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## THE IMPACT OF DIVORCE AND SEPARATION ON SECTION 18 OF THE DECEDENT ESTATE LAW

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**M**ORE than a quarter of a century has elapsed since the legislature radically changed the nature and incidents of property rights born of and dependent upon the marital relation, by abolishing the antiquated estates of dower and curtesy.<sup>1</sup> These often illusory rights<sup>2</sup> were superseded by legislation protecting a husband and wife against disinheritance<sup>3</sup> and providing for a uniform system of descent and distribution, under which a husband or wife would take a substantial share of the estate of the other.<sup>4</sup>

The far-reaching importance of this fundamental legislation warrants periodic study and discussion to determine whether it has eliminated the defects in our prior estate laws;<sup>5</sup> accomplished the legislative purpose of enlarging the property rights of a surviving spouse;<sup>6</sup> and met the chal-

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<sup>1</sup> N.Y. REAL PROP. LAW §§ 189-90.

<sup>2</sup> The remarks of Surrogate James A. Foley, Chairman of the Decedent Estate Commission, in an address to the New York State Bar Association, on January 20, 1928, are pertinent: "The right of dower as it exists today is, in most cases, an illusion and deception. The average person believes that it gives one-third of the realty *outright* to the widow upon the death of her husband, whereas, as we know, the law only gives to the widow a third of the *income* of the real estate which her husband owned at his death. . . . It has to a great extent been defeated by the present widespread system of taking title to real estate, even of homes, in the name of a corporation instead of the name of the individual. . . . Today, a wife can convey her individual real estate without the consent of her husband. . . . She has the right to defeat his curtesy." 1928 LEG. DOC. NO. 70, COMBINED REPORTS, COMMISSION TO INVESTIGATE DEFECTS IN THE LAWS OF ESTATES 145, 151-52 (reprinted 1935) (hereinafter cited as COMBINED REPORTS).

<sup>3</sup> N.Y. DECED. EST. LAW § 18.

<sup>4</sup> *Id.* § 83.

<sup>5</sup> See 1930 LEG. DOC. NO. 69, COMBINED REPORTS 225.

<sup>6</sup> Laws of N.Y. 1929, c. 229. In adopting §§ 18 and 83 of the Decedent Estate Law, as recommended by the Decedent Estate Commission, the legislature announced its intention to be ". . . to increase the share of a surviving spouse, either in the case of intestacy, or by an election against the terms of the will, thus enlarging the property rights of such spouse."

lence of any new problems that may have arisen since its enactment.

### THE STATUTE

The subject of this article requires a somewhat detailed analysis of subdivisions three, four and five of Section 18 which provide as follows:

- (3) The right of election shall not be available to a spouse against whom or in whose favor a final decree or judgment of divorce recognized as valid by the law of the state has been rendered, or against whom a final decree or judgment of separation recognized as valid by the laws of this state has been rendered. Nor shall such right of election be available to a spouse who has procured without the State of New York a final decree or judgment dissolving the marriage with the testator where such a decree or judgment is not recognized as valid by the law of this State.
- (4) No husband who has neglected or refused to provide for his wife, or who has abandoned her, shall have the right of such an election.
- (5) No wife who has abandoned her husband shall have the right of such an election.

Notice the seeming anomaly between the denial of the right of election to a spouse who had procured a judgment of divorce and the allowance of such right to a spouse who had obtained a judgment of separation (subd. three).

Is there sufficient justification for this distinction? Observe that, in the case of a "divorce recognized as valid by the law of the state," no distinction is made between the innocent and the guilty spouse; the right of election is barred whether the decree be in favor of or against the surviving spouse. At the same time consider that, while certain marital misconduct (abandonment by the wife or husband, or the husband's refusal or neglect to provide for his wife) disqualifies a spouse, unfaithfulness per se does not.<sup>7</sup>

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<sup>7</sup> In *Matter of Green*, 155 Misc. 641, 645, 280 N.Y. Supp. 692, 697 (Surr. Ct.), *aff'd*, 246 App. Div. 583, 284 N.Y. Supp. 370 (1st Dep't 1935), Surrogate Delehanty upheld the § 18 right of election of a widow who had had adulterous

Is there legal justification for the denial of the right of election to a faithful wife who had secured a valid judgment of divorce because of her husband's adultery, and the conference (negatively) of such right on an adulterous wife, whose marriage had not been dissolved and who had not abandoned her husband?

#### EFFECT OF DIVORCE AND SEPARATION UPON DOWER

As background for our inquiries, there is available a considerable body of law developed prior to 1930, involving the effect of marital disruption upon the estate of dower. The New York Statute of Dower endowed the widow with a one-third part of all lands of which her husband was seized of an estate of inheritance at any time during marriage, and provided for disendowment "in case of a divorce dissolving the marriage contract for the misconduct of the wife."<sup>8</sup> The courts removed all doubt of the "misconduct" intended by the legislature by holding that the "misconduct" referred to in the statute meant adultery only and that her misconduct thus interpreted must be established by a judgment or decree.<sup>9</sup>

The principle having been established that only a divorce for adultery barred a wife's dower, it necessarily followed

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relations with another man, after having been willfully abandoned by her husband, stating: "It is useful . . . to see whether fidelity is made a test of the right of election and to see what matrimonial misconduct does *not* disqualify the spouse to make an election. . . The first and most notable fact is that the right of election is secured to every spouse—even an adulterous one—who continues to live in the matrimonial domicile and who is not guilty of abandonment. Next is the fact that the spouse (not guilty of abandonment) who has been guilty of cruel and inhuman treatment which would have warranted the deceased spouse in obtaining a separation is not barred from the right of election. Again the spouse (not guilty of abandonment) whose conduct made it unsafe and improper for the deceased spouse to cohabit with the survivor is entitled to elect. The status of surviving spouse is all that need be established by any of these three." To the same effect, a wife who is not guilty of abandoning her husband is entitled to her *intestate* share in her husband's estate under § 83 even though she committed adultery. See *Matter of Schinzing*, 2 M.2d 661, 150 N.Y.S.2d 305 (Surr. Ct. 1957).

<sup>8</sup> N.Y. REAL PROP. LAW §§ 190, 196.

<sup>9</sup> Dower was not barred by adultery, nor even by an interlocutory decree of divorce, which had not become final prior to the husband's death. *Van Cleef v. Burns*, 118 N.Y. 549, 23 N.E. 881 (1890); *id.* 133 N.Y. 540, 30 N.E. 661 (1892); *Bryon v. Bryon*, 134 App. Div. 320, 119 N.Y. Supp. 41 (2d Dep't 1909). See also note 7 *supra*.

that a limited divorce amounting to a judicial separation of the parties from bed and board did not have such effect.<sup>10</sup>

It was early decided that a wife who had procured a judgment of divorce in the courts of this state, founded upon her husband's adultery, was entitled to dower in lands left by her former husband.<sup>11</sup> The wife's right to dower in such circumstances was later expressly preserved by statute.<sup>12</sup> Her right in such case attached only to property of which her husband was seized up to the time of the decree; it did not attach to lands which he acquired after the divorce, since the requisite of seisen during coverture was lacking.<sup>13</sup>

In 1922, it was held that a wife who had procured a final judgment of divorce in another state, not recognized as valid by the courts of this state, was not entitled to dower in lands acquired by her husband prior to the divorce.<sup>14</sup>

#### HISTORY OF SUBDIVISIONS 3, 4 AND 5 OF SECTION 18

In the report submitted to the legislature in 1928 by the Commission to Investigate Defects in the Laws of Estates, the Commission said:

The Commission proposes also to safeguard this right of election by protecting only the faithful wife. It proposes to exclude from its benefits a wife who is guilty of abandonment or who has been deprived of or who has obtained release from her marital status.<sup>15</sup>

<sup>10</sup> *Crain v. Cavana*, 62 Barb. 109 (N.Y. Sup. Ct. 1862).

<sup>11</sup> *Wait v. Wait*, 4 N.Y. 95 (1850).

<sup>12</sup> N.Y. CIV. PRAC. ACT § 1156.

<sup>13</sup> *Van Blaricum v. Larson*, 205 N.Y. 355, 98 N.E. 488 (1912).

<sup>14</sup> *In Monroe County Sav. Bank v. Yeoman*, 119 Misc. 226, 229, 195 N.Y. Supp. 531, 534 (Sup. Ct. 1922), the wife who sought dower rights was married in New York and continued to live there with her husband until she left him to go to Ohio to get a divorce. In Ohio, a final judgment of divorce was granted to her on a ground not recognized in New York. Her husband had been served by publication but had not appeared. The court held that she had thereby forfeited dower in lands acquired by him before the divorce and stated: "The marriage contract upon which the applicant predicates this motion was completely dissolved as to her. . . . Since her husband had done no wrong there was no *residuum* of marital rights or obligations. Being no longer a wife she had no capacity of becoming a widow. This is not hostile to the principle in *Wait v. Wait* . . . where the court was speaking of the effect of a divorce in this state for the husband's misconduct. . . ."

<sup>15</sup> 1928 LEG. DOC. NO. 70, COMBINED REPORTS 20.

The Commission submitted proposed legislation in conformity with its report and appended to the proposed new Section 18 of the Decedent Estate Law a note, which included the following:

The provisions of the section deny a right of election to either a widow or surviving husband in the following cases:

(a) Where a final judgment or decree of absolute divorce has been rendered which is recognized by the law of this state. The words "recognized by the law of this state" are intended to mean the recognition by the highest court of this state of the validity of such a judgment or decree procured in this state, or in another state or in a foreign country. At the present time, a former husband or wife after an absolute divorce is not entitled to letters of administration or to a distributive share in the estate of the other. [Matter of Ensign, 103 N.Y. 284; Matter of Albrecht, 118 Misc. 737, 119 Misc. 554.]

(b) Where either husband or wife as plaintiff has procured a judgment or decree dissolving the marriage, in another state or in a foreign country, which is not recognized by the laws of this state. Such a judgment or decree should act as an estoppel against the one procuring it (notwithstanding it is not accorded recognition by the courts of this state) as held in *Monroe County Savings Bank v. Yeoman*, 119 Misc. 226.

(c) Where either husband or wife has abandoned the other or the husband has refused or neglected to provide for the wife. Such an abandonment or refusal or neglect to provide, is intended, as our courts uphold, as sufficient to sustain a judgment of separation under section 1161 of the Civil Practice Act.<sup>16</sup>

In 1929, the legislature adopted subdivisions three, four and five of Section 18, as proposed by the Commission. Significantly the legislature, at the same time, adopted the new Section 87 of the Decedent Estate Law, which barred succession in intestacy

. . . to a spouse against whom or in whose favor a final decree or judgment of divorce recognized as valid by the law of this state has been rendered; or to a spouse who has procured without the state of New York a final decree or judgment dissolving the marriage with

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<sup>16</sup> *Id.* at 31-32.

the decedent, where such decree or judgment is not recognized as valid by the law of this state.<sup>17</sup>

In 1934, succession in intestacy was further limited when the legislature denied a distributive share to a

. . . husband who has neglected or refused to provide for his wife, or has abandoned her; or to a wife who has abandoned her husband.<sup>18</sup>

It is significant to note that the right of election is barred to the unsuccessful defendant in a separation action, whereas the mere fact that there is a judicial decree of separation does not bar an intestate succession.<sup>19</sup>

IS THERE SUFFICIENT JUSTIFICATION FOR THE DENIAL  
OF THE RIGHT OF ELECTION TO A SPOUSE WHO HAD  
PROCURED A DIVORCE, VALID IN THIS STATE, AND  
ITS ALLOWANCE TO A SPOUSE WHO HAD PROCURED  
A SEPARATION?

Prerequisite to the right of election is the existence of the marital relation at the time of the wife's or husband's death.<sup>20</sup> The legislature followed well-established legal doctrines in denying the right of election to a spouse who had procured a judgment of divorce "recognized as valid" by the courts of this state." The effect of such a divorce is to destroy completely the relation of husband and wife.<sup>21</sup> From the

<sup>17</sup> Laws of N.Y. 1929, c. 229, § 6.

<sup>18</sup> Laws of N.Y. 1934, c. 216, § 2.

<sup>19</sup> Compare N.Y. DECED. EST. LAW § 18(3), with N.Y. DECED. EST. LAW § 87.

<sup>20</sup> In *Matter of Adams*, 182 Misc. 937, 942, 45 N.Y.S.2d 494, 499 (Surr. Ct. 1943), *aff'd mem.*, 276 App. Div. 985, 48 N.Y.S.2d 801 (1st Dep't), *motion for leave to appeal denied*, 293 N.Y. 931, 60 N.E.2d 134 (1944), *cert. denied*, 324 U.S. 865 (1945), in which it was held that a divorce by a wife in Nevada, following a trial at which the parties appeared, barred her right of election, Surrogate Foley said: "The intention of the legislature in the enactment of section 18 of the Decedent Estate Law and in conferring a right of election or providing for its denial as to certain spouses, plainly contemplated that the factual situation at the death of the testator or testatrix was to be the test. Where a decree of divorce had been obtained by the surviving former spouse, which stood unaffected at such death, the right to elect had been destroyed."

<sup>21</sup> The remarks of the Court of Appeals in *Matter of Ensign*, 103 N.Y. 284, 287-88, 8 N.E. 544, 546 (1886), are pertinent. In that case, a wife who had procured a divorce in New York State contended that she was entitled to a share in the estate of her husband who had died intestate. Her claim was rejected; the court ruled that only the lawful wife at the death of the de-

date of the decree, no existing and vested rights are forfeited, except by express statutory mandate, but since the relation terminates, no future marital rights can arise for either. Section 18 does not give a husband or a wife an estate or interest of any kind in the property of the other at the time of the acquirement, but only an expectant interest in the estate of the other which ceases to exist when the marriage is dissolved.<sup>22</sup>

It is to be remembered that prior to the enactment of Section 18, the innocent wife was allowed dower in lands of which the husband was seized before the divorce, on the theory that although the marriage had been dissolved, the decree operated prospectively only and had no retroactive effect upon her inchoate dower which had already become a vested right.<sup>23</sup>

Consider the possibilities if Section 18 made provision for the innocent divorced wife. At the death of her former husband she may be the lawful wife of another. The deceased may have lawfully remarried. Who would prevail in the struggle between the divorced wife and the second wife of the deceased? Suppose he had remarried more than once? Section 18 deliberately contemplates the possible existence of but one "surviving spouse" in order to avoid the complexities and bitterness of such a lawsuit.

The legislature, logically, conferred the privilege of election upon a spouse who had procured a judgment of separation. It is well settled that such a judgment does not dissolve the marriage relation of the parties; they remain husband and wife in the eyes of the law as well as in the eyes of their friends and neighbors.<sup>24</sup> The marriage remains in full force and effect and whatever rights each has in the estate of the other are unaffected by the decree.<sup>25</sup> Although

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cedent could take a statutory share of the personal estate of her husband. The court stated: "The relation of husband and wife, both actual and legal, is utterly destroyed, and no future rights can thereafter spring out of or arise from it. . . . But future rights dependent upon the marital relation and born of it there can be none."

<sup>22</sup> *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937), citing *Leonard v. Leonard*, 181 Mass. 458, 63 N.E. 1068 (1902).

<sup>23</sup> *Van Blaricum v. Larson*, 205 N.Y. 355, 360, 98 N.E. 488, 489 (1912).

<sup>24</sup> *Jardine v. O'Hare*, 66 Misc. 33, 122 N.Y. Supp. 463 (Sup. Ct. 1910).

<sup>25</sup> Note, however, that § 18(3) expressly denies the right of election to a

the decree authorizes complete cessation of cohabitation, the parties can, *sua sponte*, restore complete marital status by reconciliation.<sup>26</sup>

It must be apparent that it is the opinion of the writer that there is actually nothing anomalous in the denial and the conference of the right of election in these two situations, but, on the contrary, that there is ample justification for the same.

IS THERE LEGAL JUSTIFICATION FOR THE DENIAL OF THE RIGHT OF ELECTION TO AN INNOCENT WIFE WHO HAD DIVORCED HER HUSBAND FOR ADULTERY AND THE CONFERENCE OF SUCH RIGHT ON AN ADULTEROUS WIFE, WHO HAD NOT BEEN DIVORCED AND HAD NOT ABANDONED HER HUSBAND?

The Decedent Estate Commission said it "proposes also to safeguard this right of election by protecting only the *faithful wife*."<sup>27</sup> In *Matter of Green*,<sup>28</sup> it was contended that this description required the court to hold that an unfaithful spouse might not elect. After examining the Civil Practice Act and the Decedent Estate Law to see whether fidelity is the test of the right of election, Surrogate Delehanty said:

That the reference to the "faithful wife" has no meaning such as is ascribed to it by the executors and the legatees of the deceased is evident from the sentence immediately following that in which the word is used. The Commission there says: "It proposes to exclude from its benefits a wife who is guilty of abandonment or who has been deprived of or who has obtained release from her marital status." Thus it is evident that the Commission has in substance defined the word "faithful" by saying, negatively at least, that a spouse is "faithful" if not guilty of abandonment, if not chargeable with having

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"... spouse against whom a final decree or judgment of separation recognized as valid by the laws of this state has been rendered . . ." N.Y. DECED. EST. LAW § 18(3).

<sup>26</sup> *Matter of Smith*, 243 App. Div. 348, 350, 276 N.Y. Supp. 646, 649 (4th Dep't 1935).

<sup>27</sup> 1928 LEG. DOC. NO. 70, COMBINED REPORTS 20 (emphasis added).

<sup>28</sup> 155 Misc. 641, 280 N.Y. Supp. 692 (Surr. Ct.), *aff'd*, 246 App. Div. 583, 284 N.Y. Supp. 370 (1st Dep't 1935).

gone outside this state to get a divorce not recognized here and if no judgment of divorce or separation has been rendered in our courts against him or her.<sup>29</sup>

Perhaps any reluctance the learned surrogate may have felt in the *Green* case in permitting the adulterous wife to elect was neutralized by the evidence presented as to the husband's own misconduct. Prior to her misbehavior, the husband had deserted his wife in a foreign country, without resources, in favor of a mistress, and thereafter had concealed his whereabouts from his wife. However, it would appear from the court's reasoning that the decision would have been the same even if the husband had been blameless. Essentially the decision is bottomed on the premise that where the marriage relation persists and no judgment of separation has been procured against the wife, nothing but the fact of abandonment of her husband by the wife is the bar.

While it seems strange that Section 18 allows the right of election to the adulterous wife whose marital status remains undisturbed, but denies the right to an innocent wife who divorces her husband for his misconduct, examination discloses that the legislative enactment harmonizes with the ancient rule that adultery alone did not bar dower but that adultery established by a judgment did. Dower was barred as a consequence of the judgment of divorce founded upon the fact of adultery, and not as a consequence of the offense without the judgment.<sup>30</sup> So too, Section 18 does not bar the right of election for adultery alone but denies the privilege as a consequence of a valid judgment of divorce, founded upon adultery or other grounds. The judgment destroying the marital relation is made the bar.

In denying the right of election to a former wife who had procured a "valid" judgment of divorce the legislature is, again, sustained by long existing precedent. Prior to the establishment of the present system of descent and distribution, it was the well settled law of this state that a former wife, however innocent, had no right to a distributive share

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<sup>29</sup> *Id.* at 648, 280 N.Y. Supp. at 698.

<sup>30</sup> See *Schiffer v. Pruden*, 64 N.Y. 47, 51 (1876).

in the personal estate of her divorced husband, upon his death intestate.<sup>31</sup>

Whether or not so intended, the legislature ameliorated what many may have considered a harsh rule by amending Section 1161 of the Civil Practice Act to add as a ground for the maintenance of an action for a judgment of separation "the commission of an act of adultery by the defendant. . . ." <sup>32</sup> Prior to its enactment a husband or wife wronged by the unfaithfulness of his or her spouse could institute an action for divorce only at the risk of being deprived of the right to elect as a "surviving spouse" under Section 18. By adding adultery as a ground for legal separation, the legislature has spelled out a way for the wronged spouse to retain the right to share in the estate of the offender while depriving the latter of any right to share in the estate of the former.

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<sup>31</sup> *Cf.* *Matter of Ensign*, 103 N.Y. 284, 8 N.E. 544 (1886), cited by the Commission to the legislature, in support of its recommendation that a former husband or wife after an absolute divorce recognized as valid by the law of this state should be denied the right of election.

<sup>32</sup> *Laws of N.Y. 1947, c. 774.*