NEW YORK STATE BAR ASSOCIATION
TRUSTS AND ESTATES LAW SECTION

PROPOSED LEGISLATION

The Trusts and Estates Law Section recommends that EPTL 5-1.2 be amended to read as follows:

EPTL 5-1.2. Disqualification as surviving spouse

(a) A husband or wife is a surviving spouse within the meaning, and for the purposes of 4-1.1, 5-1.1, 5-1.1-A, 5-1.3, 5-3.1 and 5-4.4, unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that:

(1) A final decree or judgment of divorce, ~~of annulment or declaring the nullity of a marriage or dissolving such marriage on the ground of absence,~~ recognized as valid under the law of this state, was in effect when the deceased spouse died.

(2) A final decree or judgment of annulment or declaring the nullity of a marriage or dissolving such marriage, recognized as valid under the law of this state, is issued before or after deceased spouse died. For the purposes of this section, in the event any such decree or judgment is issued after the deceased spouse died, the marriage shall be deemed a nullity immediately prior to the death of such spouse.

(3) ~~(2)~~ The marriage was void as incestuous under section five of the domestic relations law, bigamous under section six thereof, or prohibited remarriage under section eight thereof.

(4) ~~(3)~~ The spouse had procured outside of this state a final decree or judgment of divorce from the deceased spouse, of annulment or declaring the nullity of the marriage with the deceased spouse or dissolving such marriage on the ground of absence, not recognized as valid under the law of this state.

(5) ~~(4)~~ A final decree or judgment of separation, recognized as valid under the law of this state, was rendered against the spouse, and such decree or judgment was in effect when the deceased spouse died.

(6) ~~(5)~~ The spouse abandoned the deceased spouse, and such abandonment continued until the time of death.

(7) ~~(6)~~ A spouse who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so, unless such marital duty was resumed and continued until the death of the spouse having the need of support.

The foregoing amendments shall be effective upon enactment.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Several recent decisions have highlighted a specific type of elder abuse where a person takes unfair advantage of an individual who lacks the capacity to enter into a marriage or otherwise utilizes fraud and undue influence to secretly marry the individual for the purpose of obtaining a portion of his or her estate at the expense of the intended heirs. Because they are married at the time of the decedent's death, none of the grounds for disqualification under EPTL 5-1.2 exist, and the surviving "spouse" is entitled to his or her elective share under EPTL 5-1.1-A unless the court intervenes for equitable reasons. Some courts have been reluctant to do this in light of the unambiguous statutory language, although they have acknowledged the need for, and have recommended statutory amendments. The Trusts and Estates Law Section proposes to amend EPTL 5-1.2(a)(1) so as to address this problem. This memorandum restates the reasons and rationales, and addresses the issues raised by the Executive Committee at a recent meeting.

II. OVERVIEW OF THE PROBLEM

EPTL 5-1.1-A provides a surviving spouse with a right of election to take a share of the decedent's estate (even if a valid will does not leave that individual anything under a will or testamentary substitute), as long as the parties are married on the date of the decedent's death. Thus, a husband or wife is a surviving spouse unless it can be established satisfactorily to the court that any grounds for disqualification within EPTL 5-1.2 are present including, among others, a final decree or judgment of divorce, annulment or other formal declaration of the nullity of a marriage exists at the time of the decedent's death. EPTL 5-1.2(a)(1).

The Trusts and Estates Law Section has focused on the disqualification ground concerning a final decree of annulment or other formal declaration of the nullity of a marriage which exists at the time of the decedent's death. Currently, New York is one of the few states that permits after-death challenges, which it does pursuant to Domestic Relations Law ("DRL") §140. Thus, a marriage in New York can be annulled post-death. Nevertheless, this status change has no effect on the right to take an elective share because EPTL 5-1.2 specifies that it is the marital status of the parties at the time of the decedent's death that controls.

A strict reading of the statutes thus leads to an inequitable result. This was highlighted in two recent cases, *Matter of Berk* and *Campbell v. Thomas* (discussed in detail below), which involved decedents who married when they lacked the requisite mental capacity. The Second Department determined that courts could look to equity in determining whether these surviving spouses should be estopped from receiving their elective share. Although the Second

Department saw fit to utilize its equitable powers to address this problem, there is no guarantee that other courts would follow suit. Consequently, the Trusts and Estates Law Section recommends that EPTL 5-1.2 be amended.

A. Legislative History

1. The Disqualification Statute

In 1965, the New York Legislature enacted the original Estates, Powers and Trusts Law (EPTL) to serve as the foundation for what is now our modern right of election under EPTL 5-1.1-A, which generally entitles the surviving spouse to a portion of the decedent's electable estate. [1] New York recognized that the ability to disinherit a spouse left surviving spouses vulnerable.

Although the EPTL generally protects surviving spouses from being disinherited, EPTL 5-1.2 provides that a spouse can become disqualified from asserting his or her right of election (or receiving his or her intestate share) under certain narrow circumstances. EPTL 5-1.2 provides that one such circumstance is:

> A final decree or judgment of divorce, of annulment or declaring the nullity of a marriage or dissolving such marriage on the grounds of absence, recognized as valid under the laws of this state, ***was in effect when the deceased died.*** (emphasis added).

The Bennett Commission did not detail the rationale for the "at the time of death" language.

2. Domestic Relations Law

DRL § 140 is the mechanism to bring an action to annul a marriage, which may be brought by either of the parties or other enumerated individuals including a friend or a relative of

[1] EPTL 5-1.1-A provides that a surviving spouse is entitled to receive the greater of $50,000 or one-third of the decedent's net estate less the value of all outright dispositions passing to the spouse by the will or testamentary substitutes.

a spouse of a marriage procured by force, duress or fraud. DRL § 7 defines these types of marriages as "voidable" where one of the parties was incapable of consenting to a marriage for want of understanding, or by reason of force, duress or fraud.

The distinction between void marriages and voidable marriages has proven interesting in this context of survivor rights and an elective share. Void marriages, which are defined by DRL §§ 5 and 6 as including bigamous marriages, incestuous marriages and those involving minors, are a legal nullity that never existed in the first place. The parties can treat the marriage as a nullity without court intervention. Because the marriage never legally existed, it did not exist at the time of the decedent's death, and thus the surviving spouse is unable to take an elective share. Conversely, voidable marriages, defined in DRL § 7 as including those where one of the parties was incapable of consenting to a marriage for want of understanding, or by reason of force, duress or fraud, are valid unless and until they are attacked in an annulment proceeding. Moreover, the language of EPTL 5-1.2 has been interpreted to find that the right of election becomes fixed and unalterable at the time of the decedent's death – regardless of whether the marriage is later annulled. *Bennett v Thomas*; 38 A.D.2d 682 (4th Dept 1971); *Tabak v Garay*, 237 A.D.2d 510 (2d Dept 1997); *Parente v. Wenger*, 119 Misc.2d 758 (Sup Ct New York Co. 1983) cf. *Campbell v. Thomas*, 73 AD3d 103 (2d Dept 2010).

B. Recent Cases

1. ***Campbell v. Thomas***

In *Campbell v. Thomas*,[2] while the decedent's primary caretaker was away on a one week vacation, the defendant, the alleged surviving spouse, married the decedent in a secret ceremony

[2] *Campbell v. Thomas*, 73 AD3d 103 (2010).

and subsequently proceeded to transfer the decedent's assets into her own name or their joint name.

After the decedent passed away, the intended beneficiaries of his estate commenced an action in the Supreme Court, Putnam County, seeking a judgment declaring the marriage between the defendant and the decedent null and void because the decedent lacked the capacity to enter into the marriage due to his severe dementia. The intended beneficiaries also sought a judgment declaring that the various account changes were null and void for the same reasons.

Despite the substantial evidence of the decedent's mental incapacity, the Supreme Court denied summary judgment for both sides finding there were triable issues of fact. However the Second Department concluded on this same evidence that the plaintiffs had made a prima facie showing of their entitlement to judgment as a matter of law.

Upon review, the Second Department found that the literal terms of the statute should not be "rigidly applied if to do so 'would be to ordain the statute as an instrument for the protection of fraud.'" *Id.* at 469. The court cited to the well-known equitable principle that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong or to found any claim upon his own iniquity, or to acquire property by his own crime." *Id.* at 469-470. Indeed, the wrongdoer is deemed to have forfeited the benefit that would flow from his or her wrongdoing.

Looking to the case therein, the Second Department found that the foregoing facts provided ample support for an inference that the defendant procured the marriage through overreaching and undue influence. The Court concluded that the Supreme Court properly directed the entry of a judgment declaring that the defendant had no legal rights and can claim no legal interest as a spouse, and that in light of the defendant's lack of any legal right or interest as

a spouse of the deceased, she did not have standing to challenge the Supreme Court's directive concerning the distribution of the estate.

2. ***Matter of Berk***

In *Matter of Berk*,[3] a recent right of election case out of the Surrogate's Court, Kings County, the petitioner had served as the elderly decedent's caretaker for the last ten years of his life and secretly married him one year before he died. The petitioner filed a petition seeking a decree determining that she was entitled to take her elective share against the estate and that her Notice of Election was properly served, filed and recorded as required by law. Respondents, the co-executors of the estate and the decedent's sons, filed a verified answer alleging various affirmative defenses and counter-claims, including those seeking to have the marriage between the decedent and the petitioner deemed null and void *ab initio*, to annul the marriage *nunc pro tunc* based upon the decedent's mental state, and otherwise to dismiss the petition and vacate the Notice of Election. Alternatively, the counter-claims sought a finding that if the decedent was not disqualified as a surviving spouse, an award of compensatory damages equal to the elective share should be granted to the Estate for the resulting loss from petitioner's fraudulent conduct. Petitioner moved for summary judgment on her entitlement to take an elective share of the estate.

In examining the motion, the Surrogate's Court followed a strict reading of the statutes and stated that it was established law that a voidable marriage is only void from the time its nullity is declared by a court. Thus, even if the marriage were annulled, it would be declared a nullity as of the date of the annulment, and the decedent and the petitioner would have been deemed married at the time the decedent died. In addition, the court declined to apply equitable estoppel.

[3] 20 Misc. 3d 691; 864 N.Y.S.2d 710 (Sur. Ct. Kings Co. 2008) *rev'd* 71 AD3d 883 (2d Dept 2010).

The Second Department,[4] citing specifically to the *Campbell v. Thomas* decision, (which was decided the same day) found a triable issue of fact existed as to whether the petitioner forfeited the statutory right of election. If the trier of fact found that the surviving spouse knowingly took unfair advantage of a person who was incapable of consenting to a marriage, for the purpose of obtaining pecuniary benefits as a surviving spouse, equity will intervene to prevent the petitioner from becoming unjustly enriched from her wrongdoing. The court determined the petitioner was not entitled to summary judgment, and the counter-claims, including equitable estoppel and damages, should not have been dismissed.

III. PROPOSED SOLUTION

The EPTL should be amended to make it compatible with the remedial actions authorized under the DRL, permitting the disqualification of a spouse based on an annulment of the marriage after the death of the decedent.

A. <u>Equity Cannot Be Relied Upon As The Sole Recourse</u>

The Second Department noted the intent of the Legislature when it enacted EPTL 5-1.2 in 1966 and called upon the legislature to reexamine the statute to consider whether it might be appropriate to make revisions that "would prevent unscrupulous individuals from wielding the law as a tool to exploit the elderly and infirm." *Campbell*, at 473.

In addition, prior to the recent Second Department rulings, courts have been reluctant to apply equity and veer from the strict reading of the statute. See e.g., *Matter of Creighton*, N.Y.L.J., 7/23/08, p. 32, col. 5 (Sur. Ct. Suffolk Co.); see also *Bennett v Thomas*; 38 A.D.2d 682

[4] 71 AD3d 883 (2d Dept 2010).

(4th Dept 1971); *Tabak v Garay*, 237 A.D.2d 510 (2d Dept 1997); *Parente v. Wenger*, 119 Misc.2d 758 (Sup Ct New York Co. 1983).

This change will not require the court to determine the validity of every marriage. Rather, if there is a question concerning the validity of the marriage, status can be addressed.

B. Mental Health Law §81.29(d) Provides Support

An annulment granted post-death under the DRL only revokes the marriage as of the date it is declared void, invoking the problems detailed above. In stark contrast, MHL §81.29(d) provides that:

> [i]f the court determines that the person is incapacitated and appoints a guardian, the court may…revoke any previously executed…contract…during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed…contract…was made while the person was incapacitated..."

Because the person was deemed judicially incapacitated before his or her death, there was no limitation on the ability of the court to revoke agreements previously entered into – even if the incapacitated individual is dead when the challenge to the agreement is made.

Another recent case, *Matter of Kaminester*,[5] utilized this statute to permit a guardianship court to revoke a marriage posthumously, and deem the marriage void *ab initio*. In *Matter of Kaminester*, the decedent had been declared incapacitated prior to his death in a guardianship proceeding. In direct contravention of the court's directive, the surviving spouse married the decedent and kept it a secret during his lifetime. Following the decedent's death and upon learning of the marriage, the executor petitioned the New York County Surrogate's Court for a determination on the validity of the surviving spouse's right of election. In applying MHL §81.29(d), the Surrogate's Court held that because the decedent's marriage to the surviving

[5] 26 Misc. 3d 227 (Surr. Ct. N.Y. 2009).

spouse was revoked *ab initio*, she was not a surviving spouse at the time of the decedent's death, as is required by the disqualification statute. Therefore the surviving spouse was not entitled to an elective share of the decedent's estate.[6]

C. Statute of Limitations

While this problem could manifest under EPTL 4-1.1, 5-1.1, 5-1.1-A, 5-1.3, 5-3.1 and 5-4.4, the Sub-committee believes that these scenarios will frequently develop in the context of a purported surviving spouse filing for his or her elective share. Under EPTL 5-1.1-A(d)(1), a right of election must be made within six (6) months of the date of issuance of letters testamentary or of administration, but in no event later than two years after the date of the decedent's death.[7] When the purported surviving spouse files a notice that they intend to exercise their right of election, the validity of the marriage can be addressed and challenged. If the notice is filed outside of the time prescribed by the statute, the court will be left to make an assessment of whether to allow the late filing of the notice.

The statute of limitations for each potential annulment ground is a procedural question separate and apart from EPTL 5-1.2. The limitations periods can be found elsewhere within the CPLR and the DRL:

> Under CPLR §214(7), an action to annul a marriage on the ground of fraud must be commenced within three (3) years from the time the plaintiff discovered the facts constituting the fraud, "but if the plaintiff is a person other than the spouse whose consent was obtained by fraud, the time within which the action must be commenced shall be computed from the time, if earlier, that that spouse discovered the facts constituting the fraud."[8]

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[6] Interestingly, the Surrogate's Court indicated that even if the marriage were not revoked *ab initio*, the court would nevertheless have prevented the surviving spouse from asserting the right of election under the doctrine of equitable estoppel.

[7] EPTL § 5-1.1-A(d)(2) allows for extension of this time by court order.

[8] Although CPLR 214(7) affords three (3) years from the discovery of the fraud, CPLR 203(f) provides that whenever the time to commence an action is computed from the actual or imputed discovery of facts, the action must be commenced within two (2) years of the discovery.

> Under DRL §140(e), an action to annul a marriage on the ground that the consent of one of the parties was obtained by force or duress may be maintained at any time by the party whose consent was so obtained, or by a relative of the coerced party who has an interest in avoiding the marriage. The statute does not impose any time limitation as to when the action must be brought and expressly states that it may be brought at any time, as long as the parties did not voluntarily cohabitate before the commencement of the action.[9]
>
> Under DRL §140(c), an action to annul a marriage based upon want of understanding of one of the parties is not addressed specifically within that section of the DRL, and is encompassed under the "catch-all" CPLR §213(1) where all actions for which no limitation is specifically prescribed by law, must be commenced within six (6) years.

Because the Legislature has already proscribed specific limitations periods, the Sub-committee does not feel that an additional statute of limitations should be added to the revised EPTL 5-1.2.

D. **There Are No Additional Estate Tax Implications**

In discussions concerning revisions to EPTL 5-1.2, the issue of estate taxes was raised as a potential issue. Specifically, it was questioned whether there would be an issue with marital deduction claims and the IRS.

In reviewing this issue further, the Sub-committee does not believe that there will be any further implications for the estate tax returns and the marital deduction. If an estate is faced with a status question, it can seek a protective election from the IRS whereby the estate tax return is filed, but left open as to that one question. If this issue is litigated, there will be either a decree stating that the marriage is valid or annulled, or the issue will be settled among the parties. The IRS will have finality on the issue.

[9] Because the time limitation appears in the statute that creates the cause of action, this is seen as a condition precedent to suit, and not a statute of limitations – thus it must be plead.

This is no different than a scenario where estranged surviving spouses attempt to exercise their right of election, which is opposed on the ground of abandonment and/or failure to support. Disqualification based upon abandonment, already authorized by EPTL 5-1.2(a)(5), cannot be determined until after the decedent's death because there is the possibility of reconciliation up until the time of death.[10] See also EPTL 5-1.2(a)(6) which authorizes disqualification based upon the failed duty to support which also cannot be determined until the death of the spouse.

In at least one recent case where a post-death annulment has been sought, the estate followed this course and sought a protective election from the IRS during the pendency of the status contest. Further, the Second Department has already determined that a surviving spouse can be disqualified pursuant to a post-death annulment. The IRS will be faced with this issue whether the statute is changed or not.

CONCLUSION

For the forgoing reasons, the Trusts and Estates Law Section proposes that EPTL 5-1.2 be amended as set forth above in order to provide that a posthumous annulment disqualifies a surviving spouse from receiving his or her elective share.

Section Chair: Ilene S. Cooper

Memorandum Prepared By: Jennifer F. Hillman, Joseph T. La Ferlita, Peter Kelley

[10] See, e.g., *In re Goethie's Will*, 9 Misc.2d 906 (Surr Ct Westchester Co 1957).

Resolutions

Trusts and Estates Law Section, New York State Bar Association

Opinions expressed are those of the Section preparing this resolution and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates.

Dated: March 10, 2012

To: NYSBA Executive Committee and House of Delegates

From: NYSBA Trusts and Estates Law Section

Re: Reports for June 23, 2012

RESOLVED, that the NYSBA Trusts and Estates Law Section supports the following amendment:

EPTL 5-1.2 shall be amended to read as follows:

EPTL 5-1.2. Disqualification as surviving spouse

(a) A husband or wife is a surviving spouse within the meaning, and for the purposes of 4-1.1, 5-1.1, 5-1.1-A, 5-1.3, 5-3.1 and 5-4.4, unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that:

(1) A final decree or judgment of divorce, ~~of annulment or declaring the nullity of a marriage or dissolving such marriage on the ground of absence,~~ recognized as valid under the law of this state, was in effect when the deceased spouse died.

(2) A final decree or judgment of annulment or declaring the nullity of a marriage or dissolving such marriage, recognized as valid under the law of this state, is issued before or after deceased spouse died. For the purposes of this section, in the event any such decree or judgment is issued after the deceased spouse died, the marriage shall be deemed a nullity immediately prior to the death of such spouse.

(3) ~~(2)~~ The marriage was void as incestuous under section five of the domestic relations law, bigamous under section six

thereof, or prohibited remarriage under section eight thereof.

(4) ~~(3)~~ The spouse had procured outside of this state a final decree or judgment of divorce from the deceased spouse, of annulment or declaring the nullity of the marriage with the deceased spouse or dissolving such marriage on the ground of absence, not recognized as valid under the law of this state.

(5) ~~(4)~~ A final decree or judgment of separation, recognized as valid under the law of this state, was rendered against the spouse, and such decree or judgment was in effect when the deceased spouse died.

(6) ~~(5)~~ The spouse abandoned the deceased spouse, and such abandonment continued until the time of death.

(7) ~~(6)~~ A spouse who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so, unless such marital duty was resumed and continued until the death of the spouse having the need of support.

The foregoing amendments shall be effective upon enactment.

RESOLVED, that the NYSBA Trusts and Estates Law Section is in favor of the above amendment for the reasons set forth in the accompanying memorandum of support, without further comment.

Resolution Prepared By:	Jennifer F. Hillman, Joseph T. La Ferlita, Peter Kelly
Approved By:	Vote of the Executive Committee of the NYSBA Trusts and Estates Law Section
Section Chair:	Ilene S. Cooper