SAGE Advisors Series

Planning for Unmarried Couples

LGBT and Others

WED **SEPT 18, 2019 | 8:00-10:00** A.M.*

***8:00 A.M.** Free Breakfast by SAGE | **8:30 A.M.** CLE

SAGE Edie Windsor Center | 305 7th Ave., 15th Fl., NYC

1.5 CLE Credits in Diversity, Inclusion, and Elimination of Bias

Appropriate for Experienced Attorneys only

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NYSBA

Planning for Unmarried Couples – LGBT and Others

CLE Program presented by the LGBT Bar Association of New York (LeGaL)

Wednesday, September 18, 2019 | 8:30-10:00 a.m. | SAGE Edie Windsor Center

AGENDA

8:00 – 8:30 a.m. Registration and breakfast provided by SAGE

8:30 – 8:40 a.m. Welcome from **Jerry Chasen**, Director of Legacy Planning at SAGE

8:40 – 8:45 a.m. Introduction of panel and overview of presentation **(Sciacca)**

8:45 – 9:20 a.m. **Planning considerations.** What advanced directives are essential for unmarried couples? Should unmarried couples have Wills? Is probate avoidance important? What concerns face unmarried couples when naming beneficiaries on retirement accounts? How does the estate tax affect the unmarried couple? What should unmarried couples consider when planning for long-term care expenses? How does Medicaid and Social Security affect unmarried couples? **(Carmody)**

9:20 – 9:50 a.m. ***Post-mortem* issues.** What rights do unmarried couples have to direct the disposition of each other's remains? How do simple probate avoidance tips like joint bank accounts affect the unmarried couple? What rights does the surviving member of an unmarried couple have when someone dies intestate? How do children born to an unmarried couple prove kinship? What rights does the surviving member of an unmarried couple have or lose in a probate contest? How does the law treat an unmarried couple in compromise proceedings (wrongful death and conscious pain and suffering)? **(Jones)**

9:50 – 10:00 a.m. Questions and answers **(panel)**

Planning for Unmarried Couples – LGBT and Others

CLE Program presented by the LGBT Bar Association of New York (LeGaL)

SPEAKER BIOGRAPHIES

MATTHEW CARMODY, ESQ. is a senior associate at Brian A. Raphan P.C., practicing in elder law as well as trust and estates for over ten years. He graduated from CUNY Law School with a concentration in Health Law, and worked at the South Brooklyn Legal Services and Housing Works Client Legal Services serving low income clients with HIV, or at risk of HIV infection. Currently, Matthew runs a legal clinic at SAGE once a month, and has previously assisted transgender organization such as the Sylvia Rivera Law Project and the Trans Justice Funding Project. Matthew has received multiple guardianship and guardianship related appointment from the New York State Supreme Court.

MEREDITH R. JONES, ESQ. is a Court Attorney-Referee for the Honorable Harriet L. Thompson in the Kings County Surrogate's Court Kings. Prior to service in this court, she engaged in private practice with the law firm of Alter & Barbaro, Esqs. where she represented clients in a wide range of issues from real estate and landlord/tenant matters to matrimonial and personal injury litigation. At the same time, she served as Deputy Counsel for a State Senator where she provided advice and direction to constituents and lectured in the community regarding legal issues. Ms. Jones is a graduate of Cornell University where she received her B.A. in History and her J.D. from Cornell Law School. She is admitted to practice law in the states of New York and New Jersey. In addition to her work as Court Attorney-Referee in the Surrogate's Court, she also lectures in the community regarding trusts and estates issues.

THOMAS SCIACCA, ESQ. is the Principal of Law Offices of Thomas Sciacca, PLLC, where, since 2007 he has focused his practice on Trusts & Estates, Estate Administration, Surrogate's Court Litigation, and Guardianship. In addition, Mr. Sciacca is an Adjunct Assistant Professor at New York University's School of Professional Studies, an appointment he has held since January 2006. Mr. Sciacca is a frequent speaker on various topics related to his various areas of practice. Mr. Sciacca is a graduate of New York University School of Law (LLM – taxation), Pace University School of Law (JD), and the University at Albany, State University of New York (BA). He is licensed to practice law in New York, New Jersey, Florida, the Southern District, and the United States Tax Court.

McKinney's Consolidated Laws of New York Annotated
Estates, Powers and Trusts Law (Refs & Annos)
Chapter 17-B. Of the Consolidated Laws
Article 5. Family Rights
Part 4. Rights of Members of Family Resulting from Wrongful Act, Neglect or Default Causing Death of Decedent (Refs & Annos)

McKinney's EPTL § 5-4.4

§ 5-4.4 Distribution of damages recovered

Currentness

(a) The damages, as prescribed by 5-4.3, whether recovered in an action or by settlement without an action, are exclusively for the benefit of the decedent's distributees and, when collected, shall be distributed to the persons entitled thereto under 4-1.1 and 5-4.5, except that where the decedent is survived by a parent or parents and a spouse and no issue, the parent or parents will be deemed to be distributees for purposes of this section. The damages shall be distributed subject to the following:

(1) Such damages shall be distributed by the personal representative to the persons entitled thereto in proportion to the pecuniary injuries suffered by them, such proportions to be determined after a hearing, on application of the personal representative or any distributee, at such time and on notice to all interested persons in such manner as the court may direct. If no action is brought, such determination shall be made by the surrogate of the county in which letters were issued to the plaintiff; if an action is brought, by the court having jurisdiction of the action or by the surrogate of the county in which letters were issued.

(2) The court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), shall also decide any question concerning the disqualification of a parent, under 4-1.4, or a surviving spouse, under 5-1.2, to share in the damages recovered.

(b) The reasonable expenses of the action or settlement and, if included in the damages recovered, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent may be fixed by the court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), upon notice given in such manner and to such persons as the court may direct, and such expenses may be deducted from the damages recovered. The commissions of the personal representative upon the residue may be fixed by the surrogate, upon notice given in such manner and to such persons as the surrogate may direct or upon the judicial settlement of the account of the personal representative, and such commissions may be deducted from the damages recovered.

(c) In the event that an action is brought, as authorized in this part, and there is no recovery or settlement, the reasonable expenses of such unsuccessful action, excluding counsel fees, shall be payable out of the assets of the decedent's estate.

Credits

(L.1966, c. 952. Amended L.1967, c. 686, § 45; L.1975, c. 357, § 1; L.1992, c. 595, § 12.)

McKinney's E. P. T. L. § 5-4.4, NY EST POW & TRST § 5-4.4
Current through L.2019, chapter 248. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated
Surrogate's Court Procedure Act (Refs & Annos)
Chapter 59-a. Of the Consolidated Laws (Refs & Annos)
Article 14. Probate Proceedings; Construction of Wills; Right of Election (Refs & Annos)

McKinney's SCPA § 1410

§ 1410. Who may file objections to probate of an alleged will

Currentness

Any person whose interest in property or in the estate of the testator would be adversely affected by the admission of the will to probate may file objections to the probate of the will or of any portion thereof except that one whose only financial interest would be in the commissions to which he would have been entitled if his appointment as fiduciary were not revoked by a later instrument shall not be entitled to file objections to the probate of such instrument unless authorized by the court for good cause shown. The objections must be filed on or before the return day of the process or on such subsequent day as directed by the court; provided however that if an examination is requested pursuant to 1404, objections must be filed within 10 days after the completion of such examinations, or within such other time as is fixed by stipulation of the parties or by the court.

Credits
(L.1966, c. 953. Amended L.1971, c. 362; L.1993, c. 514, § 33.)

McKinney's S. C. P. A. § 1410, NY SURR CT PRO § 1410
Current through L.2019, chapter 248. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Estates, Powers and Trusts Law (Refs & Annos)
Chapter 17-B. Of the Consolidated Laws
Article 4. Descent and Distribution of an Intestate Estate (Refs & Annos)
Part 1. Rules Governing Intestate Succession

McKinney's EPTL § 4-1.2

§ 4-1.2 Inheritance by non-marital children

Effective: April 28, 2010
Currentness

(a) For the purposes of this article:

(1) A non-marital child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) A non-marital child is the legitimate child of his father so that he and his issue inherit from his father and his paternal kindred if:

(A) a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity or the mother and father of the child have executed an acknowledgment of paternity pursuant to section four thousand one hundred thirty-five-b of the public health law, which has been filed with the registrar of the district in which the birth certificate has been filed or;

(B) the father of the child has signed an instrument acknowledging paternity, provided that

(i) such instrument is acknowledged or executed or proved in the form required to entitle a deed to be recorded in the presence of one or more witnesses and acknowledged by such witness or witnesses, in either case, before a notary public or other officer authorized to take proof of deeds and

(ii) such instrument is filed within sixty days from the making thereof with the putative father registry established by the state department of social services pursuant to section three hundred seventy-two-c of the social services law, as added by chapter six hundred sixty-five of the laws of nineteen hundred seventy-six and

(iii) the department of social services shall, within seven days of the filing of the instrument, send written notice by registered mail to the mother and other legal guardian of such child, notifying them that an acknowledgment of paternity instrument acknowledged or executed by such father has been duly filed or;

(C) paternity has been established by clear and convincing evidence, which may include, but is not limited to: (i) evidence derived from a genetic marker test, or (ii) evidence that the father openly and notoriously acknowledged the child as his own, however nothing in this section regarding genetic marker tests shall be construed to expand or limit the current application of subdivision four of section forty-two hundred ten of the public health law.

(D) Repealed by L.2010, c. 64, § 2, eff. April 28, 2010.

(3) The existence of an agreement obligating the father to support the non-marital child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made or acknowledgement of paternity as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father and a motion for relief from and acknowledgment of paternity may be made by the father, mother or other legal guardian of such child, or the child, provided however, such motion must be made within one year from the entry of such order or from the date of written notice as provided for in subparagraph (2).

(b) If a non-marital child dies, his or her surviving spouse, issue, mother, maternal kindred, father and paternal kindred inherit and are entitled to letters of administration as if the decedent was a marital child, provided that the father and paternal kindred may inherit or obtain such letters only if the paternity of the non-marital child has been established pursuant to any of the provisions of subparagraph (2) of paragraph (a).

Credits

(L.1966, c. 952. Amended L.1967, c. 686, §§ 28, 29; L.1979, c. 139, § 1; L.1981, c. 67, § 2; L.1981, c. 75, §§ 1, 2; L.1987, c. 434, § 2; L.1992, c. 595, § 9; L.1994, c. 170, § 351; L.2010, c. 64, §§ 1 to 3, eff. April 28, 2010.)

McKinney's E. P. T. L. § 4-1.2, NY EST POW & TRST § 4-1.2
Current through L.2019, chapter 248. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Surrogate's Court Procedure Act (Refs & Annos)
Chapter 59-a. Of the Consolidated Laws (Refs & Annos)
Article 10. Intestate Administration (Refs & Annos)

McKinney's SCPA § 1001

§ 1001. Order of priority for granting letters of administration

Currentness

1. Letters of administration must be granted to the persons who are distributees of an intestate and who are eligible and qualify, in the following order:

(a) the surviving spouse,

(b) the children,

(c) the grandchildren,

(d) the father or mother,

(e) the brothers or sisters,

(f) any other persons who are distributees and who are eligible and qualify, preference being given to the person entitled to the largest share in the estate, except as hereinafter provided:

(i) Where there are eligible distributees equally entitled to administer the court may grant letters of administration to one or more of such persons.

(ii) If the distributees are issue of grandparents, other than aunts or uncles, on only one side, then letters of administration shall issue to the public administrator or chief financial officer of the county.

2. If the sole distributee has died or is an infant, incompetent or conservatee, his fiduciary, committee or conservator, if he is eligible and qualifies shall be granted letters of administration. The court may deny letters to a guardian or committee of the person only.

3. (a) Where all the distributees have died or are infants, incompetents or conservatees the court may grant letters of administration to a fiduciary, committee or conservator of a deceased distributee or infant, incompetent or conservatee distributee, if he is eligible and qualifies. If the court exercises its discretion preference shall be given to the fiduciary, committee or conservator of the distributee entitled to the largest share in the estate.

(b) Where all such distributees are equally entitled to share in the estate the court may grant letters of administration to one or more of their fiduciaries, committees or conservators, if they are eligible and qualify.

4. (a) Where a distributee who has died or is an infant, incompetent or conservatee would have had a prior right to letters of administration except for his death or disability the court may grant letters to his fiduciary, committee or conservator, if he is eligible and qualifies.

(b) Where no eligible distributee having a prior or equal right to letters of administration will accept the same and there are distributees who have died or are infants, incompetents or conservatees the court may grant letters to a fiduciary, committee or conservator of a deceased distributee, infant, incompetent or conservatee distributee, if he is eligible and qualifies. If the court exercises its discretion preference shall be given to the fiduciary, committee or conservator of the distributee entitled to the largest share in the estate.

(c) Where all such distributees who have died or are infants, incompetents or conservatees in the circumstances of subdivision 4(b) are equally entitled to share in the estate the court may grant letters of administration to one or more of their fiduciaries, committees or conservators, if they are eligible and qualify.

5. Upon the petition of a distributee having a prior or equal right to letters of administration the court may grant letters jointly to an eligible distributee or distributees and to one or more eligible persons whether distributees or not, including a trust company or other corporation authorized to act as fiduciary. Such joint fiduciaries shall be entitled to commissions as authorized by 2307.

6. Letters of administration may be granted to an eligible distributee or to an eligible person who is not a distributee upon the acknowledged and filed consents of all eligible distributees, or if there are no eligible distributees, then on the consents of all distributees, except that the guardian of the property of an infant distributee, the committee of the property of an incompetent distributee or the conservator of property of a conservatee appointed within the State of New York may so consent on behalf of his ward.

7. Letters of administration may be granted to a trust company or other corporation authorized to act as fiduciary upon the acknowledged and filed consents of all distributees inclusive of those who may be non-domiciliary aliens, provided that all such persons are otherwise eligible, except that the guardian of the property of an infant distributee, the committee of the property of an incompetent distributee or the conservator of property of a conservatee appointed within the state of New York may so

consent on behalf of his ward.

8. When letters are not granted under the foregoing provisions and an appointment is not made by consent as hereinbefore provided then letters of administration shall be granted in the following order:

(a) to the public administrator, or the chief fiscal officer of the county, or

(b) to the petitioner, in the discretion of the court, or

(c) to any other person or persons.

9. Letters of administration may be granted by the court in any case in which a paper writing purporting to be a will has been filed in the court and proceedings for its probate have not been instituted within a reasonable time or have not been diligently prosecuted.

Credits

(L.1966, c. 953. Amended L.1967, c. 685, § 45; L.1968, c. 267; L.1969, c. 772, § 6; L.1971, c. 344, § 2; L.1981, c. 115, §§ 117 to 120; L.1992, c. 595, § 22; L.1993, c. 514, § 27.)

McKinney's S. C. P. A. § 1001, NY SURR CT PRO § 1001
Current through L.2019, chapter 248. Some statute sections may be more current, see credits for details.

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832 N.Y.S.2d 57, 2007 N.Y. Slip Op. 01886

KeyCite Yellow Flag - Negative Treatment

Distinguished by In re Zorskas, N.Y.Sur., June 27, 2008

38 A.D.3d 558
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of Ruth RICHICHI, deceased.

Joseph Richichi, respondent;
Carmela Ortolano, appellant.
March 6, 2007.

Synopsis
Background: Daughter brought action against mother's estate, claiming ownership of funds in two joint accounts bearing her name. The Surrogate's Court, Richmond County, Fusco, S., granted co-executor's motion for summary judgment. Daughter appealed.

[Holding:] The Supreme Court, Appellate Division, held that any presumption that joint brokerage account containing daughter's name constituted an intent to create a joint tenancy was rebutted by will and agreement to the contrary.

Affirmed.

West Headnotes (2)

[1] Finance, Banking, and Credit
Presumptions as to joint accounts

Presumption created by Banking Law provision governing creation of joint accounts, that the deposit of funds into a joint account creates prima facie evidence of an intent to create a joint tenancy, can be rebutted by providing direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account had been opened for convenience only. McKinney's Banking Law § 675.

9 Cases that cite this headnote

[2] Finance, Banking, and Credit
Presumptions as to joint accounts

Any presumption under Banking Law provision governing joint accounts that funds deposited into joint brokerage account containing daughter's name constituted an intent to create a joint tenancy, was rebutted by decedent's will and agreement signed by decedent's children, both of which expressly stated that all joint accounts established with children had been created solely for convenience; in addition, permitting daughter to have retained the balance of brokerage account, which represented the bulk of estate, would have frustrated intentions expressed in decedent's will. McKinney's Banking Law § 675.

10 Cases that cite this headnote

Attorneys and Law Firms

**58 John Z. Marangos, Staten Island, N.Y., for appellant.

Anthony M. Bramante, Brooklyn, N.Y., for respondent.
A. GAIL PRUDENTI, P.J., ROBERT W. SCHMIDT, GABRIEL M. KRAUSMAN, and RUTH C. BALKIN, JJ.

Opinion
*559 In a probate proceeding, the objectant Carmela Ortolano appeals from an order of the Surrogate's Court, Richmond County (Fusco, S.), dated September 28, 2005, which granted that branch of the motion of the petitioner Joseph Richichi

which was for summary judgment determining that certain bank and brokerage accounts are assets of the decedent's estate.

ORDERED that the order is affirmed, with costs.

In July 1989, the decedent opened a joint bank account and a joint brokerage account with her daughter, Carmela Ortolano, using the decedent's own funds and funds the decedent received after her husband's death. In October 1989 the decedent executed a will which provided that the joint accounts she had established with her children had been created "solely for convenience," and that her entire estate, including the jointly held assets, should be distributed in equal shares to all four of her children. In 1998 all of the decedent's children signed an agreement acknowledging that the decedent's accounts held jointly with her children had been established "as a convenience." After the decedent's death in 2003, Ortolano claimed ownership of the funds in the two joint accounts bearing her name. The Surrogate's Court granted that branch of the motion of Joseph Richichi, the decedent's son and the co-executor of her estate, which was for summary judgment determining that the subject accounts are assets of the decedent's estate. We affirm.

[1] Generally, the deposit of funds into a joint account constitutes prima facie evidence of an intent to create a joint tenancy (*see* Banking Law § 675). The presumption created by Banking Law § 675 can be rebutted " 'by providing direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account had been opened for convenience only' " (*Fragetti v. Fragetti,* 262 A.D.2d 527, 692 N.Y.S.2d 442, quoting *Wacikowski v. Wacikowski,* 93 A.D.2d 885, 461 N.Y.S.2d 888; *see Matter of Friedman,* 104 A.D.2d 366, 478 N.Y.S.2d 695, *affd.* 64 N.Y.2d 743, 485 N.Y.S.2d 987, 475 N.E.2d 454).

[2] Contrary to Ortolano's contention, Joseph Richichi rebutted the presumption of joint tenancy through clear and convincing evidence, including the decedent's will and the 1998 agreement signed by her children, both of which expressly stated that the joint accounts had been established for the sake of convenience. *560 Moreover, permitting Ortolano to retain the balance of the brokerage account, which represented the bulk of the decedent's estate, would frustrate the decedent's intention, clearly expressed in her will, that all four of her children share equally in her estate (*see Matter of Camarda,* 63 A.D.2d 837, 839, 406 N.Y.S.2d 193). In response to Joseph Richichi's demonstration of his entitlement to judgment as a matter of **59 law, Ortolano failed to offer competent evidence raising a triable issue of fact (*see Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718).

All Citations

38 A.D.3d 558, 832 N.Y.S.2d 57, 2007 N.Y. Slip Op. 01886

832 N.Y.S.2d 57, 2007 N.Y. Slip Op. 01886

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McKinney's Consolidated Laws of New York Annotated
Banking Law (Refs & Annos)
Chapter 2. Of the Consolidated Laws
Article XIII-E. Joint Deposits and Shares; Unauthorized Withdrawals; Withdrawals from Decedents' Accounts (Refs & Annos)

McKinney's Banking Law § 675

§ 675. Joint deposits and shares; ownership and payment

Effective: October 3, 2011
Currentness

(a) When a deposit of cash, securities, or other property has been made or shall hereafter be made in or with any banking organization or foreign banking corporation transacting business in this state, or shares shall have been already issued or shall be hereafter issued, in any savings and loan association or credit union transacting business in this state, in the name of such depositor or shareholder and another person and in form to be paid or delivered to either, or the survivor of them, such deposit or shares and any additions thereto made, by either of such persons, after the making thereof, shall become the property of such persons as joint tenants and the same, together with all additions and accruals thereon, shall be held for the exclusive use of the persons so named, and may be paid or delivered to either during the lifetime of both or to the survivor after the death of one of them, and such payment or delivery and the receipt or acquittance of the one to whom such payment or delivery is made, shall be a valid and sufficient release and discharge to the banking organization or foreign banking corporation for all payments or deliveries made on account of such deposit or shares prior to the receipt by the banking organization or foreign banking corporation of notice in writing signed by any one of such joint tenants, not to pay or deliver such deposit or shares and the additions and accruals thereon in accordance with the terms thereof, and after receipt of any such notice, the banking organization or foreign banking corporation may require the receipt or acquittance of both such joint tenants for any further payments or delivery.

(b) The making of such deposit or the issuance of such shares in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding to which the banking organization, foreign banking corporation, surviving depositor or shareholder is a party, of the intention of both depositors or shareholders to create a joint tenancy and to vest title to such deposit or shares, and additions and accruals thereon, in such survivor. The burden of proof in refuting such prima facie evidence is upon the party or parties challenging the title of the survivor.

(c) 1. The superintendent of financial services shall promulgate and may from time to time amend rules and regulations which require that the joint tenants of an account established on or after the date on which the rule or regulation becomes effective and representing any deposit or shares governed by the foregoing provisions of this section, shall, at the time the account is established be informed of the terms and conditions of the account including the relationship and consequences between the parties in the account and the responsibilities of the institution with which the account is established.

2. This subdivision or any rule or regulation thereunder shall not be deemed or construed as increasing or diminishing the rights or liability of any person, or other entity.

Credits

(Added L.1964, c. 157, § 9, eff. June 1, 1965. Amended L.1983, c. 777, § 1; L.2011, c. 62, pt. A, § 104, subd. (g), eff. Oct. 3, 2011.)

McKinney's Banking Law § 675, NY BANK § 675
Current through L.2019, chapter 248. Some statute sections may be more current, see credits for details.

KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Estates, Powers and Trusts Law (Refs & Annos)
Chapter 17-B. Of the Consolidated Laws
Article 5. Family Rights
Part 1. Rights of Surviving Spouse

McKinney's EPTL § 5-1.4

§ 5-1.4. Revocatory effect of divorce, annulment or declaration of nullity, or dissolution of marriage on disposition, appointment, provision, or nomination regarding a former spouse

Effective: July 7, 2008
Currentness

(a) Except as provided by the express terms of a governing instrument, a divorce (including a judicial separation as defined in subparagraph (f)(2)) or annulment of a marriage revokes any revocable (1) disposition or appointment of property made by a divorced individual to, or for the benefit of, the former spouse, including, but not limited to, a disposition or appointment by will, by security registration in beneficiary form (TOD), by beneficiary designation in a life insurance policy or (to the extent permitted by law) in a pension or retirement benefits plan, or by revocable trust, including a bank account in trust form, (2) provision conferring a power of appointment or power of disposition on the former spouse, and (3) nomination of the former spouse to serve in any fiduciary or representative capacity, including as a personal representative, executor, trustee, conservator, guardian, agent, or attorney-in-fact.

(b)(1) Provisions of a governing instrument are given effect as if the former spouse had predeceased the divorced individual as of the time of the revocation.

(2) A disposition, appointment, provision, or nomination revoked solely by this section shall be revived by the divorced individual's remarriage to the former spouse.

(c) Except as provided by the express terms of a governing instrument, a divorce (including a judicial separation as defined in subparagraph (f)(2)) or annulment of a marriage severs the interests of the divorced individual and the former spouse in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming their interests into interests as tenants in common.

(d)(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary (including a former spouse) designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage.

(2) Written notice of a divorce, annulment, or remarriage under subparagraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action and may be filed with the secretary of state if real property or a cooperative apartment is affected. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction over the divorce, the real property or cooperative apartment, securities, bank accounts or other assets affected by the divorce or annulment under this section. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(e) A person who purchases property from a former spouse or any other person for value and without notice, or who receives from a former spouse or any other person, a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property or benefit, nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse or other person who, not for value, received a payment, item of property or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property or benefit, with interest thereon, to the person who is entitled to it under this section.

(f) For purposes of this section, the following terms shall have the following meaning and effect:

(1) “Disposition or appointment of property” includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) “Divorce or annulment” means a final decree or judgment of divorce or annulment, or a final decree, judgment or order declaring the nullity of a marriage or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, or a “judicial separation,” which means a final decree or judgment of separation, recognized as valid under the law of this state, which was rendered against the spouse.

(3) “Divorced individual” includes an individual whose marriage has been annulled or subjected to a judicial separation.

(4) “Former spouse” means a person whose marriage to the divorced individual has been the subject of a divorce, annulment, or judicial separation.

(5) “Governing instrument” includes, but is not limited to, a will, testamentary instrument, trust agreement (including, but not limited to a totten trust account under 7-5.1(d)), insurance policy, thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust, agreement with a bank, brokerage firm or investment company, registration of securities in beneficiary form pursuant to part 4 of article 13 of this chapter, a court order, or a contract relating to the division of property made between the divorced individuals before or after the marriage, divorce, or annulment.

(6) “Revocable,” with respect to a disposition, appointment, provision, or nomination, means one under which the divorced

individual, at the time of the divorce or annulment, was empowered, by law or under governing instrument, either alone or in conjunction with any other person who does not have a substantial adverse interest, to cancel the designation in favor of the former spouse, whether or not the divorced individual was then empowered to designate himself or herself in place of the former spouse and whether or not the divorced individual then had the capacity to exercise the power.

Credits

(Added L.2008, c. 173, § 1, eff. July 7, 2008.)

McKinney's E. P. T. L. § 5-1.4, NY EST POW & TRST § 5-1.4
Current through L.2019, chapter 248. Some statute sections may be more current, see credits for details.

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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Estates, Powers and Trusts Law (Refs & Annos)
Chapter 17-B. Of the Consolidated Laws
Article 4. Descent and Distribution of an Intestate Estate (Refs & Annos)
Part 1. Rules Governing Intestate Succession

McKinney's EPTL § 4-1.1

§ 4-1.1 Descent and distribution of a decedent's estate
Currentness

The property of a decedent not disposed of by will shall be distributed as provided in this section. In computing said distribution, debts, administration expenses and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves a distributee from contributing to all such taxes the amounts apportioned against him or her under 2-1.8. Distribution shall then be as follows:

(a) If a decedent is survived by:

(1) A spouse and issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.

(2) A spouse and no issue, the whole to the spouse.

(3) Issue and no spouse, the whole to the issue, by representation.

(4) One or both parents, and no spouse and no issue, the whole to the surviving parent or parents.

(5) Issue of parents, and no spouse, issue or parent, the whole to the issue of the parents, by representation.

(6) One or more grandparents or the issue of grandparents (as hereinafter defined), and no spouse, issue, parent or issue of parents, one-half to the surviving paternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation, and the other one-half to the surviving maternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the issue of such grandparents, the whole to the surviving grandparent or grandparents on the other side, or

if neither of them survives the decedent, to their issue, by representation, in the same manner as the one-half. For the purposes of this subparagraph, issue of grandparents shall not include issue more remote than grandchildren of such grandparents.

(7) Great-grandchildren of grandparents, and no spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents, one-half to the great-grandchildren of the paternal grandparents, per capita, and the other one-half to the great-grandchildren of the maternal grandparents, per capita; provided that if the decedent was not survived by great-grandchildren of grandparents on one side, the whole to the great-grandchildren of grandparents on the other side, in the same manner as the one-half.

(b) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.

(c) Distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime.

(d) The right of an adopted child to take a distributive share and the right of succession to the estate of an adopted child continue as provided in the domestic relations law.

(e) A distributive share passing to a surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

Credits

(L.1966, c. 952. Amended L.1967, c. 686, § 27; L.1969, c. 596; L.1971, c. 68; L.1974, c. 903, § 2; L.1978, c. 423, § 1; L.1992, c. 595, § 8.)

McKinney's E. P. T. L. § 4-1.1, NY EST POW & TRST § 4-1.1
Current through L.2019, chapter 248. Some statute sections may be more current, see credits for details.

New York City, N.Y., Code § 3-240
NEW YORK CITY CHARTER, CODE, AMENDMENTS & RULES
NEW YORK CITY ADMINISTRATIVE CODE
TITLE 3. ELECTED OFFICIALS
CHAPTER 2. CITY COUNCIL AND CITY CLERK.
SUBCHAPTER 3. DOMESTIC PARTNERSHIPS.

The New York City Charter is current with files received through August 31, 2019.

§ 3-240. [Definitions. [FN25]

[FN25]. Section heading supplied by editor.

As used in this section, the following terms shall have the following meanings:
a. "Domestic partners" shall mean persons who have a registered domestic partnership, which shall include any partnership registered pursuant to this chapter, any partnership registered in accordance with executive order number 123, dated August 7, 1989, and any partnership registered in accordance with executive order number 48, dated January 7, 1993, and persons who are members of a marriage that is not recognized by the state of New York, domestic partnership, or civil union, lawfully entered into in another jurisdiction. Nothing in this code shall affect a partnership that has been registered pursuant to either such executive order and has not been terminated in accordance with such executive orders or this chapter.
b. "Registry of domestic partnerships" shall mean the registry maintained by the city clerk pursuant to this chapter, and shall include all domestic partnerships registered by the city clerk pursuant to executive order number 48, dated January 7, 1993, and all domestic partnerships registered with the former department of personnel pursuant to executive order number 123, dated August 7, 1989. Within ten days of the effective date of the local law that added this definition, the department of citywide administrative services shall transfer to the city clerk the records of domestic partnerships registered with the former department of personnel.
c. "Affidavit of domestic partnership" shall mean an affidavit prepared by the office of the city clerk in accordance with rules adopted by the city clerk.

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTE

Section added L.L. 27/1998 § 2, eff. Sept. 5, 1998.

Subd. a amended L.L. 24/2002 § 2, eff. Aug. 27, 2002. [See Note after § 3-245]

CASE NOTES

¶ 1. A court held that the City's domestic partnership law (which provides health benefits for domestic partners of City employees) did not impermissibly legislate in the area of marriage. There was no conflict between the city law and state laws, the court said. It was particularly significant that the state law also allow health benefits to domestic partners of state employees. Slattery v. City of New York, 266 A.D.2d 24, 697 N.Y.S.2d 603 (1st Dept. 1999), appeal dismissed 94 N.Y.2d 897, 706 N.Y.S.2d 699 (2000), leave to appeal dismissed, 95 N.Y.2d 823, 712 N.Y.S.2d 907 (2000).

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261 A.D. 236, 25 N.Y.S.2d 88

In the Matter of the Application of NANA HENRIETTA BUTTLES, as Successor Testamentary Trustee, to Execute the Trust under the Last Will and Testament of ANTHONY DUGRO, Deceased, for Leave to Sell Securities and for Advice and Direction as to the Distribution of Personal Property Remaining Unsold and the Management of Real Property and the Collection of Rents and Payment of Operating Expenses Thereof.
In the Matter of the Application of FRANCIS A. DUGRO and DOROTHEA W. DUGRO, Distributees in the Estate of ANTHONY DUGRO, Deceased, to Compel NANA HENRIETTA BUTTLES, Successor Trustee, to Make Distribution to FRANCIS A. DUGRO, DOROTHEA W. DUGRO and KATHERINE D. WISWALL of the Proceeds of Bonds Liquidated by the Successor Trustee.
(Consolidated Proceedings.)
DOROTHEA W. DUGRO, II, Claimant, Appellant;
NANA HENRIETTA BUTTLES, as Successor Testamentary Trustee, of ANTHONY DUGRO, Deceased, and as General Guardian of PAUL VINCENT BUTTLES, an Infant;
FRANCIS A. DUGRO and DOROTHEA W. DUGRO; MARVIN DUGRO BUTTLES, JR., Individually and as Administrator, etc., of FRANCIS A. DUGRO, Deceased, KATHERINE D. WISWALL, CHARLES DUGRO, NEW YORK TRUST COMPANY, PHILIP H. DUGRO and Trustees and Guardians of ANTONIA DUGRO SCHOLLER, Respondents.
Supreme Court of New York, Appellate Division, First Department.

February 7, 1941.

CITE TITLE AS: Matter of Dugro

*236 Marriage

Presumptions --- Presumption in favor of marriage can only be negatived by disproving every reasonable possibility --- Proof of solemnization of ceremonial marriage gives rise to true presumption of its validity ---Evidence establishes appellant is child of grandson of decedent and another who were ceremonially married in Rhode Island and that said grandson acknowledged paternity --- Proof offered by respondents is insufficient to establish that ceremonial marriage of appellant's parents was invalid ---Appellant met burden of establishing her right to share in decedent's estate --- Appellant was not obligated to prove that earlier marriage was terminated by death, annulment or divorce

A presumption in favor of marriage can only be negatived by disproving every reasonable possibility. Proof of the solemnization of a ceremonial marriage between parties gives rise to a true presumption of its validity.

Accordingly, in this proceeding for instructions as to the distribution of certain assets of decedent's estate, appellant is entitled to participate as the lawful issue of decedent, where it is admitted that she is the child of a grandson of decedent and her mother, and the evidence establishes that said parties were ceremonially married in Rhode Island on June 13, 1907; that appellant was *237 born to the parties on May 1, 1908; that the birth certificate lists said grandson as appellant's father; that there is testimony which demonstrates that he acknowledged paternity and that during his life he and the appellant occupied the relationship of parent and child; and that the proof offered by respondents is insufficient to establish that the ceremonial marriage in Rhode Island of appellant's parents was invalid. Appellant, on whom was the burden of establishing her right to share in the estate, met that burden by proving the ceremonial marriage of her parents and establishing that she is the issue of that marriage.

It was not incumbent upon appellant to prove that an alleged earlier marriage was terminated by death, annulment or divorce.

APPEAL by the claimant, Dorothea W. Dugro, II, from a decree of the Surrogate's Court of New York County (DELEHANTY, S.), entered in the office of said Surrogate's Court on the 30th day of July, 1940.

John L. Delius of counsel [*Thomas R. Purcell,* attorney], for the appellant.

Louis Stone of counsel; *Louis Stone,* attorney, for the respondents Francis A. Dugro and Dorothea W. Dugro; *Larkin, Rathbone & Perry,* attorneys for the respondent Marvin Dugro Buttles, Jr., individually and as administrator, etc., of Francis A. Dugro, deceased; *Humes, Buck, Smith & Stowell,* attorneys for the respondent Philip H. Dugro; *Howard O. Patterson,* attorney for the respondent Katherine D. Wiswall; *Benjamin Shiverts,* attorney for the respondent Nana Henrietta Buttles and general guardian of Paul Vincent Buttles.

MARTIN, P. J.

The will of Anthony Dugro, who died in 1884, established

certain trusts which will ultimately vest in such of his children or their lawful issue as are survivors at the termination of the trusts. The appellant is entitled to participate, if she is the lawful issue of Anthony Dugro. The surrogate has determined that the marriage of Philip Henry Dugro, grandson of the testator, to the mother of the appellant was bigamous and that, therefore, the appellant is not a legitimate descendant of the testator. The ultimate sole issue before this court is whether Dorothea W. Dugro, II, is a lawful descendant of Anthony Dugro.

It is admitted that the appellant is the child of Philip Henry Dugro and Sybrania Stanley. The record establishes that Philip Henry Dugro and Sybrania Stanley were ceremonially married in Providence, R. I., on June 13, 1907, by a Baptist clergyman. The appellant was born in the borough of Brooklyn, N. Y., on May 1, 1908. The birth certificate lists P. Henry Dugro as the father, and there is testimony which establishes that he acknowledged the paternity, and during his life he and the appellant occupied the relationship of parent and child.

*238 The respondents produced the record of the marriage of Sybrania Stanley and James McGroarty in the borough of Brooklyn on July 19, 1905. There was some proof that these parties lived together, and one of the respondents' witnesses testified that a brother of Sybrania had stated that they (Jim McGroarty and Sybrania Stanley) had run away and that they separated. The respondents maintain that less than twenty-three months after the marriage to McGroarty and while McGroarty was still living (he died in 1911) Sybrania Stanley entered into a bigamous marriage with Dugro. The respondents maintain that the proof of a valid previous marriage is adequate factual demonstration of the invalidity of the succeeding one.

The burden of establishing that she is entitled to share in the estate of Anthony Dugro is on the appellant. She met that burden by proving the ceremonial marriage of her parents and establishing that she is the issue of that marriage.

The respondents contend that they have met the burden of going forward by proof of the previous marriage, and it is argued that the presumption of the validity of the second marriage rests on proof of the ceremony performed in Providence, R. I., but this presumption was rebutted by the proof of a prior marriage, since both were so close in time, and the presumption then left was that the first marriage continued to the time the second marriage was attempted. The respondents further argue it was for the appellant to rebut this succeeding presumption by evidence that the McGroarty marriage was invalid in inception or was dissolved.

The respondents do not seem to understand the extent of their burden. It was not incumbent upon the appellant to prove that the first marriage was terminated by death, annulment or divorce. As was said by Surrogate WINGATE in *Matter of Callahan* (142 Misc. 28, 31; affd., 236 App. Div. 814; affd., 262 N. Y. 524): '* * * It must, therefore, be determined that as a result of the proof of the ceremonial marriage by the petitioner, the burden of proof, or to use the phrase of Professor Wigmore, 'the risk of non-persuasion' on the general subject, passed from the petitioner to the respondents, to demonstrate the invalidity of this marriage. Such invalidity could be shown only by a demonstration that one or the other party thereto was, at the time of its celebration, debarred from entering into the relation. * * *'

Matter of Callahan involved the invalidity of a second marriage, and, after a discussion of reasons for presumptions, Surrogate WINGATE, at page 36, said:

'* * * The petitioner has clearly demonstrated the solemnization of a ceremonial marriage between herself and the decedent. *239 This gives rise to a true presumption of its validity. Not only is there present the logical inference thereof by reason of the common experience of mankind, but there is a distinct and definite public policy to this effect which has been emphasized in innumerable adjudications.

'In *Matter of Biersack* (96 Misc. 161; affd., 179 App. Div. 916) the following appears (at p. 166): 'The expression of Lord COTTENHAM in *Piers v. Piers,* 2 H. L. Cas. 233, has frequently been adopted and applied:

''His words were: 'A presumption of this sort, in favor of marriage, can only be negatived by disproving every reasonable possibility. * * * You should negative every reasonable possibility.'

''A presumption like unto that which assumes legitimacy is also indulged in behalf of a second marriage, even though children, the fruit thereof, are not involved. There it finds its impulse in the law's jealousy for the order of society.'

'Among the many cases containing similar statements it will suffice to cite the following: *Clayton v. Wardell* (4 N. Y. 230, 237, 238); *Matter of Meehan* (150 App. Div. 681, 682, 684); *Smith v. Smith* (194 id. 543, 548, 554); *Matter of Tyrrell* (115 Misc. 714, 715; affd., 198 App. Div. 1001); *Matter of Goode* (188 N. Y. Supp. 188, 189, not officially reported; affd., 204 App. Div. 877); *Graham v. Graham* (211 id. 580, 583); *Matter of Briggs* (per O'BRIEN, S., 138 Misc. 136, 148; affd., 232 App. Div. 666); *Nesbit v. Nesbit* (3 Dem. 329, 331, 332); *Johannessen v. Johannessen* (70 Misc. 361, 364, 365); *Matter of Grande* (80 id. 450, 457); *Matter of Salvin* (106 id. 111, 112, 113); *Matter of Rossignot* (112 N. Y. Supp. 353, not officially reported).'

In *Matter of Tompkins* (207 App. Div. 166) it was said: 'The presumption of the validity of a marriage is sufficiently strong to cast the burden of showing its invalidity upon those who attack it. (*Hynes v. McDermott,* 91 N. Y. 451, 458.)'

In that case the court quoted from *Hunter v. Hunter* (111 Cal. 261, 267; 43 P. 756) in part, as follows: 'There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative * * * that the first marriage had not ended *240 before the second marriage.' (See, also, *Matter of Dedmore,* [1930] 257 Ill. App. 519, and *Routledge v. Githens,* [1926] 118 Ore. 70; 245 P. 1072.)

The rule is concisely stated in Schouler on Marriage, Divorce, Separation and Domestic Relations (Vol. 2 [6th ed.], § 1252, p. 1488): 'The burden is upon a person who asserts the illegality of a marriage to prove such illegality and where a second marriage is shown as a fact a strong presumption exists in favor of its legality which is not overcome by mere proof of a prior marriage and that the wife had not obtained a divorce before her second marriage. The parties attacking such second marriage have the burden of proof to show that neither party to the first marriage had obtained a divorce.'

It is clear from the authorities that the respondents had to affirmatively establish that the first marriage was valid and existing at the time of the Rhode Island ceremony and could not rest on an inference of continuity. Nor is the respondents' burden any less because of the fact that they are endeavoring, through the attack on the second marriage, to have it established that the appellant is illegitimate. On the contrary, as was said in *Matter of Smith* (136 Misc. 863, 868): 'While the burden cast by the law upon any person attacking the validity of a *de facto* marriage is great, the presumption in favor of the marriage is less strong than the presumption that a recognized child is legitimate. (*Caujolle v. Ferrié,* 23 N. Y. 90, 95, 107; *Ellis v. Kelsey,* 118 Misc. 763, 766; affd., 208 App. Div. 774; 214 id. 784; affd., as to this matter, 241 N. Y. 374, 379; *Matter of Leslie,* 175 App. Div. 108, 111; *Matter of Biersack,* 96 Misc. 161, 166; affd., 179 App. Div. 916; *Mace v. Mace,* 24 id. 291, 293.)'

To succeed, the respondents had to eliminate the possibility that the second marriage was valid and the issue legitimate. (*Caujolle v. Ferrié,* 23 N. Y. 90; *Matter of Biersack,* 96 Misc. 161; affd., 179 App. Div. 916; *Matter of Meehan,* 150 id. 681.)

The factual situation in *Matter of Meehan* (*supra*) is strikingly similar to the situation now before us. Frank C. Meehan and Caroline F. McDonald were ceremonially married on January 30, 1881, and the parties lived together and two children were born of the marriage. On the death of Meehan, in a contest over the right to administer his estate, his brother and sister asserted that the marriage to Caroline F. McDonald was invalid because Meehan had a wife living at the time it was contracted. The record established a ceremonial marriage between Meehan and one Sarah Ruppius on September 16, 1877, followed by their living together for a short time, and there was evidence that Sarah Ruppius was *241 alive after Meehan's second marriage and had been seen in his company after the death of Caroline F. McDonald. In upholding the validity of the second marriage and the legitimacy of the issue thereof, this court said: 'While there appears to be no case in this State directly in point, there are numerous decisions in other jurisdictions to the effect that, if necessary to support the legality of the second marriage it will be presumed, in the absence of evidence to the contrary, that the first marriage had been legally dissolved.' (Citing cases.)

Further: 'We think that where the fact of a marriage, especially of a ceremonial marriage, followed by the long cohabitation of the parties and the birth of children, is established, it is incumbent upon whoever assails the validity of the marriage and the legitimacy of the children to prove his case by evidence instead of presumptions, even if that involve

proof of a negative, and especially when, as here, the attempt is made after the lapse of thirty years and the death of the parties, not by any one claiming rights under an alleged prior marriage, but by relatives who would deprive children of their inheritance by branding them as illegitimates. The appellants have failed to bear the burden of proof imposed upon them. The first marriage may have been legally dissolved or, what is quite as probable, it may have been invalid because the said Sarah Ruppius had a husband living at the time.'

We find nothing that was said in *Matter of Findlay* (253 N. Y. 1) opposed to the holdings cited above. In that case the facts negativing probability of access were sufficiently strong to destroy a presumption of legitimacy as to children born after separation, and the court (at p. 12) said: 'We have no thought to weaken the presumption of legitimacy by allowing its overthrow at the call of rumor or suspicion, or through inferences nicely poised.'

The record shows that the declaration of intention of marriage signed prior to the Rhode Island ceremony, contains statements as to residence and place of birth claimed not to be in accord with the facts; the number of the marriage is given as '1,' and after the query, 'Divorced,' there is a blank. When McGroarty died in 1911 his death certificate stated he was single. When appellant's mother died in 1909, her death certificate gave her name as 'Sybarine McGroarty,' and the gravestone on her grave bears the name 'Stanley,' her maiden name. When appellant's father died, his death certificate described him as single. It is impossible to reconcile all these contradictory statements, and in the absence of proof of the circumstances under which they were made, it is difficult to evaluate them. An example of the unreliability of such statements may be found in the certificate of appellant's *242 birth, which gives her birth date as May 1, 1908, but the date of the report as May 2, 1905. We treat all this evidence as subordinate to the principal established facts, that the appellant's parents were ceremonially married and that she is the issue of the union following that ceremony.

The record here establishes that Philip Henry Dugro, in his lifetime, acknowledged the appellant as his daughter, and the proof offered by the respondents is insufficient to establish that the ceremonial marriage in Rhode Island of the parents of the appellant was invalid.

This court holds that the appellant is a legitimate descendant of Anthony Dugro and entitled to share in his estate as a distributee thereof.

The decree appealed from should be reversed and the matter remitted to the Surrogate's Court for further action in accordance with this opinion.

TOWNLEY, UNTERMYER, DORE and COHN, JJ., concur.

Decree unanimously reversed and the matter remitted to the Surrogate's Court for further action in accordance with opinion.

25 N.Y.S.2d 88

162 A.D. 599, 147 N.Y.S. 1069

EARLY B. MCCULLEN, Appellant,
v.
ANNA F. MCCULLEN, Respondent.
Supreme Court of New York, Appellate Division, First Department.

May 29, 1914.

CITE TITLE AS: McCullen v McCullen

*599 Husband and wife

Annulment of marriage --- Remarriage while former husband living ---Subsequent annulment of former marriage does not validate second marriage --- Statute construed --- Pleading --- Complaint

Where a woman remarries while her first husband is still living, the second marriage is absolutely void, and will be declared to be so in a suit brought by the second husband, although after the second marriage the first marriage was annulled, on the ground that it was induced by the false representations of the first husband.

The second marriage is not validated by ratification after the annulment of the first marriage merely because the parties thereto continue to cohabit as man and wife, if there was no new solemnization of the second marriage in the manner required by the statute.

The statute distinguishes between marriages which are absolutely void and those which are merely voidable; the former are void from their *600 inception, and the parties thereto may remarry, while the latter are void only from the time the invalidity is declared by a court of competent jurisdiction, and there is no right to remarry in the absence of such decree.

Where the defendant does not appear in an action to annul a second marriage on the ground that the husband by the former marriage is still living, the plaintiff need merely allege and prove the former marriage, that the former husband was living at the time of the marriage with the plaintiff, and that the former marriage has not been annulled or dissolved. It is not necessary for the plaintiff to negative by allegation, or proof, the exceptions or provisos contained in section 6 of the Domestic Relations Law.

APPEAL by the plaintiff, Early B. McCullen, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 25th day of February, 1914, upon the decision of the court after a trial at the New York Special Term. The judgment dismissed the complaint.

Dix W. Noel, for the appellant.
No appearance for the respondent.

LAUGHLIN, J.:

This action was brought to have a marriage formally celebrated between the parties on the 28th day of February, 1907, annulled on the ground that the defendant at the time of the celebration thereof had a husband living. On the 22d day of November, 1902, the defendant was married in due form to one Fickbohn in the city and county of New York, and the contract of marriage, duly signed, witnessed and acknowledged, was duly filed in the office of the clerk of the city and county of New York within six months thereafter as required by section 11 of the former Domestic Relations Law in force at that time. (Gen. Laws, chap. 48 [Laws of 1896, chap. 272], § 11, as amd. by Laws of 1901, chap. 339.) After the marriage between the parties hereto, and on the 31st day of August, 1908, in an action in the Supreme Court of this State, the defendant's former marriage was duly annulled by judicial decree on the ground that the defendant herein was induced by fraud perpetrated upon her by said Fickbohn to enter into said marriage contract. The learned trial court in this action proceeded upon *601 the theory that the final decree in the former annulment action, although made and entered after the marriage between the plaintiff and defendant, was a judicial determination that the defendant's former marriage was void at its inception and was never binding upon her, and that she, therefore, was competent to marry the plaintiff.

If the annulment of the defendant's former marriage had been upon the ground that it was absolutely *void,* and not merely *voidable,* the decree could be sustained, for where a marriage is void, although the Legislature has authorized the court in the interest of the public to enter a formal decree declaring it void, it is void without any decree of the court, and forms no obstacle to the right of either party to marry again. (Dom. Rel. Law [[[Consol. Laws, chap. 14; Laws of 1909, chap. 19], §§ 6, 7; *Stein v. Dunne,* 119 App. Div. 1; affd., 190 N. Y. 524; *Price v. Price,* 124 id. 589; *Pettit v. Pettit,* 105 App. Div. 312.) There is, however, a clear distinction made by our statutory law, and by the decisions thereunder, between *void*

and *voidable* marriages. A marriage is absolutely void under our statute only when one of the parties has a husband or wife by a former marriage living, and in circumstances which it is not material to consider on this appeal. (Dom. Rel. Law of 1896, § 3; Dom. Rel. Law of 1909, § 6.) There is no evidence that the defendant had a husband living at the time she married Fickbohn. The only question with respect to her former marriage appears to have been with reference to the representations made by her former husband to induce her to enter into it, and that is the sole ground upon which it was annulled. Our statutes authorize an action for the annulment of a marriage on the ground of fraud; but such marriages are classed by our statute as *voidable,* and it is expressly declared that they are void *only* from the time their nullity is declared by a court of competent jurisdiction. (Dom. Rel. Law of 1896, § 4; Dom. Rel. Law of 1909, § 7.) True it is provided in section 1754 of the Code of Civil Procedure that a final judgment annulling a marriage rendered during the lifetime of both parties 'is conclusive evidence of the invalidity of the marriage, in every court of record or not of record, in any action or special proceeding, civil or criminal;' but that is *602 merely a rule of evidence with respect to the effect of the decree as evidence. It was not intended thereby to declare a rule of law with respect to whether the marriage should be deemed invalid from the date of its celebration or from the date of the decree, and those matters were left to be regulated by other statutory provisions, as they are regulated by the provisions of the Domestic Relations Law, to which reference has been made, whereby it appears that where the marriage was absolutely void there has been no attempt on the part of the Legislature to validate it for any period, and the decree of the court merely formally declares in the interests of society what the law had prescribed in advance, namely, that the marriage was absolutely void, whereas, in the case of a voidable marriage, the Legislature deemed it wise likewise in the interests of society to recognize its validity until declared void by judicial decree. It follows, therefore, that at the time of the celebration of the marriage between the parties hereto the defendant had a husband living and her former marriage was in full force and effect. She, therefore, could not then lawfully marry the plaintiff or another. The marriage between the plaintiff and the defendant was, therefore, absolutely void, and it could not be validated by ratification after defendant's former marriage was annulled, although the parties could then have lawfully married. Since by statute it is now required that a marriage shall be formally solemnized or the contract shall be in writing (Dom. Rel. Law of 1909, § 11, as amd. by Laws of 1913, chap. 490; Id. § 12), no new marriage could be inferred even if, as one of them testified, the parties cohabited as husband and wife after the rendition of the decree of annulment. (See *Pettit v. Pettit, supra.*)

There was no appearance in this action for the defendant. The plaintiff merely alleged the former marriage between the defendant and Fickbohn; that Fickbohn was living when the marriage between the plaintiff and defendant was celebrated, and that the marriage between the defendant and Fickbohn had not been annulled or dissolved. All of these facts were sufficiently proved. I am of opinion that it was not necessary for the plaintiff to negative by allegation or proof the exceptions or provisos contained in *603 section 6 of the Domestic Relations Law which would render inapplicable to the marriage between the defendant and Fickbohn the statutory provision declaring the marriage absolutely void where one of the contracting parties had a husband or wife by a former marriage living. (See *Stein v. Dunne, supra.*) The findings made by the trial court are sufficient to entitle the plaintiff to an interlocutory judgment for the annulment of the marriage.

It follows that the judgment should be reversed and the decision modified by striking therefrom the conclusion of law and substituting therefor a conclusion to the effect that the plaintiff is entitled to an interlocutory judgment for the annulment of the marriage in accordance with the provisions of section 1774 of the Code of Civil Procedure and directing the entry thereof.

INGRAHAM, P. J., CLARKE, SCOTT and DOWLING, JJ., concurred.

Judgment reversed and decision modified as indicated in opinion. Order to be settled on notice.

147 N.Y.S. 1069

McKinney's Consolidated Laws of New York Annotated
Domestic Relations Law (Refs & Annos)
Chapter 14. Of the Consolidated Laws (Refs & Annos)
Article 2. Marriages (Refs & Annos)

McKinney's DRL § 6

§ 6. Void marriages

Currentness

A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either:

1. Such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person; provided, that if such former marriage has been dissolved for the cause of the adultery of such person, he or she may marry again in the cases provided for in section eight of this chapter and such subsequent marriage shall be valid;

2. Repealed.

3. Such former marriage has been dissolved pursuant to section seven-a[1] of this chapter.

Credits

(L.1909, c. 19. Amended L.1915, c. 266, § 1; L.1922, c. 279, § 1; L.1950, c. 144, § 3; L.1967, c. 680, § 20; L.1981, c. 118, § 2.)

Footnotes

1 Repealed. See Domestic Relations Law §§ 220 et seq.

McKinney's D. R. L. § 6, NY DOM REL § 6
Current through L.2019, chapter 248. Some statute sections may be more current, see credits for details.

KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Estates, Powers and Trusts Law (Refs & Annos)
Chapter 17-B. Of the Consolidated Laws
Article 5. Family Rights
Part 1. Rights of Surviving Spouse

McKinney's EPTL § 5-1.2

§ 5-1.2 Disqualification as surviving spouse
Currentness

(a)[1] 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) The marriage was void as incestuous under section five of the domestic relations law, bigamous under section six thereof, or a prohibited remarriage under section eight thereof.

(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.

(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.

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

(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.

Credits

(L.1966, c. 952. Amended L.1981, c. 300, § 2; L.1993, c. 515, § 4.)

Footnotes

1 So in the original. No par. (b) has been enacted.

McKinney's E. P. T. L. § 5-1.2, NY EST POW & TRST § 5-1.2
Current through L.2019, chapter 248. Some statute sections may be more current, see credits for details.

KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Public Health Law (Refs & Annos)
Chapter 45. Of the Consolidated Laws (Refs & Annos)
Article 42. Cadavers (Refs & Annos)
Title I. Disposition (Refs & Annos)

McKinney's Public Health Law § 4201

§ 4201. Disposition of remains; responsibility therefor
Effective: November 24, 2012
Currentness

1. As used in this section, the following terms shall have the following meanings, unless the context otherwise requires:

(a) “Cremation” means the incineration of human remains.

(b) “Disposition” means the care, disposal, transportation, burial, cremation or embalming of the body of a deceased person, and associated measures.

(c) “Domestic partner” means a person who, with respect to another person:

(i) is formally a party in a domestic partnership or similar relationship with the other person, entered into pursuant to the laws of the United States or any state, local or foreign jurisdiction, or registered as the domestic partner of the person with any registry maintained by the employer of either party or any state, municipality, or foreign jurisdiction; or

(ii) is formally recognized as a beneficiary or covered person under the other person's employment benefits or health insurance; or

(iii) is dependent or mutually interdependent on the other person for support, as evidenced by the totality of the circumstances indicating a mutual intent to be domestic partners including but not limited to: common ownership or joint leasing of real or personal property; common householding, shared income or shared expenses; children in common; signs of intent to marry or become domestic partners under subparagraph (i) or (ii) of this paragraph; or the length of the personal relationship of the persons.

Each party to a domestic partnership shall be considered to be the domestic partner of the other party. “Domestic partner” shall

not include a person who is related to the other person by blood in a manner that would bar marriage to the other person in New York state. “Domestic partner” shall also not include any person who is less than eighteen years of age or who is the adopted child of the other person or who is related by blood in a manner that would bar marriage in New York state to a person who is the lawful spouse of the other person.

(d) “Person” means a natural person eighteen years of age or older.

2. (a) The following persons in descending priority shall have the right to control the disposition of the remains of such decedent:

(i) the person designated in a written instrument executed pursuant to the provisions of this section;

(ii) the decedent's surviving spouse;

(ii-a) the decedent's surviving domestic partner;

(iii) any of the decedent's surviving children eighteen years of age or older;

(iv) either of the decedent's surviving parents;

(v) any of the decedent's surviving siblings eighteen years of age or older;

(vi) a guardian appointed pursuant to article seventeen or seventeen-A of the surrogate's court procedure act or article eighty-one of the mental hygiene law;

(vii) any person eighteen years of age or older who would be entitled to share in the estate of the decedent as specified in section 4-1.1 of the estates, powers and trusts law, with the person closest in relationship having the highest priority;

(viii) a duly appointed fiduciary of the estate of the decedent;

(ix) a close friend or relative who is reasonably familiar with the decedent's wishes, including the decedent's religious or moral beliefs, when no one higher on this list is reasonably available, willing, or competent to act, provided that such person has executed a written statement pursuant to subdivision seven of this section; or

(x) a chief fiscal officer of a county or a public administrator appointed pursuant to article twelve or thirteen of the surrogate's court procedure act, or any other person acting on behalf of the decedent, provided that such person has executed a written

statement pursuant to subdivision seven of this section.

(b) If a person designated to control the disposition of a decedent's remains, pursuant to this subdivision, is not reasonably available, unwilling or not competent to serve, and such person is not expected to become reasonably available, willing or competent, then those persons of equal priority and, if there be none, those persons of the next succeeding priority shall have the right to control the disposition of the decedent's remains.

(c) The person in control of disposition, pursuant to this section, shall faithfully carry out the directions of the decedent to the extent lawful and practicable, including consideration of the financial capacity of the decedent's estate and other resources made available for disposition of the remains. The person in control of disposition shall also dispose of the decedent in a manner appropriate to the moral and individual beliefs and wishes of the decedent provided that such beliefs and wishes do not conflict with the directions of the decedent. The person in control of disposition may seek to recover any costs related to the disposition from the fiduciary of the decedent's estate in accordance with section eighteen hundred eleven of the surrogate's court procedure act.

(d) No funeral director, undertaker, embalmer or no person with an interest in, or who is an employee of any funeral firm, cemetery organization or business operating a crematory, columbarium or any other business, who also controls the disposition of remains in accordance with this section, shall receive compensation or otherwise receive financial benefit for disposing of the remains of a decedent.

(e) No person who: (1) at the time of the decedent's death, was the subject of an order of protection protecting the decedent; or (2) has been arrested or charged with any crime set forth in article one hundred twenty-five of the penal law as a result of any action allegedly causally related to the death of the decedent shall have the right to control the disposition of the remains of the decedent. However, the application of this paragraph in a particular case may be waived or modified in the interest of justice by order of (i) the court that issued the order of protection or in which the criminal action against the person is pending, or a superior court in which an action or proceeding under the domestic relations law or the family court act between the person and the decedent was pending at the time of the decedent's death, or (ii) if proceeding in that court would cause inappropriate delay, a court in a special proceeding.

3. The written instrument referred to in paragraph (a) of subdivision two of this section may be in substantially the following form, and must be signed and dated by the decedent and the agent and properly witnessed:

APPOINTMENT OF AGENT TO CONTROL DISPOSITION OF REMAINS

I,

(Your name and address)

being of sound mind, willfully and voluntarily make known my desire that, upon my death, the disposition of my remains shall be controlled by

.

(name of agent)

With respect to that subject only, I hereby appoint such person as my agent with respect to the disposition of my remains.

SPECIAL DIRECTIONS:

Set forth below are any special directions limiting the power granted to my agent as well as any instructions or wishes desired to be followed in the disposition of my remains:

Indicate below if you have entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law for funeral merchandise or service in advance of need:

[ ] No, I have not entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law.

[ ] Yes, I have entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law.

(Name of funeral firm with which you entered into a pre-funded pre-need funeral agreement to provide merchandise and/or services)

AGENT:

Name:

Address:

Telephone Number:

SUCCESSORS:

If my agent dies, resigns, or is unable to act, I hereby appoint the following persons (each to act alone and successively, in the order named) to serve as my agent to control the disposition of my remains as authorized by this document:

1. First Successor

Name:

Address:

Telephone Number:

2. Second Successor

Name:

Address:

Telephone Number:

DURATION:

This appointment becomes effective upon my death.

PRIOR APPOINTMENT REVOKED:

I hereby revoke any prior appointment of any person to control the disposition of my remains.

Signed this _____ day of _____, ___.

(Signature of person making the appointment)

Statement by witness (must be 18 or older)

I declare that the person who executed this document is personally known to me and appears to be of sound mind and acting of his or her free will. He or she signed (or asked another to sign for him or her) this document in my presence.

Witness 1:

(signature)

Address:

Witness 2:

(signature)

Address:

ACCEPTANCE AND ASSUMPTION BY AGENT:

1. I have no reason to believe there has been a revocation of this appointment to control disposition of remains.

2. I hereby accept this appointment.

Signed this _____ day of _____ , _____ .

_____

(Signature of agent)

4. (a) In the absence of a written instrument made pursuant to subdivision three of this section, the designation of a person for the disposition of one's remains or directions for the disposition of one's remains in a will executed pursuant to the laws of the state of New York prior to the effective date of this section, or otherwise executed pursuant to the laws of a jurisdiction outside the state of New York, shall be: (i) considered reflective of the intent of the decedent with respect to the disposition of the decedent's remains; and (ii) superseded by a written instrument subsequently executed pursuant to subdivision three of this section, or by any other subsequent act by the decedent evidencing a specific intent to supersede the designation or direction in such a will with respect to the disposition of the decedent's remains. All actions taken reasonably and in good faith based upon such authorizations and directions regarding the disposition of one's remains in such a will shall be deemed valid regardless of whether such a will is later probated or subsequently declared invalid.

(b) In the absence of a written instrument made pursuant to subdivision three of this section, the designation of a person for the disposition of one's remains or directions for the disposition of one's remains in a will executed pursuant to the laws of the state of New York on or after the effective date of this section, shall be considered a reflection of the intent of the decedent with respect to the disposition of the decedent's remains, provided that the person who represents that he or she is entitled to control the disposition of remains of the decedent has complied with subdivision five and paragraph (a) of subdivision seven of this section and signed a written statement in accordance with paragraph (b) of subdivision seven of this section.

4-a. A written instrument under this section may limit the disposition of remains agent's authority to consent to organ or tissue donation or designate another person to do so, under article forty-three of this chapter. Failure to state wishes or instructions shall not be construed to imply a wish not to donate.

5. A written instrument executed under this section shall be revoked upon the execution by the decedent of a subsequent written instrument, or by any other subsequent act by the decedent evidencing a specific intent to revoke the prior written instrument and directions on disposition and agent designations in a will made pursuant to subdivision three of this section shall be superseded by a subsequently executed will or written instrument made pursuant to this section, or by any other subsequent act of the decedent evidencing a specific intent to supersede the direction or designation. The designation of the decedent's spouse or domestic partner as an agent in control of disposition of remains shall be revoked upon the divorce or legal separation of the decedent and spouse, or termination of the domestic partnership, unless the decedent specified in writing otherwise.

6. A person acting reasonably and in good faith, shall not be subject to any civil liability for:

(a) representing himself or herself to be the person in control of a decedent's disposition;

(b) disposing of a decedent's remains if done with the reasonable belief that such disposal is consistent with this section; or

(c) identifying a decedent.

7. No cemetery organization, business operating a crematory or columbarium, funeral director, undertaker, embalmer, or funeral firm shall be held liable for actions taken reasonably and in good faith to carry out the written directions of a decedent as stated in a will or in a written instrument executed pursuant to this section. No cemetery organization, business operating a crematory or columbarium, funeral director, undertaker, embalmer or funeral firm shall be held liable for actions taken reasonably and in good faith to carry out the directions of a person who represents that he or she is entitled to control of the disposition of remains, provided that such action is taken only after requesting and receiving written statement that such person:

(a) is the designated agent of the decedent designated in a will or written instrument executed pursuant to this section; or

(b) that he or she has no knowledge that the decedent executed a written instrument pursuant to this section or a will containing directions for the disposition of his or her remains and that such person is the person having priority under subdivision two of this section.

8. Every dispute relating to the disposition of the remains of a decedent shall be resolved by a court of competent jurisdiction pursuant to a special proceeding under article four of the civil practice law and rules. No person providing services relating to the disposition of the remains of a decedent shall be held liable for refusal to provide such services, when control of the disposition of such remains is contested, until such person receives a court order or other form of notification signed by all parties or their legal representatives to the dispute establishing such control.

9. This section does not supersede, alter or abridge any provision of section four hundred fifty-three of the general business law. In the event of a conflict or ambiguity, the provisions of section four hundred fifty-three of the general business law shall govern.

10. This section does not supersede, alter or abridge any provision of article forty-three of this chapter including, but not limited to, the persons authorized to execute an anatomical gift pursuant to section forty-three hundred one of this chapter.

11. This section does not diminish the enforceability of a contract or agreement in which a person controlling the disposition of the remains of a decedent agrees to pay for goods or services in connection with the disposition of such remains.

Credits

(Added L.2005, c. 768, § 1, eff. Aug. 2, 2006. Amended L.2006, c. 76, § 1, eff. Aug. 2, 2006; L.2007, c. 401, § 1, eff. Aug. 1, 2007, deemed eff. Aug. 2, 2006; L.2009, c. 348, § 4, eff. Oct. 25, 2009; L.2012, c. 491, pt. B, § 1, eff. Nov. 24, 2012.)

McKinney's Public Health Law § 4201, NY PUB HEALTH § 4201
Current through L.2019, chapter 248. Some statute sections may be more current, see credits for details.

End of Document

Trusts and Estates Matters in Relation to Unmarried Couples (Post-Mortem)

I. Disposal of decedent's remains (Public Health Law 4201)
   A. the person designated in a written instrument (form contained in PHL 4201)
   B. surviving spouse
      1. EPTL 5-1.2(a)(2) precludes inheritance where the marriage between the alleged surviving spouse was void as bigamous under DRL 6. Bigamous marriages[1] are void ab initio, needing no decree of the court. McCullen v. McCullen, 162 A.D. 599 (1st Dept 1914).
      2. Presumption of validity of the second marriage
         a. Where a person has entered into two (2) successive marriages, a second marriage is presumed valid. Matter of Dugro, 261 A.D.236 (1st Dept 1941) (aff'd, 287 N.Y. 595).There is a presumption that the first marriage was terminated by death or dissolved by divorce.
   C. surviving domestic partner (NYC Code 3-240)
      1. No rt of election
      2. No inheritance rights under intestacy
      3. Can receive under will
   D. surviving children (18 or older)
   E. surviving parents
   F. surviving siblings (18 or older)
   G. guardian (SCPA Art. 17 and 17-A, and MHL Art. 81)
   H. Distributees (pursuant to EPTL 4-1.1)
   I. fiduciary of the decedent's estate
   J. Close friend or relative familiar with the decedent's wishes
   K. Public Administrator (or chief fiscal officer of a county)

II. Jointly held property & survivorship rights
   A. EPTL 5-1.4 revokes survivorship rights and certain inheritance rights in marital property (including wills, nominations as fiduciary and joint accounts) when parties get divorced (which may be revived by remarriage to the same former spouse) and transforms the estates into tenancies in common. For unmarried couples, a break-up does not revoke anything.
   B. Joint accounts (Banking Law 675) - presumption that funds deposited in the account creates a joint tenancy with rights of survivorship.
      1. May be rebutted by showing that the account was an account of convenience.

III. Administration
   A. Priority regarding letters of administration (SCPA 1001)
      1. Surviving spouse
      2. Children

---

[1]Bigamy is a class E felony subject to prosecution pursuant to Penal Law 255.15. Moreover a person who knowingly performs the marriage ceremony for a bigamous marriage is subject to prosecution pursuant to Penal Law 255.00 (class A misdemeanor). (See Moskowitz v. Moskowitz, 6/10/97 NYLJ p. 27, (col. 6).

3. Grandchildren
4. Parents
5. Siblings
6. Any other distributee who is eligible and qualifies (preference being given to the person with the largest share)
    a) letters will issue to P.A. if distributees are cousins on only one side

B. Nonmarital children (EPTL 4-1.2)
1. Guardianship (SCPA Article 17 or SCPA Article 17-A, MHL Article 81) - guardian of an infant or developmentally or intellectually disabled distributee may serve as fiduciary

IV. Probate
A. Who may contest a will (SCPA 1410
1. Distributees (receiving less than their intestate share under the will)
2. Any person adversely affected by the admission of the will to probate (i.e. person named as beneficiary in a prior instrument)
3. A nominated executor in a prior instrument may not file objections unless granted leave by the court for good cause shown.
4. Unmarried partner has no standing to contest will (unless they were named in a prior instrument and receive less in the current instrument).

B. Applicable provisions
1. Disposal of decedent's remains
2. Nominated executor
3. Creation of trusts
4. Beneficiaries

C. No right of election for unmarried partner.

V. Wrongful death - unmarried survivor is not a beneficiary under the statute
A. Action to be brought by duly appointed fiduciary (EPTL 5-4.1)
B. Allocation of proceeds
1. Conscious pain and suffering
    a. Will (unmarried partner may take if they are beneficiary in the will)
    b. EPTL 4-1.1 (if no will)
2. Wrongful death (EPTL 5-4.4) - unmarried partner is not a beneficiary

ADVISING UNMARRIED COUPLES IN TRUSTS & ESTATES MATTERS

THOMAS SCIACCA, ESQ.

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2 PRESENTED BY

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All information current as of May 31, 2016. Educational only; not intended to give legal advice or create an attorney-client relationship between the author and the reader.

3

OVERVIEW & AGENDA

- What rights does the law afford spouses that are unavailable to the unmarried couple?
- How can an unmarried couple plan ahead to account for these shortfalls?
- Can anything be done *post-mortem* for the survivor?

4

FINAL ARRANGEMENTS

- In New York, only certain people have the authority to control the disposition of a decedent's remains. They include, in the following order of priority:
  - Surviving spouse or domestic partner
  - Adult children
  - Parents
  - Adult siblings

5

FINAL ARRANGEMENTS (CONT'D)

- Is the surviving partner a "domestic partner"? Are they registered with the City, County, or other government agency? Are they residing together? Financially and emotionally interdependent?
- What is the likelihood that a blood relative will try to assert rights?
- Will a funeral director refuse to take instruction from the surviving partner even absent a dispute with blood relatives?

6

TIPS

- Plan in advance with a pre-need burial/funeral payment
- Even better, sign the form in Public Health Law § 4201
- Avoid relying on language in the Will – not effective until probate

7

STANDING TO CHALLENGE WILL

- Only those adversely interested by probating the Will can object to same. This includes all intestate distributees and beneficiaries under prior Wills
  - Surviving spouse and/or children
  - Parents
  - Siblings
  - Nieces & nephews

8

WILL CHALLENGE (CONT'D)

- If deceased partner has children, children are closest distributees. Court will appoint a Guardian Ad Litem if they are minors
- If deceased partner is childless, survivor may be dealing with parents, siblings, or more remote relatives. May need to hire genealogist to identify distributees

9

WILL CHALLENGE (CONT'D)

- Probate contest could take months or years (average = 18-24 months)
- Surviving partner can finance litigation costs from Estate assets if nominated Executor and bondable (required in some counties), but cannot distribute assets to self to finance everyday living costs

10

TIPS

- Have unmarried clients identify all distributees
- Frank conversation about likelihood of a contest
- Ensure non-probate assets for availability to surviving partner or avoid probate altogether

11

INTESTACY

- Intestacy only protects surviving spouses and those who are related to the Decedent by blood – the survivor of an unmarried couple is not a distributee
- Surviving partner is also not a distributee – no right to receive Letters of Administration
- If no distributees come forward, reporting death to the Public Administrator may be necessary

12

INTESTACY (CONT'D)

- If the surviving and deceased partner shared a residence or safe deposit box, questions will arise concerning the owner of each item. No right to family exempt property in EPTL § 5-3.1(a)
- If there is a common bank account, the fiduciary may question whether the deceased intended it to have survivorship provisions or not
- Surviving partner may need to present claim for funeral and other expenses s/he advanced pending fiduciary appointment

TIPS

13

- Identify tangibles owned by decedent vs by survivor
- Review signature cards and bank records for all common accounts
- Identify potential claims against Estate and file timely

14 (UN)MARRIED WITH CHILDREN …

- When the unmarried couple has children and one partner dies intestate, the children are distributees, but the spouse is not
- Surviving partner has no standing to receive Letters of Administration, even though his/her own children may be the sole beneficiaries
- Adult children may receive Letters of Administration if they qualify

15

KIDS (CONT'D)

- Children born out of wedlock may need to prove kinship pursuant to EPTL § 4-1.2
- Minors inheriting through intestacy subject to SCPA Article 17 guardianship proceeding – inherit all funds outright at age 18; Court permission for withdrawals to pay expenses

16

TIPS

- Avoid direct inheritance by minors with trusts or custodial accounts
- Consider having client sign acknowledgement of paternity for child born out of wedlock
- Advise concerning adoption options for non-biological parent

17

ESTATE TAX

- Unmarried couples are not entitled to the marital deduction for assets they leave to one another – fully included in the gross taxable estate
- Similarly, unmarried couples cannot leave assets in a lifetime trust (such as a QTIP or QDOT) for their surviving partner and defer taxation until a later date

18

ESTATE TAX

- Assets own jointly between non-spouses come with a presumption in IRC § 2040 that the entire asset is subject to taxation in Estate of first owner – unless survivor can prove otherwise
- Filing and payment date for estate taxes is 9 months after date of death. Extensions available, but interest on late payments begins to accrue

19

ESTATE TAX

- Good news: with recent modifications to the Federal and NYS estate tax exemption amounts (presently $5.45 million and $4,187,500, respectively), very few Estates subject to estate taxation
- Bad news: a surviving partner of an unmarried cannot inherit the decedent's unused Federal exemption amount – likely increasing the total assets subject to taxation in survivor's Estate with only one available exemption

TIPS

20

- Identify potentially taxable estates during the planning stage
- Alert clients with illiquid estates (real property, business interests, etc.) 9 month due date
- Consider purchasing life insurance to provide liquidity

TIPS

- Ask clients to produce papers for all jointly-owned assets to try to prove contribution
- Advise clients concerning estate tax planning vehicles, such as charitable remainder trusts