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sibility of fraud being perpetrated on insurance companies has been dismissed with a statement that the presence or absence of insurance in the case was not "an element to be considered." [19] Similarly, the fact that such a recovery may run counter to public policy is passed over with a statement by one court to the effect that public policy is constantly changing.[20] Paradoxically enough, the New York courts have held that a husband's contributory negligence is a complete bar to recovery in an action for damages for the loss of his wife's services.[21] No apparent reason exists for permitting recovery in a wrongful death action while denying it in an action for loss of services.[22]

Inevitably, the conclusion is reached that some legislative action should be taken in New York to prevent recovery by a negligent beneficiary. The ideal solution would be an amendment to the wrongful death statute which would codify the result reached in the instant case. Thus, recovery would be allowed only to the extent of cost of recovery and the expenses of administration, burial and last sickness.

WILLS—EFFECT OF CONTRACT TO MAKE TESTAMENTARY DISPOSITION ON WIDOW'S RIGHT OF ELECTION.—Testator entered into a separation agreement with his first wife, whereby he contracted to bequeath to her a life income in his entire estate. This agreement was later incorporated in a divorce decree. The testator then remarried. In 1952 he died, leaving a will in conformity with the separation agreement. His second wife thereupon sought to exercise her right of election pursuant to Section 18 of the New York Decedent Estate Law. The Surrogate *held* that a wife could not be deprived of her statutory share in her husband's estate by a prior contract to will his estate to another. *Matter of Erstein,* 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954).

The question of whether a contract to devise and bequeath an estate, made by a testator during his lifetime, could be enforced to the

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Supp. 49, 53 (4th Dep't 1900), *aff'd mem.,* 165 N.Y. 667, 59 N.E. 301 (1901); Rozewski v. Rozewski, 181 Misc. 793, 796, 46 N.Y.S.2d 743, 745 (Sup. Ct. 1944).

[19] *See* Rozewski v. Rozewski, *supra* note 18 at 798, 46 N.Y.S.2d at 746.

[20] *Id.* at 797, 46 N.Y.S.2d at 745.

[21] Diem v. Adams, 266 App. Div. 307, 42 N.Y.S.2d 55 (1st Dep't 1943); Maxson v. Tomek, 244 App. Div. 604, 280 N.Y. Supp. 319 (4th Dep't), *motion for leave to appeal denied,* 268 N.Y. 726 (1935).

[22] It could be argued that in an action for loss of services the plaintiff sues in his own capacity, while in a wrongful death action the plaintiff sues in the capacity of personal representative. See PROSSER, TORTS 421-422, 957 (1941). However, this is a purely academic distinction, since the recovery in either action would inure to the benefit of the negligent party.

exclusion of the widow's right to participate in her husband's estate first arose in the case of *Matter of Hoyt*.[1] There, in a factual situation similar to the instant case, Surrogate Foley held that a first wife seeking to enforce such a contract was not a creditor of the estate, but she merely had an enforceable right in equity to compel the fulfillment of the agreement and therefore was a legatee. Having determined that the first wife was a mere legatee, she took subject to the second wife who was entitled to her right of election.[2]

About the same time as the *Hoyt* case was decided, the Appellate Division was presented with a similar problem in *Brindisi v. Stallone*.[3] There it was decided, however, that the first wife was entitled to a life interest in the testator's estate, and that the second wife took subject to the first wife. The court held that where the contract was made in good faith and for a valuable consideration, the second wife is considered to have married a person who possessed no property that was subject to devolution at his death. The court took the position that she had only an expectancy in her husband's estate, which could be defeated during his lifetime by several methods, one of which was a contract to bequeath made in good faith.

The Court in the instant case reviewed both of these conflicting decisions and, while it agreed with the result reached in the *Hoyt* case, it refused to follow the reasoning advanced therein by Surrogate Foley. The decision, according to Surrogate Collins, should not rest upon the dubious ground that the first wife is not a creditor.[4] There are times when she is so considered, as for example, in tax litigation,[5] or where the husband agrees to pay alimony for the lifetime of his divorced wife.[6] It was pointed out that the "good faith" test of the

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[1] 174 Misc. 512, 21 N.Y.S.2d 107 (Surr. Ct. 1940).

[2] The holding of the *Hoyt* case was followed in the recent case of Matter of Lewis, 123 N.Y.S.2d 859 (Surr. Ct. 1953).

[3] 259 App. Div. 1080, 21 N.Y.S.2d 29 (2d Dep't 1940).

[4] *See* Matter of Erstein, 205 Misc. 924, 930, 129 N.Y.S.2d 316, 322 (Surr. Ct. 1954).

[5] See Matter of Brokaw, 180 Misc. 490, 493, 41 N.Y.S.2d 57, 59 (Surr. Ct. 1943), *aff'd mem.*, 267 App. Div. 811, 46 N.Y.S.2d 887 (1st Dep't), *aff'd*, 293 N.Y. 555, 59 N.E.2d 243 (1944); Matter of Strebeigh, 176 Misc. 381, 386, 27 N.Y.S.2d 569, 576-577 (Surr. Ct. 1941) (The decedent's first wife was not required to contribute towards the estate tax, as her annuity was considered a charge on the estate.).

[6] As a general rule the husband's obligation to pay alimony ceases upon his death. *See* Wilson v. Hinman, 182 N.Y. 408, 412, 75 N.E. 236, 238 (1905); Murray v. Murray, 278 App. Div. 183, 189, 104 N.Y.S.2d 44, 49 (1st Dep't), *aff'd mem.*, 303 N.Y. 700, 103 N.E.2d 59 (1951). However, where the husband agrees not only to obligate himself for alimony payments during his lifetime, but also to continue such payments for his wife's lifetime, then the first wife is a creditor of the estate for the amount of such payments. See Matter of Gray, 176 Misc. 829, 832-833, 29 N.Y.S.2d 123, 126-127 (Surr. Ct. 1941), *aff'd mem.*, 266 App. Div. 732, 41 N.Y.S.2d 949 (1st Dep't 1943), *aff'd mem.*, 292 N.Y. 532, 54 N.E.2d 380 (1944). Where a husband contracts to make periodic alimony payments to his first wife and also to make a testamentary disposition for her, she is considered a creditor of the estate under the first provision and

Brindisi case was erroneous, since the courts are not concerned with the motives of the husband but only with whether the transaction was real or illusory.[7]

Instead, the Court stated that the testamentary disposition of one's property is not a matter of right, but rather a privilege granted by the legislature. Because it is a privilege, certain conditions and restrictions may be imposed.[8] Therefore, the testator in the principal case, having decided upon this method of paying alimony, could do so only in so far as the provisions of the agreement did not conflict with any statutory restraint upon the right of disposition. The Court looked to the broad public policy behind Section 18 and determined that it prohibits a husband from binding himself by contract to devise and bequeath his property in a manner that would deprive the surviving spouse of her statutory rights. Furthermore, Section 18 was enacted to correct the evils that existed under the common law, whereby a husband, who was legally obligated to support his wife during his lifetime, could prevent her from participating in his estate by failing to provide for her in his will.[9] Because this section is remedial in nature, it has been liberally construed in favor of the surviving spouse.[10] For the same reason, the courts jealously protect this right of the spouse and are quick to detect any evasion or practices that would frustrate the purpose of the statute.[11] The instant case offers an excellent example of such protection.

As stated in the *Brindisi* case, a wife has a mere expectancy in her husband's estate and a husband is free to dispose of all his property during his lifetime. This form of disinheritance is valid under our present laws; Section 18 does not prevent such a disposition.[12]

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a legatee under the second. *Cf.* Matter of Lewis, *supra* note 2 at 862-863. Where provision is made for the first wife in the form of a testamentary trust, the corpus may be so large that the second wife would be denied her statutory share. Faced with this problem, the courts have evaluated the first wife's interest by reference to mortality tables and settled the estate accordingly. See, *e.g.*, Matter of Lewis, *supra.*

[7] *See* Matter of Erstein, *supra* note 4 at 932, 129 N.Y.S.2d at 324.

[8] The New York Decedent Estate Law imposes various limitations, *e.g.*, Section 21 (prescribes form of a will); Sections 10 and 15 (who can make a will); Section 17 (the amount that may be devised or bequeathed in certain instances).

[9] See 1928 LEG. DOC. No. 70, REPORT, DECEDENT ESTATE COMMISSION 18-20 (Reprint ed. 1935).

[10] See, *e.g.*, Thompson v. Thompson, 163 Misc. 946, 299 N.Y. Supp. 55 (Sup. Ct. 1937), *aff'd*, 254 App. Div. 601, 2 N.Y.S.2d 858 (3d Dep't 1938); Matter of Harris, 150 Misc. 758, 271 N.Y. Supp. 464 (Surr. Ct. 1934); *see* Matter of Collins, 156 Misc. 783, 785, 282 N.Y. Supp. 728, 732 (Surr. Ct. 1935).

[11] See, *e.g.*, Matter of Curley, 245 App. Div. 255, 280 N.Y. Supp. 80 (2d Dep't), *aff'd mem.*, 269 N.Y. 548, 199 N.E. 665 (1935); Matter of Byrnes, 141 Misc. 346, 252 N.Y. Supp. 587 (Surr. Ct. 1931), *aff'd mem.*, 235 App. Div. 782, 257 N.Y. Supp. 884 (1st Dep't 1932), *aff'd*, 260 N.Y. 465, 184 N.E. 56 (1933).

[12] *See* Newman v. Dore, 275 N.Y. 371, 374, 9 N.E. 2d 966 (1937); Spafford v. Pfeffer, 179 Misc. 867, 871, 39 N.Y.S.2d 831, 835 (Sup. Ct. 1943).

The above preclusion can be accomplished in a variety of ways: the husband may make an inter vivos transfer,[13] establish a trust,[14] or set up a Totten trust.[15] The court in the *Brindisi* case, however, failed to distinguish between the aforementioned procedures and that of contracting away one's estate. In the former, with the exception of a Totten trust,[16] the party must give up complete control over the property or the transfer will be considered illusory by the courts and set aside at the instance of the decedent's widow.[17] Experience has shown, however, that since man is not naturally inclined to surrender all his property during his life, these transactions do not constitute a serious threat to a widow. Such a natural restraint is not present where one contracts away his estate. In such an instance, the husband is free to exercise absolute dominion and control over his property during his lifetime. It would be anomalous indeed to set aside inter vivos trusts and transfers on the ground that the testator retained a degree of control over the property which rendered the transfer illusory, if the testator could accomplish the same result by contracting away his estate. Had the Court refused to permit the wife to exercise her right of election in this instance, Section 18 would have been open to evasion and, for all practical purposes, reduced to a nullity.

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[13] See, *e.g.*, Spafford v. Pfeffer, *supra* note 12; Matter of Schurer, 157 Misc. 573, 284 N.Y. Supp. 28 (Surr. Ct. 1935), *aff'd mem.*, 248 App. Div. 697, 289 N.Y. Supp. 818 (1st Dep't 1936).

[14] *See* President and Directors of the Manhattan Co. v. Janowitz, 172 Misc. 290, 297, 14 N.Y.S.2d 375, 384 (Sup. Ct. 1939), *modified*, 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940).

[15] Matter of Halpern, 303 N.Y. 33, 100 N.E.2d 120 (1951).

[16] In a Totten trust, the depositor may retain some control because the trust is tentative in nature. It does not become absolute until the death of the depositor or until the gift is completed during the depositor's lifetime by some unequivocal act or declaration, such as a transfer of the bankbook to the beneficiary. *See* Matter of Totten, 179 N.Y. 112, 126, 71 N.E. 748, 752 (1904). However, it is not likely that the husband would adopt this method of distribution since it necessitates the liquidation of his assets and the establishment of a bank account.

[17] Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937); *see* Hirschfield v. Ralston, 66 N.Y.S.2d 59, 61 (Sup. Ct. 1946); Marano v. LoCarro, 62 N.Y.S.2d 121, 126-127 (Sup. Ct.), *aff'd mem.*, 270 App. Div. 999, 63 N.Y.S.2d 829 (1st Dep't 1946).