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Election of Surviving Spouse to Take Against Will--Pre-Requisites to Valid Election--Termination of Right to Elect (In re Coffin's Estate, 152 Misc. 619 (1934))

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the state for at least a year [5] and the plaintiff is a resident [6] of the state when the action is commenced.[7]

The interpretation of the statute given by the court permits a plaintiff who has lived in this state with her husband for one year at any time during their marital relation, no matter at what period and notwithstanding that they had spent almost their entire life [8] up to the time of the separation in another state such as in the case before us to take up a residence here and bring an action for separation in our courts.[9]

M. E. W.

ELECTION OF SURVIVING SPOUSE TO TAKE AGAINST WILL—PRE-REQUISITES TO VALID ELECTION—TERMINATION OF RIGHT TO ELECT.—Testatrix executed a will in 1931, by which she bequeathed and devised an estate in excess of $7,000. The sole legacy to her surviving husband was a bequest of $800. One week after the demise of the testatrix, her will was filed in court. Two days later the surviving spouse executed and acknowledged a notice of election to take against the will and delivered same to his attorney, to serve, file and record. On December 8, 1932, the will was admitted to probate and letters testamentary issued to the named executors on that date and on December 22d respectively. On March 21, 1933, the surviving spouse died, and two months later his attorney personally served notice of election on the executors and filed proof of service. *Held,* the surviving spouse must strictly perform the conditions of the statute [1] in order to make a valid election and his death before compliance destroys the right to elect. *In re Coffin's Estate,* 152 Misc. 619, 273 N. Y. Supp. 974 (1934).

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[5] Barber v. Barber, *supra* note 2.

[6] See *supra* note 4.

[7] N. Y. CIVIL PRACTICE ACT §1162, subd. 3.

[8] Katz v. Katz, 203 App. Div. 672, 197 N. Y. Supp. 307 (1st Dept. 1922).

[9] *Contra:* Elwell v. Elwell, 70 Misc. 61, 128 N. Y. Supp. 495 (1910), Greenbaum, J., interpreting the statute not to mean a residence at some time during the marital relation but a continued residence—one which must be at least one year and had not ceased up to the time of the separation.

[1] N. Y. DECEDENT ESTATE LAW (1929) §18, subd. 7: "An election made under this section shall be in lieu of dower, and must be made within six months from the date of issuance of letters testamentary or if letters testamentary have not been issued from the date of issuance of letters of administration with the will annexed, and shall be made by serving written notice of such election upon the representative of the estate personally or in such other manner as the surrogate may direct *and* by filing and recording a copy of such notice with proof of service in the surrogate's court where such will was probated. * * *" (Italics author's.)

Where a right exists in favor of a surviving spouse, to elect to take against a will, such right is strictly personal to the spouse.[2] It is deemed personal in the sense that death terminates the right of election [3] and it may not be exercised after death by the decedent's personal representatives.[4] An executor cannot complete the acts requisite under the statute, to enforce the personal right of election, commenced by the testator before death,[5] nor may an agent or attorney,[6] since death revokes the relationship between the parties.[7]

"The right of election is purely statutory, and can only be enjoyed by a compliance with the statute conferring it." [8] This statute is in derogation of the common law rights of testamentary disposition [9] and statutes which change the common law are strictly construed.[10] Both requirements as to filing and personal service on executor of the notice to elect must be met.[11] Mere filing without notice is insufficient,[12] the terms of the statute being mandatory.[13] Then, too, the action must be seasonably brought since timely election is imperative to valid election.[14]

V. G. R.

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[2] Flynn v. McDermott, 183 N. Y. 62, 72 N. E. 931 (1905); Miller v. Stephens, 158 Ind. 438, 63 N. E. 847 (1902); Harding v. Harding, 140 Ky. 277, 130 S. W. 1098 (1910); Church v. McLaren, 85 Wis. 122, 55 N. W. 152 (1893).

[3] *In re* Mihlman's Will, 140 Misc. 535, 251 N. Y. Supp. 147 (1931); Fosher v. Guilliams, 120 Ind. 172, 22 N. E. 118 (1889); *In re* Crozier's Appeal, 90 Pa. 384 (1879); Jackson's Appeal, 126 Pa. 105, 17 Atl. 535 (1889); Anderson's Estate, 185 Pa. 174, 39 Atl. 818 (1898).

[4] Donald v. Portis, 42 Ala. 29 (1868); Fergus v. Schiable, 91 Neb. 180, 135 N. W. 448 (1912); *In re* Roberts's Estate, 82 Pa. Super. Ct. 251 (1923); Church v. McLaren, *supra* note 2.

[5] *In re* Gunyon's Estate, 85 Wis. 122, 55 N. W. 152 (1893).

[6] Instant case.

[7] Anderson v. Anderson, 20 Wend. 585 (N. Y. 1838); Putnam v. Van Buren, 7 How. Pr. 31 (N. Y. 1852); *In re* Robbins, 112 N. Y. Supp. 1032 (1908), *aff'd*, 132 App. Div. 905, 116 N. Y. Supp. 1146 (2d Dept. 1909).

[8] Miller v. Stephens, *supra* note 2, 158 Ind. at 443, 63 N. E. at 849.

[9] Instant case.

[10] People v. Alaboda, 198 App. Div. 41, 189 N. Y. Supp. 464 (3d Dept. 1921); People v. Bailey, 103 Misc. 366, 171 N. Y. Supp. 394 (1918); see Dean v. Met. El. Ry. Co., 119 N. Y. 540, 23 N. E. 1054 (1890); Psota v. L. I. R. R. Co., 246 N. Y. 388, 159 N. E. 180 (1927); Matter of Smith's Estate, 136 Misc 863, 242 N. Y. Supp. 464 (1930); Matter of Marsh's Estate, 143 Misc. 609, 257 N. Y. Supp. 514 (1932).

[11] Miller v. Stephens, *supra* note 2; Bailey v. Hughes, 115 Iowa 304, 88 N. W. 804 (1902); Wilson's Estate, 297 Pa. 348, 147 Atl. 70 (1929).

[12] Beck's Estate, 265 Pa. 51, 108 Atl. 261 (1919).

[13] *In re* Zweig's Will, 135 Misc. 839, 261 N. Y. Supp. 400 (1932).

[14] *Id.* 145 Misc. at 847, 261 N. Y. Supp. at 409, Wingate, Surrogate: "The effect of the insertion in the statute of a time limit within which the granted privilege must be exercised is a true statute of limitation, and if the right to take against the will is not validly exercised within the period indicated, the privilege will be deemed to have lapsed with the effect as if it never had existed."