

Elder Abuse by Marriage: A Call to Legislative Action

By,

Susan B. Slater-Jansen, Esq.¹

When women marry older men for their money they are sometimes called “golddiggers.” When men marry older women for their money they are sometimes called “gigolos.” These marriages are not a new thing. What is fairly new, or more widely discovered, is a phenomenon in which caretakers secretly marry their mentally incapacitated and often dying charges and then try to claim shares in their estates.

In two recent cases, the Appellate Division, Second Department fashioned equitable remedies for the families of two men who were caught in such a scam. However, without legislative action there is no statutory framework to stop this type of abuse.

In the case of *Campbell v. Thomas*,² Howard Nolan Thomas, age 72, was diagnosed with terminal prostate cancer and severe dementia in early 2000. Mr. Campbell also suffered from Alzheimer’s disease. In February 2001, Nancy Thomas, Howard’s daughter and primary caregiver, took a one-week vacation, leaving Howard in the care of Nidia Colon, age 62, a friend of Howard’s for 25 years. During the one-week vacation, Nidia married Howard and started transferring assets into their joint names. She also named herself sole beneficiary of his New York City Teacher’s Retirement System account and sold part of a parcel of land Howard owned, depositing the proceeds in a bank account in Howard’s name to which she added her own.

¹ Susan B. Slater-Jansen is a partner at Kurzman Eisenberg Corbin & Lever, LLP in White Plains, New York. She specializes in estate planning, business succession planning, estate administration and pension distribution planning. Ms. Slater-Jansen is a Fellow of the American College of Trusts and Estate Counsel.

² 36 A.D.3d 576, 828 N.Y.S.2d 178 (2nd Dept. 2007).

Howard's children first learned of the marriage in March 2001. When confronted with it by his children, he said he had no recollection of any marriage and told his daughter, "What are you talking about?...I'm not married...Are you crazy?"

After Howard died his children commenced an action in Supreme Court seeking a judgment declaring Howard and Nidia's marriage null and void, contending that he lacked the capacity to enter into the marriage. They also asked that the changes to the bank account and the beneficiary designation be declared null and void. The children later amended their complaint to add causes of action for undue influence, conversion and fraud. Nidia then cross-moved for summary judgment to obtain an order that the marriage and the transfers were valid.

Howard's children also obtained letters testamentary on Howard's will which left his entire estate to them. In May 2003, Nidia filed a right of election against the will, which the children opposed. Nevertheless, the parties agreed that the determination of the right of election issue would depend upon the outcome of the case in the Supreme Court regarding the validity of the marriage.

The children also moved for summary judgment in the Supreme Court for a judgment declaring the marriage, the changes to the bank account and the beneficiary designation to be null and void.

While the Supreme Court, Putnam County refused to grant summary judgment to either party, the Appellate Division, Second Department granted the children's appeal, concluding that they had made a *prima facie* showing of their entitlement to judgment as a matter of law by demonstrating through affidavits of doctors and family members and medical records that Howard, "lacked the capacity to understand his actions before his marriage, and that his mental state only diminished thereafter."³ The matter was then remitted to Supreme Court for the entry of judgment to declare null and void the

³ 36 A.D.3d 576, 828 N.Y.S.2d 178.

marriage, the beneficiary designation and the change in ownership of Howard's bank account.

Upon remittitur, not only did the Supreme Court issue such an order, but it also directed the entry of a judgment declaring that Nidia, "shall have no legal rights and can claim no legal interest as spouse of [Howard]." ⁴ The Court further removed Nidia as a beneficiary of the TSA (she had been a 1/5 beneficiary prior to the marriage), and restored ownership to Howard's estate of all property that was in the decedent's name as of October 1, 2000.

In her appeal of the order (which she first unsuccessfully tried to vacate), Nidia contended that the entry of a judgment declaring that she had no legal rights as a surviving spouse was improper, since under the law she would be considered a surviving spouse for purposes of elective share rights even if the marriage was annulled or voided after Howard's death.

New York's Estates Powers and Trusts Law ("EPTL") Section 5-1.2 (a)(1)

provides that:

"(a) A husband or wife is a surviving spouse within the meaning and for the purpose of...5-1.1, 5-1.1A, 5-3.1...unless it is established satisfactorily to the court having jurisdiction of the action or the 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 grounds of absence, recognized under the laws of this state, was in effect **when the deceased spouse died.**"
(emphasis added)

Interestingly, a "void" marriage is *void ab initio* under EPTL Section 5-1.2(a)(2). The surviving spouse of a void marriage is disqualified from receiving both an intestate

⁴ *Campbell v. Thomas*, 73 A.D.3d 103, 897 N.Y.S.2d 460, 465 (2nd Dept. 2010). Quoted is the Appellate Division's description of the Supreme Court's action upon remittitur, as it ruled on the second appeal involving these parties.

share and the elective share of a New York decedent. A void marriage for this purpose under EPTL Section 5-1.2(a)(2) is due to incest or bigamy.

EPTL Section 5-1.2(a)(1) however, deals with “voidable” marriages under Domestic Relations Law (“DRL”) Sections 7 and 140. Under the DRL, a voidable marriage is “void from the time its nullity is declared by a court of competent jurisdiction.”⁵

Until *Campbell v. Thomas*, a voidable marriage that was not terminated until after the death of one spouse did not prevent the surviving spouse from obtaining his or her elective share.⁶ The Appellate Division, Second Department, in the recent case of *Campbell v. Thomas*, however, supported the Supreme Court’s use of its equitable powers to assure that the wrongdoer could not profit from her wrongdoing by electing against a share of the decedent’s estate. The Appellate Division also urged the Legislature to amend the relevant provisions of the EPTL and the DLR to “prevent unscrupulous individuals from wielding the law as a tool to exploit the elderly and infirm and unjustly enrich themselves at the expense of such victims and their rightful heirs.”⁷

With more examples of elder abuse being exposed daily, it would seem that the Legislature’s previous aim of protecting a surviving spouse from being cut out of a decedent’s estate by unhappy relatives needs to be adjusted to take into account the newly recognized reality.

A second case, *Matter of Berk*,⁸ was decided the same day as *Campbell v. Thomas* and also cited *Campbell*. In *Berk*, the decedent’s hired caretaker of 10 years secretly married the decedent a year before his death. As in *Campbell*, the decedent (who was 99 years old at the time of the “wedding”) was suffering from dementia. The caretaker was 47 years old when the marriage took place. The marriage was kept a secret from the

⁵ DRL Section 7.

⁶ See, *In re Leuke’s Estate*, 78 Misc.2d 904, 358 N.Y.S.2d 932 (Sur. Ct. Erie Cty. 1974), aff’d, 49 A.D.2d 698, 373 NYS2d 1003 (4th Dept. 1975).

⁷ *Campbell v. Thomas*, 73 A.D.3d 103, 897 N.Y.S.2d 460, 473.

⁸ 71 A.D.3d 883, 897 N.Y.S.2d 475 (2nd Dept. 2010).

decedent's sons and grandchildren (his sole heirs), friends and relatives. The caretaker only informed his sons of the marriage the day before the funeral – in the car on the way to the funeral home.

After the decedent's will was admitted to probate, the caretaker petitioned Surrogate's Court, Kings County to determine the validity of her right to an elective share of the decedent's estate. The decedent's sons asserted counterclaims and the housekeeper moved for summary judgment on her petition. The Court granted her petition, determining that she had demonstrated her entitlement to judgment as a matter of law by establishing that she was the decedent's surviving spouse at his death.

The Appellate Division, Second Department reversed, stating that, as per *Campbell v. Thomas*, there was a triable issue of fact as to whether the caretaker had forfeited her right of election. The Court remanded the case back to Surrogate's Court to determine whether the caretaker, knowing that the decedent was mentally incompetent and therefore incapable of consenting to the marriage, deliberately took advantage of his incapacity by marrying the decedent to gain an unfair advantage as surviving spouse at the expense of the decedent's sons. The Appellate Division further added that if it was determined that the caretaker committed such a wrongdoing, equity would prevent her from being enriched by her wrongdoing.⁹

Over the last few years, abuse of the elderly by their caretakers has become a prominent concern in both Supreme and Surrogate's Courts. There are numerous cases in which individuals with severe dementia have unwittingly given powers of attorney over their assets and changed their wills to cut out intended beneficiaries. Naturally, the "attorneys-in-fact" steal the assets and have themselves made the new beneficiaries.

⁹71 A.D.3d 883, 897 N.Y.S.2d 475, 476. In *Berk*, an "associate of the decedent's who was frequently with the petitioner and the decedent," noted that, "on numerous occasions the petitioner shoved and screamed at the decedent, causing him to become 'tearful.' In addition, according to a friend of the decedent's, the decedent told him, in confidence, that he was 'afraid' of the petitioner, as she would hit him, scratch his face, and scream at him." 71 A.D.3d 883, 897 N.Y.S.2d 475, 476.

The cases discussed in this article represent the judiciary's stance against newly revealed conduct that shocks the public conscience. While the Appellate Division is to be commended for fashioning an equitable remedy, it is up to the Legislature to amend EPTL Section 5-1.2(a)(1) to provide the protection our elderly so desperately need. This protection can easily be achieved by deleting the last phrase of the statute that requires the annulment to be in effect "when the deceased spouse died," and providing simply for the establishment of, "A final decree or judgment of divorce, of annulment or declaring the nullity of a marriage or dissolving such marriage on the grounds of absence, recognized as valid under the laws of this state."