St. John's Law Review

Volume 16
Number 1 *Volume 16, November 1941, Number 1*

Article 5

July 2013

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ABANDONMENT AS GROUNDS FOR THE FORFEITURE OF A RIGHT OF ELECTION AGAINST A WILL

In the general revision of the Decedent Estate Law, effective September 1, 1930, a surviving spouse was given the right of election to take against the will of the deceased spouse, subject, however, to certain stated limitations.[1] Section 18 granting this new right confers the privilege upon the maker of a will to provide certain forms of benefit for the surviving spouse. Minimum requirements are fixed. If these benefits are given, the surviving spouse cannot exercise the right of election to take against the will and its terms stand. If the testator gives less than the statutory requirements, the surviving spouse may elect to take certain benefits defined in the section. In some cases the surviving spouse may take the difference between

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[1] Matter of Sadowski, 246 App. Div. 490, 284 N. Y. Supp. 490 (4th Dep't 1935).

N. Y. DEC. EST. LAW § 18, subd. 1 provides:

"(a) In exercising the right of election herein granted a surviving spouse shall in no event be entitled to take more than one-half of the net estate of the decedent, after the deduction of debts, funeral and administration expenses and any estate tax, and the words 'intestate share' wherever used in this section shall in no event be construed to mean more than one-half of such net estate.

"(b) Where the intestate share is over twenty-five hundred dollars and where the testator has devised or bequeathed in trust an amount equal to or greater than the intestate share, with income thereof payable to the surviving spouse for life, the surviving spouse shall have the limited right to elect to take the sum of twenty-five hundred dollars absolutely which shall be deducted from the principal of such trust fund and the terms of the will shall otherwise remain effective.

"(c) Where the intestate share of the surviving spouse in the estate does not exceed twenty-five hundred dollars, the surviving spouse shall have such right to elect to take his or her intestate share absolutely, which shall be in lieu of any provision for his or her benefit in the will.

"(d) Where the will contains an absolute legacy or devise, whether general or specific, to the surviving spouse, of or in excess of the sum of twenty-five hundred dollars and also a provision for a trust for his or her benefit for life of a principal equal to or more than the excess between said legacy or devise and his or her intestate share, no right of election whatever shall exist in the surviving spouse.

"(e) Where the will contains an absolute legacy or devise, whether general or specific, to the surviving spouse in an amount less than the sum of twenty-five hundred dollars and also a provision for a trust for his or her benefit for life of a principal equal to or more than the excess between said legacy or devise and his or her intestate share, the surviving spouse shall have the limited right to elect to take not more than the sum of twenty-five hundred dollars inclusive of the amount of such legacy or devise, and the difference between such legacy or devise and the sum of twenty-five hundred dollars shall be deducted from the principal of such trust fund and the terms of the will shall otherwise remain effective.

"(f) Where the aggregate of the provisions under the will for the benefit of the surviving spouse including the principal of a trust, or a legacy or devise, or any other form of testamentary provision, is less than the intestate share, the surviving spouse shall have the limited right to elect to take the difference between such aggregate and the amount of the intestate share, and the terms of the will shall otherwise remain effective."

what has been given and the share which the section prescribes. Where the will fails to comply with the statutory plan, or where there is a complete disinheritance, the surviving spouse may take all the statutory benefits outright.[2]

This statutory right of election is denied to a surviving 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 against whom a final decree or judgment of separation recognized as valid by the laws of this state has been rendered. It is also denied to a spouse who has procured without this state 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.[3] A decree of separation does not dissolve the marriage relation. Consequently, where the separation is procured by the surviving spouse, he or she is not deprived of the right of election. The spouse against whom the judgment is obtained is the only one deprived of that right.[4] It is to be noted that the statute does not bar a right of election to a spouse who has been guilty of cruel and inhuman treatment or whose conduct made it unsafe and improper for the deceased spouse to cohabit with the survivor.[5] The adulterous spouse is not barred in the absence of a decree of divorce based upon infidelity.[6]

The statutory provisions barring a right of election to a husband who has neglected or refused to provide for his wife, or abandoned her;[7] or to a wife who has abandoned her husband,[8] have been subject to considerable judicial interpretation.

To bar a spouse from taking an elective share upon the ground of abandonment, or a husband for neglect or refusal to provide for his wife, the proof must be such as would sustain a judgment of separation under § 1161 of the Civil Practice Act.[9] Abandonment as

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[2] Matter of Byrnes, 260 N. Y. 465, 184 N. E. 56 (1932), *rearg. denied,* 261 N. Y. 623, 185 N. E. 765 (1933).

[3] N. Y. DEC. EST. LAW § 18, subd. 5; Matter of Dress, 279 N. Y. 703, 18 N. E. (2d) 322 (1938); Matter of Fingerlin, 167 Misc. 880, 4 N. Y. S. (2d) 668 (1938); Matter of Browning, 153 Misc. 564, 276 N. Y. Supp. 262 (1934).

[4] Matter of Smith, 243 App. Div. 348, 276 N. Y. Supp. 648 (4th Dep't 1935).

[5] Matter of Green, 155 Misc. 641, 280 N. Y. Supp. 692, *aff'd,* 246 App. Div. 588, 284 N. Y. Supp. 370 (1st Dep't 1935).

[6] Matter of Green, 155 Misc. 641, 280 N. Y. Supp. 692, *aff'd,* 246 App. Div. 588, 284 N. Y. Supp. 370 (1st Dep't 1935).

[7] N. Y. DEC. EST. LAW § 18, subd. 3.

[8] N. Y. DEC. EST. LAW § 18, subd. 4; Matter of Dress, 279 N. Y. 703, 18 N. E. (2d) 322 (1938).

[9] Matter of Maiden, 284 N. Y. 429, 31 N. E. (2d) 889 (1940); Matter of Quick, 262 App. Div. 808, 28 N. Y. S. (2d) 10 (4th Dep't 1941); Matter of Kellas, 256 App. Div. 425, 10 N. Y. S. (2d) 879 (3d Dep't 1939), *aff'd,* 281 N. Y. 813, 24 N. E. (2d) 485 (1939); Matter of Sadowski, 246 App. Div. 490, 284 N. Y. Supp. 490 (4th Dep't 1935); Matter of Green, 155 Misc. 830, 280 N. Y. Supp. 692, *aff'd,* 246 App. Div. 588, 284 N. Y. Supp. 370 (1st Dep't 1935); Matter of Wheeler, 156 Misc. 830, 282 N. Y. Supp. 642 (1935); Matter of Stolz, 145 Misc. 799, 260 N. Y. Supp. 906 (1932).

used in the law of divorce contemplates a voluntary separation of one party from the other without justification, with the intention of not returning.[10] Where the wife consents to the separation there is no abandonment. It is only where the husband deserts the wife without her consent and refuses to give her adequate and proper support, that an action for abandonment will lie.[11]

Matter of Maiden,[12] recently considered by the Court of Appeals and decided by a divided court, involved a widow's right to elect. It appeared from the deposition of the widow that she left her husband's home on November 1, 1928 after having had a conversation with him the evening before. She had previously on the morning of that day sent away two trunks filled with her belongings. In another part of the deposition she stated that the reason for her departure was his continued insistence in her participating with him in acts of sexual perversion; that this conduct continued throughout the period that they lived together, that is, from the date of their marriage on July 27, 1927, to the time of her departure, and that his conduct probably wore upon her health to such an extent that she consulted a physician and shortly thereafter separated from him. Though her husband died more than eight years after she had left him, she never, in the interval, saw the decedent or communicated in any way with him. She brought no action against him and made no claim against him during his life for support. The surrogate found no abandonment on the part of the husband and determined that the widow was entitled to no part of the decedent's estate. In reversing his decree, the Appellate Division held that the representative had failed to sustain the burden of establishing that the widow had abandoned the deceased spouse and that, if her testimony was rejected, the case was devoid of any proof as to what caused the separation. In reviewing this determination the Court of Appeals appears to have been unanimous in holding that the legislature intended to exclude a wife from an elective share only where the abandonment would be cause for an action of separation as provided in § 1161 of the Civil Practice Act. There was, however, a sharp division as to the weight and sufficiency of the evidence. The majority view in defining the nature of abandonment said "To constitute abandonment under this statute something more is necessary than a departure from the marital abode or a living apart. * * * To amount to abandonment the departure of a spouse from the marital home must be unjustified and without the consent of the other spouse. The reason is inseparable from the act."[13] In confirming the right of election the majority of the court, observing

[10] Williams v. Williams, 130 N. Y. 193, 29 N. E. 98 (1891); Matter of Kellas, 256 App. Div. 425, 10 N. Y. S. (2d) 879 (3d Dep't 1939), *aff'd,* 281 N. Y. 813, 24 N. E. (2d) 485 (1939).

[11] Matter of Powers, 33 App. Div. 126, 53 N. Y. Supp. 346 (1st Dep't 1898).

[12] 284 N. Y. 429, 31 N. E. (2d) 889 (1940).

[13] Matter of Maiden, 284 N. Y. 429, 432, 31 N. E. (2d) 889, 890 (1940).

that separations occur in so many instances with fault and without fault, with consent and without consent, were unwilling to rest a conclusion of fault on the part of the departing spouse on inference alone. It took the view that whether the testimony of the widow as to the reason she left her husband was accepted or rejected, the legal representative had failed to sustain the burden of proof. If her testimony was true, she was justified in leaving. If false, there was mere departure without proof that it was unjustified and without the consent of the spouse. In the absence of such proof, the reason for leaving would rest upon inference alone. In the light of this holding it would seem to follow that even though the trier of the facts may reject the reason given by the surviving spouse for her departure as untrue, the legal representative, upon whom rests the burden of establishing abandonment, can only defeat her right to take a share in the deceased spouse's estate by affirmative proof that the husband was without fault and gave no consent. In the absence of such proof, the result would be the same in a case where the surviving spouse remained silent and offered no explanation for her departure.

Civil Practice Act § 1161 prescribed no period of absence as a prerequisite to an action for abandonment. If the wife's absence is a temporary one which has not ripened into an abandonment at the time she offers to return, it is the husband's duty to take her back. The offer or consent to return after departure with the intention of not returning, to be effective, must, therefore, be made in good faith within a reasonable time after departure or at least after the husband's offer to receive the wife. What is reasonable will depend on the circumstances of the case and the conduct of the parties. Her conduct amounts to abandonment only after it is persistent and obstinate.[14]

Abandonment, resulting in a denial of the right to elect, is established where the proof discloses that the husband, without any separation agreement, left his wife and failed to support and live with her for fifteen years preceding her death during which time she wholly supported herself.[15] Where a wife claims that her husband disappeared and abandoned her, she will be denied a share in his estate upon the ground of abandonment where, after living with her husband for one year after the marriage, she left him and moved to the home of her parents and, after residing there about a year, moved to an adjoining state in which ten years later she instituted an action for divorce against her husband which she abandoned and thereupon entered into a ceremonial marriage with another by whom she had a child still living, and with whom she continuously lived for more than thirty-five years, and the proof shows that she might have easily ascertained the whereabouts of the decedent who worked for the same

[14] Bohmert v. Bohmert, 241 N. Y. 446, 150 N. E. 511 (1926).

[15] Matter of Barnes, 149 Misc. 149, 267 N. Y. Supp. 634 (1933).

employer for a long time and lived for over twenty-five years in the matrimonial domicile.[16]

Abandonment by a husband is not made out where it appears that he left involuntarily and at the express request of his wife who owned the home, was herself possessed of ample means, rejected his efforts for a reconciliation and during the ten-year period of separation preceding her death refrained from compelling him to support her.[17]

Where a wife, upon learning that her husband is suffering from a loathsome disease, refuses to cohabit with and leaves him, her departure will be regarded as justified and not a bar to the assertion of her right of election.[18]

There is no abandonment where the spouses have lived apart by agreement and the husband has made the agreed payments,[19] or where, in lieu of periodic payments for the wife's support, the husband made a conveyance which constituted a valuable consideration [20] or a lump sum payment of all obligations for support.[21] Where there has been a reconciliation between the husband and wife and the latter voluntarily resumed living with her husband, a prior abandonment on his part is wiped out and the husband is entitled to his elective share.[22] Where the spouses are living together and the wife supports the husband and in addition gave him large sums of money, his failure to support her will not be regarded as "neglect or refusal to support" upon the theory that the wife never expected or demanded it.[23]

Where the only testimony offered in opposition is the claim of the husband, who had not been living with the deceased spouse for a considerable time, consisted of statements made by the deceased to the witnesses to the effect that he had failed to support her, together with a statement of similar import included in the will, it was held to be insufficient to establish either abandonment or failure to provide.[24] Proof of judgments of the Domestic Relations Court and the Magistrates' Court that the husband was a disorderly person is

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[16] Matter of Fingerlin, 167 Misc. 770, 4 N. Y. S. (2d) 668 (1938).

[17] Matter of Sadowski, 246 App. Div. 490, 284 N. Y. Supp. 490 (4th Dep't 1935).

[18] Matter of Wheeler, 156 Misc. 830, 282 N. Y. Supp. 642 (1936).

[19] Matter of Stolz, 145 Misc. 799, 260 N. Y. Supp. 906 (1932).

[20] Matter of McCann, 155 Misc. 763, 281 N. Y. Supp. 445 (1935); Matter of Brown, 153 Misc. 282, 274 N. Y. Supp. 924 (1934).

[21] Thompson v. Thompson, 163 Misc. 946, 299 N. Y. Supp. 55 (1937), *aff'd*, 254 App. Div. 601, 2 N. Y. S (2d) 858 (3d Dep't 1938); Matter of Tankelowitz, 162 Misc. 474, 295 N. Y. Supp. 754 (1937); Matter of Sachs, 155 Misc. 233, 279 N. Y. Supp. 404, *aff'd*, 246 App. Div. 546, 282 N. Y. Supp. 693 (2d Dep't 1935).

[22] Matter of Sidman, 153 Misc. 735, 276 N. Y. Supp. 56 (1934).

[23] Matter of Armond, 174 Misc. 486, 22 N. Y. S. (2d) 18 (1940); City Bank Farmers Trust Co. v. Miller, 163 Misc. 459, 297 N. Y. Supp. 88, *aff'd*, 253 App. Div. 707, 1 N. Y. S. (2d) 640 (1st Dep't 1937).

[24] Matter of Chamberlain, 161 Misc. 880, 293 N. Y. Supp. 253 (1937).

prima facie evidence of his refusal or neglect to provide for his wife.[25]

It is now well established that the burden of proving abandonment rests upon the party alleging it.[26]

The legislative policy of barring a spouse from an elective share where there was an abandonment or a neglect or refusal to provide was not incorporated in the general revision of the Decedent Estate Law in regard to a share passing to the surviving spouse by intestacy.[27] By subsequent amendment a surviving spouse is barred upon similar grounds from receiving an intestate share.[28] This policy has been further extended to dowager for wrongful death [29] and to the statutory cash and property exemptions granted a husband and wife under the provisions of the Surrogate's Court Act.[30]

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MALPRACTICE AND THE STATUTE OF LIMITATIONS

I

Ironical as it seems, the New York State Legislature in its efforts clearly to define the rights and remedies of citizens of the state has at times enacted statutes which, in their ambiguity, confound bench and bar alike. Courts, reluctant to go beyond a literal interpretation of these statutes, have often placed upon them harsh and unfair constructions which remain long unchallenged because of a strict adherence to the doctrine of *stare decisis*. The inevitable result is an unending list of unjust decisions. This has been the case

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[25] Matter of Rechtschaffen, 278 N. Y. 336, 16 N. E. (2d) 357 (1938).

[26] Matter of Maiden, 284 N. Y. 429, 31 N. E. (2d) 889 (1940); Matter of Rechtschaffen, 278 N. Y. 336, 16 N. E. (2d) 357 (1938); Matter of Quick, 262 App. Div. 808, 28 N. Y. S. (2d) 10 (4th Dep't 1941).

[27] Matter of Knuppel, 151 Misc. 773, 273 N. Y. Supp. 867 (1933).

[28] N. Y. DEC. EST. LAW § 87, subd. c and d providing:

"No distributive share of the estate of a decedent shall be allowed under the provisions of this article, either

(c) to a husband who has neglected or refused to provide for his wife, or has abandoned her;

(d) or to a wife who has abandoned her husband."

[29] N. Y. DEC. EST. LAW § 133, subd. 4a and b providing:

"No distributive share of such damages shall be allowed under the provisions of this article either

(a) To a husband who has neglected or refused to provide for his wife, or has abandoned her;

(b) Or to a wife who has abandoned her husband."

[30] N. Y. SURR. CT. ACT § 200, subd. 6, providing: "No property or money shall be set apart under this section to a surviving spouse who cannot inherit as a distributee, any part of the estate of a deceased spouse who died intestate; nor to a surviving spouse who can neither inherit, nor claim any rights against the estate of a deceased spouse who has died testate."