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.[17] 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 and consistent with the DRL. The EPTL should reflect and honor 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,[18] 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.

Endnotes

1. See N.Y. Domestic Relations Law § 5-7 & 140 (DRL) (West McKinney's & Supp. 2009) (and the cases cited therein).
2. 38 A.D.2d 682; 327 N.Y.S.2d 139 (4th Dep't 1971).
3. *Id.*
4. *In re Wang*, 20 Misc. 3d 691; 864 N.Y.S.2d 710 (Sur. Ct., Kings Co. 2008).
5. *See In re Levi*, N.Y.L.J., March 18, 1996 , p. 31, col. 1 (Sur. Ct., Nassau Co.). This article does not address the circumstances where a fraudulent or invalid marriage exists. If the status of an individual as a surviving spouse is contested because it is believed that a valid marriage did not exist, that is also a preliminary issue, but is not the circumstances addressed in this article. Instead, this article focuses on the circumstances where a valid marriage exists, but because it was procured by force, or duress, or as otherwise defined by DRL § 7, that marriage was voidable.
6. Another recent case, *In re Kaminester*, N.Y.L.J., October 23, 2009, p. 36, col. 1 (Sur. Ct., N.Y. Co. 2009), determined that a marriage revoked under NY Mental Hygiene Law § 81.29, unlike a marriage annulled for lack of capacity under DRL § 7, is void *ab initio*, and thus is deemed never to have existed. Accordingly, the purported surviving spouse was unable to exercise a spousal right of election.
7. *Estate of Antonio Sgagliardich*, N.Y.L.J., July 2, 2008, p. 41, col. 1 (Sur. Ct., Bronx Co.).
8. *See* Terry L. Turnipseed, *How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America*, 96 K.Y.L.J. 275 (2007-2008).
9. 20 Misc. 3d 691; 864 N.Y.S.2d 710 (Sur. Ct., Kings Co. 2008).
10. *Id.* at 697; N.Y.S.2d at 716.
11. *In re McKinley's Estate*, 66 Misc. 126 (Sur. Ct., Cattaraugus Co. 1910).
12. *Id.* at 132.
13. *In re Creighton*, N.Y.L.J., July 23, 2008, p. 32, col. 5 (Sur. Ct., Suffolk Co.).
14. *Id.*
15. *Id.* (citations omitted).
16. Uniform Probate Code § 2-202.
17. 42 U.S.C. § 402(e) & (f). For a further discussion of this concept, see Turnipseed, *supra*.
18. To the extent that a final decree or judgment of divorce is necessary, this requirement is consistent with the DRL. Divorce proceedings terminate upon the death of a spouse, unless all that remains is signing the judgment by the court. *Cornell v. Cornell*, 7 N.Y.2d 164 (1959).

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