

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

CivilLITIGATION

Proving spousal abandonment to defeat right of election

Consider this scenario: An elderly man and woman meet on a cruise. After disembarking, the shipboard romance continues and two weeks later they begin cohabiting, spending six months of the year at his home in New York and six months of the year at her home in Maine.

After about a year, they marry and continue residing in both homes. Then, while at wife's ("W") home in Maine, husband ("H") suffers a stroke and returns to his home in New York for medical treatment.

W goes to New York to visit her husband for a week or 10 days, then less than two weeks later files for divorce, leaves town and doesn't see H again before his death about three months later. After H's death, W files a claim against his estate seeking her spousal elective share. Can W's claim be disallowed?

Section 5-1.1-A of the Estates Powers and Trusts Law provides a personal right of election to a surviving spouse to receive the greater of \$50,000 or one-third of the deceased spouse's net estate.

There are very limited circumstances under which a surviving spouse can be disqualified for purposes of the elective share — if the marriage was terminated by divorce or annulment, if it was void as incestuous, if there was a final decree of separation, if the surviving spouse abandoned the deceased spouse and the abandonment continued until the time of death or if the surviving spouse had a duty to support the decedent and failed to do so. See EPTL §5-1.2 (1)-(6). None of these grounds for disqualification would apply to the above scenario except possibly spousal abandonment.

The case law is clear that the burden of proving abandonment is on the party objecting to the elective share claim. *Matter of Reifberg*. However, merely showing that the decedent and the claimant spouse lived separately is not sufficient to prove abandonment; rather, the departure from the marital home must be unjustified and without the consent of the other spouse.

Matter of Maiden. Courts generally treat matters of abandonment as questions of fact and will not ordinarily grant summary judgment to either party. *Matter of Baldo*. The so-called Dead Man's Statute can complicate the question of proof and preclude

the admission of some testimony. See CPLR §4519. As the court noted in *Matter of Reifberg*, the Dead Man's Statute and the obvious self-interest of the surviving spouse means that the question of abandonment is almost always one of fact "and often a close one".

The cases — all with interesting fact patterns — come down on both sides of the issue, but more often seem to favor the surviving spouse in finding that he or she did not abandon the decedent.

Some examples of cases in which the surviving spouse was permitted to claim his or her elective share include *Matter of Reifberg*, *Matter of Oppenheim*, *Matter of Maiden* and *Matter of Arrathoon*. In *Reifberg*, H left a will leaving virtually everything to his first wife, named her as executor and essentially disinherited his second wife who (not surprisingly) objected to probate and asserted a claim for her elective share of H's estate.

Although the executor submitted proof that the second wife had the locks on the house changed and excluded H from the house, and that at the time of H's death, he and the claimant were living apart, the surrogate found that the executor had failed to prove abandonment and allowed the second wife's claim for the spousal elective share. This determination was affirmed by the Second Department and by the Court of Appeals.

In *Matter of Maiden*, W left the marital residence after approximately one and a half years of marriage claiming that H required her to engage with him in "acts of sexual perversion." They lived separately until the time of H's death. W then asserted a claim for her elective share which the executor disallowed.

Upon review by the surrogate, the court found abandonment and disqualified W from taking her elective share, but the appellate division reversed and the Court of Appeals affirmed the reversal, concluding that more is needed to prove abandonment than a departure from the marital home and subsequently living apart at the time of death.

In a similar vein, the court in *Oppenheim* found that a surviving husband was entitled to his elective share of his deceased wife's

Continued ...



By **RACHEL BRODY BANDYCH**
Daily Record
Columnist

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

estate. The court concluded so even though acknowledging that the facts alleged in the petition may have warranted a judgment of separation to W based upon H's cruel and inhuman treatment of her.

The facts underlying the *Arrathoon* decision are especially interesting. In that case, H and W were married in Iran and later moved to the NYC area where they lived together for 50 years. They had two children — a daughter who lived in the NYC area and a son who lived in California.

H was hospitalized for two weeks at the age of 87 after suffering a stroke and a fall at home. Although he returned home, he couldn't care for himself and W, who was frail and elderly, could not provide much assistance to him, so he moved into his daughter's home.

However, while H lived with the daughter, he visited W almost daily. After H began living with his daughter, the daughter (an attorney who had formerly practiced in the trusts and estates area) became increasingly interested in her father's estate plan and took steps to limit her mother's access to the family's finances.

In fact, the daughter consulted attorneys to arrange for ways to increase her share and to limit her mother's interest in H's estate. For more than two years after H began residing with their daughter, W continued to live in the family residence, but finally due to her own frailty and health considerations, W sold the house and moved to California to live near her son and to seek medical treatment.

After H died, W claimed her spousal elective share from H's estate and bitter litigation ensued. Her daughter claimed that W had abandoned H and that the elective share claim should be denied; however, the court concluded otherwise and found that, under the circumstances and given the self-serving evidence presented by the daughter, she had failed to prove abandonment and W was entitled to her spousal share. The surrogate's decision was affirmed on appeal.

On the other side of the equation, there are some reported decisions in which abandonment has been found and a surviving spouse has been disqualified from receiving his or her elective share.

For example, in *Matter of Prince*, H left W after causing her to become infected with a disease and they lived apart from the time of his departure in 1944 until W's death in 1970. During that time, W worked to support herself and received no financial support from H. Also during that time, H attacked W with a knife causing her serious injuries as a result of which he was tried, convicted and sentenced to jail.

Despite all of that, upon W's death, H asserted a claim for his elective share of W's estate. Based upon this set of facts, the Sur-

rogate Court found that H had abandoned W and disallowed H's claim against W's estate. The First Department affirmed on appeal but notably, one justice wrote a strong dissent stating that, since W would have eagerly agreed to H's departure, his departure was not without her consent and, therefore, did not constitute abandonment. This is an example of how difficult it is to successfully demonstrate abandonment.

The court in *Matter of Baldo* took the rare step of granting summary judgment against a surviving spouse asserting a claim for her elective share. In this case, H was stricken with severe dementia and became physically violent toward his home health aides and W.

On at least one occasion, he struck and choked W. W left the marital residence and subsequently H was placed in a nursing home for care. Once H was placed in the nursing home, W decided to sever all contact with him for the final 18 months of his life and entered into a relationship with another man. On this set of facts, the court concluded summarily that W had abandoned H and disallowed her claim against his estate.

This brings us back to the scenario set forth in the beginning of the article. The facts come from *Matter of Jongbloed*. A reading of the *Jongbloed* decision makes clear that there was deeply rooted acrimony between the parties to the litigation. In fact, H's son testified at trial that he had "started a file" on W within a few months of H and W meeting, so this was a battle that undoubtedly began long before H's death.

As noted above, H and W spent six months at their respective homes each year for approximately four years. According to the testimony, after H had his initial stroke and returned to New York, W went to visit him and told H's son that she was not going to be H's nursemaid, that she had her own life to live and that H was the son's "problem."

All within three weeks' time, W came to New York, visited H, filed for divorce, removed her personal items from H's home and returned to Maine. She never returned to New York to visit H, never called or spoke with him before his death, and even drove from Maine to Florida but failed to visit on her way through New York. Based upon those facts, the court concluded that W had abandoned H and disqualified her from receiving her elective share of H's estate.

As the cases outlined above show, proving abandonment is a burden which is not easily satisfied. A claim of abandonment must be supported by egregious facts established through evidence, which can withstand objection under the Dead Man's Statute. Although abandonment can be a successful defense to an elective share claim, it can be a tricky defense to prove.

Rachel Brody Bandysh is Senior Counsel in Underberg & Kessler's Estates & Trusts Practice Group. She concentrates her practice on estate planning and estate administration.