

## In ‘Bellwether,’ Judge Rejects Spousal Share for Caretaker

BY ANDREW DENNEY

THE CARETAKER for a businessman who married him in his final days forfeited her statutory share of his estate because she knowingly married him while he was mentally incapacitated, a Surrogate’s Court judge found.

The ruling was handed down just before the July Fourth holiday, following a 37-day trial in a 12-year-old court battle over the estate of Irving Berk, a successful businessman who founded the Berk Trade and Business School and who was 100 when he died in 2006, leaving behind an estate of more than \$5 million.

Berk’s caretaker, Hua Wang, known as Judy, married Berk as his physical and mental health were in decline and without his family’s knowledge.

There is nothing on the books in New York that specifically addresses situations in which someone takes advantage of a mentally incapacitated person by secretly marrying them to obtain a portion of their estate through marriage and, generally speaking, there is a strong presumption in the law that marriages are valid.

Thus, Wang had been successful at fending off Berk’s sons’ challenge to her



right of election which, under state law, entitles her to claim one-third of Berk’s estate.

But following a 37-day trial Acting Brooklyn Surrogate Judge John Ingram, said he found it “impossible” that Wang didn’t know that Berk wasn’t mentally incapacitated when they got married in 2005.

“The evidence presented shows consistent, insidious and duplicitous conduct that led to” Wang’s “clandestine marriage” to Berk, the judge said.

Jessica Baquet, a partner at Jaspán Schlesinger who, with Ruskin Moscou Faltischek partner John Farinacci,

represent Berk’s sons, Harvey and Joel, said that Ingram’s ruling could be applied to other cases and that it could prevent marriage from being “weaponized” against elderly or infirm people as a way of taking a part of their estates.

“The case is a bellwether for change in the way the courts address elder exploitation,” Baquet said.

Jordan Weitberg of Bressler, Amery & Ross, who has represented Wang throughout the case, said her attorneys are disappointed with Ingram’s ruling and that the judge got it wrong in terms of characterizing his client’s relationship with Berk.

“Ms. Wang deeply loved and cared for Mr. Berk and spent all her time with him, and the witnesses to the marriage testified that both Mr. Berk and Ms. Wang were very happy at the time of the marriage,” Weitberg said. He said his client is appealing the ruling.

Legal observers say that the ruling comes at a time when people are living longer, potentially putting them at risk of exploitation by caretakers, and puts would-be fraudsters on notice that courts will take action if they sense that a marriage was obtained through undue influence.

“When someone is elderly and dependent and weaker physically and, sometimes, emotionally, this case is fair warning that the courts will do what they think is the right thing,” said Gary Bashian, a wills and estates attorney with Bashian & Farber who was not involved with the case.

The Berk estate case has twice been sent up for review by the Appellate Division, Second Department, and was the first test of a standard set by the appellate court to determine if a spouse has forfeited their elective share.

Ingram was acting on instructions from the Second Department to determine if the caretaker forfeited her statutory right to a third of her dead husband’s fortune by marrying him through undue influence.

Berk wrote his sons and his four grandchildren into his will in 1982 as the sole beneficiaries. In 1997, as their father’s health started to slip, his sons hired Wang to be his live-in caretaker.

In 2005, Wang and Berk got married in a civil ceremony at the New York City

Clerk’s Office that was attended by a Mandarin interpreter. Wang stayed quiet about the marriage until she was sharing a car with Berk’s sons on the way to a funeral home the day before their father’s funeral.

Under state law, spouses are given a right of election entitling them to \$50,000 or one-third of the estate, whichever is larger.

But in 2008, Brooklyn Surrogate’s Court Judge Diana Johnson found that, regardless of whether or not Berk’s marriage to Wang was executed through fraud, her hands are essentially tied by state statute; she said her decision would seem to invite a “plethora of surreptitious deathbed marriages” as a means of trying to line one’s pockets through the statutory right to election but “this is simply the state of the law.”

In 2010, ruling on both the Berk matter and a companion case, the Second Department issued a landmark reversal, finding that a spouse forfeits his or her right to election if they knowingly marry an elderly or infirm person for the purpose of obtaining some of their estate.

When it was drafted into law more than 50 years ago, New York’s right of election was intended to prevent individuals from disinherit their spouses, the appeals court reasoned in the companion case, and called on the state Legislature to re-examine the law and find a way to prevent it from being used as a tool to “exploit the elderly and infirm.”

In 2015, the Second Department yet again handed the case back to the Surrogate’s Court, directing the lower court to answer the question: Did Wang know

that Berk was incapacitated when they were wed, and thus knowing he was incapable of consenting to the marriage? If so, did she take unfair advantage of Berk by marrying him for his money?

Ingram said that Berk’s sons presented a “plethora of credible evidence” that their father was in a diminished mental state when he married Wang, such as the fact that Berk was unable to accurately complete his application for a marriage license, misreporting his address and his mother’s maiden name.

Wang was also represented by Benjamin Xue of Xue & Associates. Following the close of evidence, Wang brought in Randall Eng, the recently retired presiding justice of the Appellate Division, Second Department, who now works for Meyer Suozzi.

Weitberg said Ingram made several errors through the trial and that the judge did not properly assess testimony from numerous witnesses that Berk was active and vibrant throughout his life and that he continued running his business at the Berk Trade School and managed his real estate holdings in New York and Florida.

The witnesses presented by his opposing counsel, Weitberg said, were “either biased family members, proven liars,” or gave “snapshot” testimony that “failed to provide a fair picture of Mr. Berk.”

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