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NOTES

AIDING AVARICE: THE INEQUITABLE RESULTS OF LIMITED GROUNDS FOR SPOUSAL DISQUALIFICATION UNDER EPTL § 5-1.2

JESSICA BAQUET *

INTRODUCTION

For thousands of years, it has been settled in law that a person is not completely free to dictate how his property will be disposed of after his death.¹ The most significant historic limitation on

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¹ See Encyc. Britannica, *Inheritance*, available at <http://www.britannica.com/eb/article-13094/inheritance> (last visited Mar. 23, 2008) ("Freedom of testation has never been absolutely unlimited."); see also Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 235 (1996) (asserting that, even though some say "the first principle of the law of wills is freedom of testation," the formality of most wills statutes seriously limits testamentary freedom); see also Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose At My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 742 (2006) (noting that "[l]imitations upon free testation are at least as old as the Code of Hammurabi," written in 2084 B.C.); see also Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse but Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 559 (2001) (explaining that, prior to the Statute

“free testation” is that one spouse cannot disinherit the other.² This legal concept still pervades the law. Today, almost all of the fifty states have legislation that provides a surviving spouse with the right to inherit a percentage of a deceased spouse’s estate, even if the deceased spouse attempted to disinherit the surviving spouse in his will.³ Why does the law prohibit one spouse from disinheriting the other? Historically, the reason was to protect a wife from poverty in the event that her husband met his death.⁴ Today, the law recognizes that marriage is a partnership that depends upon the contribution of both spouses and, as such, each spouse is entitled to a share of what belongs to the other.⁵

However, some state laws governing spousal disinheritance are outdated and out-of-step with today’s social climate. There may be no better example of this than the New York laws governing

of Wills in 1540, inheritance under English Common Law was “a system of forced heirship”).

² See THIRD REPORT OF THE TEMPORARY STATE COMM’N ON THE MODERNIZATION, REVISION & SIMPLIFICATION OF THE LAW OF ESTATES, Legis. Doc. No. 19, at 202 (1964) [hereinafter THIRD REPORT] (explaining that, historically, dower and curtesy were the only bar to complete testamentary freedom in New York); see also Turnipseed, *supra* note 1, at 744–45 (providing history that explains why some form of protection preventing husbands from disinheriting their wives was required at common law in order to counterbalance the extreme subordination of wives at that time).

³ See DEL. CODE ANN. tit. 12, § 901 (2008) (stating that the surviving spouse is entitled to one-third share of the decedent’s estate less any transfers to the surviving spouse); see also N.J. STAT. ANN. § 3B:8-1 (2007) (providing that the surviving spouse is entitled to one-third of the decedent’s “augmented estate”); see also S.C. CODE ANN. § 62-2-201 (2007) (entitling the surviving spouse to one-third of the decedent’s estate); see also W. VA. CODE ANN. § 42-3-1 (2007) (permitting the surviving spouse to “a right of election” in the decedent’s estate determined by the length of the marriage); see also Turnipseed, *supra* note 1, at 739, 771 (asserting that virtually every state in the union has either an elective share statute, dower and curtesy laws or a community property approach limiting free testation, except for Georgia, which provides the spouse with the “unfettered ability” to disinherit his mate).

⁴ See WARREN’S WEED NEW YORK REAL PROPERTY § 1.05 (4th ed. 1999) [hereinafter WARREN’S WEED] (positing that a wife’s dower interest is designed to “guarantee sustenance for herself, and nurture and education for her children, should her husband predecease her”).

⁵ See *First Report of the EPTL-SCPA Advisory Committee*, in 13-1 WARREN’S HEATON ON SURROGATE’S COURT PRACTICE app. 1.04[2] (2007) [hereinafter *First Report of the Advisory Committee*] (noting that a major trend that has recently emerged is the “increasing legal recognition of the theory that marriage is an economic partnership”); see also Leslie Fields, *Alabama’s Elective Share: It’s Time to Adopt a Partnership Theory of Marriage*, 46 ALA. L. REV. 797, 798 (1995) (providing that modern scholars prefer the community property regime, as under it, property earned during the marriage does not become the fruit of the earner, but rather becomes property of the marriage, thus providing both spouses with ownership over the property).

the disqualification of a surviving spouse.⁶ When a surviving spouse is “disqualified” in New York, she can no longer elect against the deceased spouse’s will,⁷ inherit from the deceased spouse if he dies intestate,⁸ exercise her right to the “exemption for the benefit of family,”⁹ or lay claim to the proceeds of a lawsuit brought for wrongful death of the deceased spouse.¹⁰ In keeping with the historical trend of protecting the surviving spouse, New York law provides limited circumstances in which a surviving spouse can be disqualified.¹¹ In the simplest terms, a surviving spouse may be disqualified only where, at the date of the deceased spouse’s death: (1) a decree of divorce, separation, annulment, or dissolution of marriage, recognized as valid in New York, or valid in the issuing state but not in New York, was in effect; (2) the surviving spouse abandoned the deceased spouse; (3) the marriage was bigamous, incestuous or otherwise prohibited; or (4) the surviving spouse had a duty to support the decedent but failed to do so.¹²

The limited provisions for spousal disqualification are inadequate because they do not account for various modern scenarios in which the surviving spouse should not be entitled to protection and in which the deceased spouse should be able to disinherit the surviving spouse. For example, couples today sometimes permanently end their marriages without legally divorcing.¹³ In other

⁶ See generally N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 2008) (providing the methods which a spouse in New York may disqualify a surviving spouse from any inheritance); see also *First Report of the Advisory Committee*, *supra* note 5, at 2 (describing the overall trend with which the drafters of the EPTL considered that statute to be in accord).

⁷ See *id.* § 5-1.1 (setting forth the precepts of the right of election); see also *id.* § 5-1.1-A (clarifying the provisions which govern the spousal right of election).

⁸ See *id.* § 4-1.1 (discussing a spouse’s right to inherit from his or her mate in intestacy); see also *id.* § 2-1.8 (outlining the amounts excluded from intestacy).

⁹ *Id.* § 5-3.1. Under this exemption, where the decedent leaves a surviving spouse and/or surviving children under age 21, certain property belonging to the decedent, such as clothing, photos and other personal items, vests in the surviving spouse or children and does not pass through the decedent’s estate. *Id.*

¹⁰ See *id.* § 5-4.4 (setting forth a spouse’s right to the proceeds of a wrongful death lawsuit); see also *id.* § 5-4.3 (defining what damages are covered).

¹¹ See *id.* § 5-1.2 (providing the methods which a spouse in New York may disqualify a surviving spouse from any inheritance); see also Fields, *supra* note 5, at 798 (explaining the modern trend that generally seeks to entitle both spouses to the earnings of the other).

¹² See *supra* note 11 and accompanying text.

¹³ See *In re Estate of Carmona*, 223 N.Y.L.J. 92 (Sur. Ct. 2000) (discussing a surviving spouse’s ability to exercise his right of election against the decedent spouse’s will, where

situations, individuals marry for the limited purpose of enabling a foreigner to become a U.S. citizen, and later lack the funds to get divorced and/or the knowledge of the legal ramifications of the failure to procure a divorce.¹⁴ In addition, an alarming trend has developed in the recent past in which deceitful caretakers marry their elderly and incapacitated wards solely to financially exploit them.¹⁵ In these circumstances, the unworthy spouse cannot be disqualified under the statute's language. Therefore, the bar to spousal disinheritance in New York sometimes protects unworthy individuals whose interests should not be safeguarded.

This note asserts that, in this area, New York law is in dire need of reform. Part I will provide a brief history of the bar to spousal disinheritance. Part II will examine instances in which New York Surrogates were unable to disqualify unworthy spouses because of the narrow provisions of the New York Estates, Powers and Trusts Law (hereinafter EPTL) § 5-1.2. Part II will also discuss societal trends that will soon present additional instances in which a literal application of EPTL § 5-1.2 will lead to inequitable results. Part III will propose amendments to EPTL § 5-1.2 and will describe policy justifications for legislative change. Finally, Part IV will suggest that, in the absence of legislative change, Surrogates in New York should apply the principle of

the married couple had separated and lived apart with almost no communication for more than fourteen years, but never formally divorced); *see also In re Estate of Lamos*, 313 N.Y.S.2d 781, 782 (Sur. Ct. 1970) (considering the rights of a surviving spouse who had lived apart from and had no communication at all with the decedent spouse for fourteen years although the couple had never legally divorced or separated).

¹⁴ *See In re Estate of Dominguez*, 2002 N.Y. Misc. LEXIS 1596, at *2-4 (Sur. Ct. Nov. 18, 2002) (finding that EPTL § 5-1.2 would not permit disqualification of a surviving spouse on the grounds that he married decedent spouse only in order to obtain a green card and the two never lived together as a married couple); *see also* Ctrs. for Disease Control, Dep't of Health & Hum. Services, *Cohabitation, marriage, Divorce and Remarriage in the United States*, 23 VITAL & HEALTH STAT. 23, 22 (2002), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf (positing that couples are less likely to transition from separation to legal divorce in communities that are poverty-stricken and have very low median family income and education).

¹⁵ *See, e.g., In re Joseph S.*, 808 N.Y.S.2d 426, 428 (App. Div. 2006) (annulling the marriage of an elderly man, who suffered from mental and physical illnesses, to a caretaker half his age, whose motives were "highly suspicious"); *In re A.S.*, No. 20493/062007, 2007 N.Y. Misc. LEXIS 2693, at *2 (Sup. Ct. 2007) (granting an annulment of the marriage of an 87-year-old woman to her 57-year-old chauffeur on the grounds that she lacked capacity to enter the marriage and he had acted fraudulently in marrying her in order to deplete her bank accounts, occupy her real estate and bring his daughter to the United States from Ecuador).

equitable estoppel to prevent unworthy spouses from exercising their rights of election.

I. A BRIEF HISTORY OF THE BAR TO SPOUSAL DISINHERITANCE

The notion that one spouse cannot disinherit another is based on several considerations. First, the law has long recognized that one spouse's commitment to the other does not end with death.¹⁶ The legislative history to the ETPL states that:

[a]n elective right was created against the provisions of a will and hence against the property passing under a will, so that a spouse could not by will disinherit his or her mate and was obliged, to that extent, to fulfill the obligations of support required under the public policy of the state of New York.¹⁷

Second, marital relationships are reciprocal. Though man has historically been thought of as the financial provider, in fact, he can only play this role because his wife assists and supports in making their home. And, today, these roles are often reversed. For the unique contribution of support that each spouse makes to the other, lawmakers have reasoned that a spouse is legally entitled to share in his or her mate's estate.¹⁸ Finally, in situations where one spouse is employed and the other is a homemaker, the homemaker spouse would be unable to survive if the employed spouse died leaving a will that disinherited him or her. Lawmakers consequently barred spousal disinheritance to protect the surviving spousal from poverty.¹⁹

¹⁶ See THIRD REPORT, *supra* note 2, at 23 (explaining that the public policy of New York requires posthumous spousal support); see also Fields, *supra* note 5, at 801 (positing that the purpose of the elective share is to provide support for the surviving spouse because "the obligation to support one's spouse continues beyond death").

¹⁷ THIRD REPORT, *supra* note 2, at 23.

¹⁸ See Fields, *supra* note 5, at 801 (noting that "[e]lective share statutes attempt to return to the surviving spouse [their] contribution to the marriage"); see also Sidney Kwes-
tel & Rena C. Sepowitz, *Testamentary Substitutes: Retained Interests, Custodial Accounts and Contractual Transactions — A New Approach*, 38 AM. U.L. REV. 1, 2–3 (1988) (stating that most laws have enacted some degree of legal protection for surviving spouses to compensate them for their contribution to the marriage).

¹⁹ See THIRD REPORT, *supra* note 2, at 23 (detailing the policy reasoning behind New York elective share statute); see also Bradley B. Wrightsel, *A Proposed Solution to Spousal Disinheritance in Ohio: The Uniform Probate Code's Elective Share Revision*, 19 OHIO N.U.L. REV. 951, 953 (1993) (explaining that the policy behind elective share statutes is to protect the surviving spouse from being disinherited and impoverished).

While the bar to spousal disinheritance is well founded in theory, it is also deeply rooted in law. In the United States, this principle was first embodied by the common law concepts of dower and curtesy,²⁰ the origins of which date back to ancient times.²¹ An examination of modern laws illustrates that today's legal principles are based on those common law concepts. For example, a spouse's elective share today, in many states, is equivalent to one-third of the decedent's estate.²² The concept of a one-third fractional share dates at least as far back as the Magna Carta of 1225, which provided that "[the widow] for her dower a third of all her husband's land which was his in his lifetime, unless a smaller share was given her at the church door."²³

Dower was designed to protect women, the perceived weaker sex, from "imposition, to provide a fund for their maintenance, when they can no longer lean on the protecting arm which had sustained and supported them."²⁴ In essence, dower entitled a widow to a life estate in one-third of the real property owned by her husband during the marriage, no matter what his last will and testament may have otherwise stated.²⁵ Even where a husband attempted to transfer title to his land during his life, at

²⁰ See Mark Patton, Note, *Quasi-Community Property in Arizona: Why Just at Divorce and Not Death?*, 47 ARIZ. L. REV. 167, 175 (2005) (stating that dower and curtesy were the common law methods of preventing spousal disinheritance). See generally THIRD REPORT, *supra* note 2, at 23 (describing the legislative history behind New York's dower and curtesy law).

²¹ See *supra* note 1 and accompanying text.

²² See Wrightsel, *supra* note 19, at 951 n.1 (stating that "[t]he statutory amount is typically one-third or one-half of the decedent's probate estate"); see also *supra* note 3 and accompanying text.

²³ Thomas Lund, *Some Interesting Medieval Dower Cases*, 37 U. TOL. L. REV. 659, 743 (2006) (quoting Magna Carta, reprinted in 3 ENGLISH HISTORICAL DOCUMENTS (1189–1327) 342 (1975)).

²⁴ Kevin R. Garrison, *The Ins and Outs of the Alabama Elective Share*, 58 ALA. L. REV. 1161, 1162 (2007) (quoting *Gould v. Womack*, 2 Ala. 83, 94 (1841)).

²⁵ See FOURTH REPORT OF THE TEMPORARY STATE COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, Legis. Doc. No. 19, at 276 (1965) [hereinafter FOURTH REPORT] (noting that the New York dower statute entitled a widow to one-third of the lands owned by her husband during their marriage); see also Lund, *supra* note 23, at 660 (stating that the basic dower rule was that a widow was entitled to one-third of the land owned by her husband during his life); see also Theresa M. Mohan & J. Aaron J. Byrd, *You Cannot Change 500 Years of Property Law at 5 p.m. on a Friday: Dower as Applied in Kentucky*, 33 N. KY. L. REV. 335, 336 (2006) (explaining that at common law, a widow was entitled to a one-third life estate in any land that her husband owned in fee simple or fee tail during the marriage).

common law the transferee took title subject to the widow's dower interest, which would entitle her to reclaim one-third of the land after her husband's death.²⁶

Curtesy, on the other hand, was designed to provide for a surviving husband after his wife's death by entitling him "to a life estate in the land that his wife owned during their marriage, assuming that a child was born alive to the couple."²⁷ Provisions governing curtesy made no mention of a one-third share, and traditionally entitled a widower to a life estate in all of the property his wife owned during the marriage.²⁸ This was more than the one-third share that dower provided a widow.²⁹ However, while a wife could exercise her right to dower irrespective of whether she bore the children of her husband, a husband was entitled to curtesy only where his wife had birthed his issue.³⁰

Though the concept of dower once seemed to provide significant protection for a widow, changing times have rendered it largely ineffective. Dower entitled a widow only to a life estate in one-third of the *real property* owned by her husband, but not to any of his intangible assets.³¹ At a time when most families made their

²⁶ See Lund, *supra* note 23, at 660–61 (positing that a person who buys land from a married man takes an interest in the land subject to the wife's dower interest); see also Turnipseed, *supra* note 1, at 738 (asserting that once dower was attached to land at the inception marriage, a husband could not unilaterally terminate the dower by transferring the land).

²⁷ Garrison, *supra* note 24, at 1163 (quoting BLACK'S LAW DICTIONARY 411 (8th ed. 2004)); see *In re Estate of Starbuck*, 116 N.Y.S. 1030, 1031–32 (Sur. Ct. 1909) (quoting Burrill's Law Dictionary which said that curtesy is "[a]n estate to which a man is by law entitled, on the death of his wife, in the lands or tenements of which she was seized during the marriage in fee simple or fee tail, provided he had issue by her, born alive, during the marriage, and capable of inheriting her estate").

²⁸ See Garrison, *supra* note 24, at 1163 (noting absence of the "fractional share" for the concept of curtesy); see also Patton, *supra* note 20, at 176 (stating that curtesy provided the husband with a life estate in an entire parcel of land and not merely one-third of it).

²⁹ See *supra* note 28 and accompanying text.

³⁰ See, e.g., *In re Estate of Starbuck*, 116 N.Y.S. at 1031–32 (quoting Burrill's Law Dictionary which defined curtesy as "[a]n estate to which a man is by law entitled, on the death of his wife, in the lands or tenements of which she was seized during the marriage in fee simple or fee tail, provided he had issue by her, born alive, during the marriage, and capable of inheriting her estate"); see also Garrison, *supra* note 24, at 1163 (clarifying that curtesy was dependent on a child being born alive to the couple).

³¹ See Fields, *supra* note 5, at 800 (stating that dower entitled a widow to a life estate in one-third of her husband's real property, but not in any "modern" assets); see also Monahan & Byrd, *supra* note 25, at 336, (explaining how common law inheritance principles entitled one spouse only to an interest in the other spouses' real property).

living by farming their land, this system made sense.³² However, as a result of the industrial revolution, wealth came to be more commonly possessed in intangible forms, like securities.³³ Dower, therefore, ultimately came to provide the widow with less financial security after her husband's death. For this reason, most states in the U.S. abolished dower in the early 1900s.³⁴

New York was among the first states to abandon the dower and curtesy system.³⁵ Reportedly, New York did so at the recommendation of the Decedent Estate Commission³⁶ after two instances in which one spouse managed to disinherit the other.³⁷ The Decedent Estate Commission characterized dower as "a polite phrase without any substantial benefit to [a wife]."³⁸ The Decedent Estate Law abolished dower except as to marriages that occurred prior to September 1, 1930 in which the husband was seized of an estate of inheritance prior to that date and during the marriage.³⁹ Curtesy, on the other hand, was abolished except

³² See Fields, *supra* note 5, at 800 (discussing the fact that during the seventeenth and eighteenth centuries, society was agrarian and most people didn't have trust funds, insurance policies or securities); see also Reginald F. Byron, *United Kingdom: Countries and Their Culture*, BNET: COUNTRIES & THEIR CULTURE, Jan. 1, 2001, http://findarticles.com/p/articles/mi_gx5228/is_2001/ai_n19144273/pg_3 (stating that "the Industrial Revolution created a new social order as entrepreneurship and factory production resulted in new forms of wealth and work that were added to the agrarian social order").

³³ See *supra* note 32 and accompanying text.

³⁴ See Fields, *supra* note 5, at 801 (noting that the transformation in the U.S. economy led to the abolition of the dower and curtesy system); see also Turnipseed, *supra* note 1, at 748 (recording that New York was the first state to do away with dower and curtesy).

³⁵ See THIRD REPORT, *supra* note 2 at 23 ("Prior to 1930, New York law provided for common law rights of dower and curtesy. These were virtually abolished upon recommendation of the Foley Commission."); see also Turnipseed, *supra* note 1, at 748 (stating that New York's elective share statute was the first of its kind in the United States).

³⁶ See THIRD REPORT, *supra* note 2, at 191 (noting that the right of election was created at the recommendation of the Decedent Estate Commission); see also *supra* note 35 and accompanying text.

³⁷ Turnipseed, *supra* note 1, at 748 (asserting that legislators in New York abolished dower and curtesy "based solely on anecdotal evidence of two instances of disinheritance; no disinheritance studies had been conducted at that time"). See generally Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1672 (2003) (discussing the 'Fearon Bill' which abolished dower and curtesy in New York).

³⁸ THIRD REPORT, *supra* note 2, at 202-03.

³⁹ See 40 N.Y. JUR. 2D § 955 (2008) (providing that "while dower is of diminishing importance, it still exists where the parties were married before September 1, 1930"); see also Former N.Y. DEC. EST. LAW § 18 (1930) (limiting a spouse's right of dower and curtesy for marriages and deaths prior to 1930).

as to those wives dying prior to August 31, 1930.⁴⁰

The system of dower and curtesy was replaced by the elective share, a right belonging to husband and wife alike,⁴¹ which was first provided for in the Decedent Estate Law.⁴² The elective share was thought to be “the greatest reform in the law of property in New York State in one hundred years.”⁴³ The purpose of the law was to correct “the glaring inconsistency in [New York] law which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death.”⁴⁴ In short, if the deceased spouse left to his mate less than the amount she stood to gain by exercising her right of election, the surviving spouse could simply elect against the will, which would entitle her to one-third of the deceased spouse’s estate.⁴⁵ However, section 18 of the Decedent Estate Law “permitted a surviving spouse to elect to take a specific share of the estate of [the deceased spouse], but the share . . . was limited to assets which passed under the decedent’s will.”⁴⁶ Accordingly, non-probate assets were not within a spouse’s reach through the exercise of his or her right of election.

It soon became clear that the Decedent Estate Law did not adequately protect a surviving spouse, because it “failed to cover *inter vivos* transfers made by the decedent or various situations where title passes by operation of law on death of the settlor.”⁴⁷

⁴⁰ See *supra* note 39. Curtesy was abolished by Former N.Y. Dec. Est. Law § 18 (1930) except for deaths preceding this date. See generally George L. Haskins, *Curtesy in the United States*, 100 U. PA. L. REV. 196, 196–200 (1951). In his article, Haskins provides a discussion on the general characteristics of curtesy. *Id.*

⁴¹ See THIRD REPORT, *supra* note 2, at 197 (explaining that there wasn’t “any distinction made on account of the sex of the surviving spouse”); see also Richard A. Whitney, *Legal Rights that are Lost by a Divorcing Spouse – New York Law*, LAWYERS.COM, <http://www.lawyers.com/rawhitney/RightsLostAsAResultofDivorce.jsp> (last visited Aug. 10, 2008) (discussing the right of election in the context of divorce).

⁴² See THIRD REPORT, *supra* note 2, at 214 (describing the Decedent Estate Law); see also Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1652 (2003) (commenting on New York’s reform in the 1920s which replaced dower with a “facially sex-neutral elective share”).

⁴³ *Id.* at 119 (quoting Frank H. Twyeffort, *The New Decedent Estate Law of New York*, 6 N.Y.U.L. REV. 377 (1929)).

⁴⁴ *Id.* (quoting COMBINED REPORTS OF THE DECEDENT ESTATE COMMISSION, Legis. Doc. No. 70, at 19 (1928)).

⁴⁵ N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(a)(2) (McKinney 2008); see Turnipseed, *supra* note 1, at 739 (describing the elective share as “severely limit[ing] freedom of testation vis-à-vis surviving spouses”).

⁴⁶ *In re Estate of Agioritis*, 357 N.E.2d 979, 980–81 (N.Y. 1976).

⁴⁷ *Id.* at 981.

For example, Totten trusts and life insurance policies pass to a beneficiary designated by the decedent upon his death and do not pass through his will.⁴⁸ Title to joint bank accounts also does not pass by will, and instead passes to a surviving joint owner upon the other owner's death. Accordingly, a spouse could effectively disinherit his mate by writing her out of his will, transferring all of his assets into non-probate form, and designating a third person as the beneficiary of those assets.⁴⁹ The legislative history to the EPTL notes that, because of this, the right of election under the Decedent Estate Law became "diluted and to a large extent meaningless."⁵⁰

As a first attempt to prevent spouses from disinheriting each other in this way, New York courts forbade so-called "illusory transfers."⁵¹ However, they differed in their analyses of whether a transfer was illusory. In *Bodner v. Feit*,⁵² the Appellate Division of the First Department found a transfer to be illusory where: (1) the decedent's motive in making the transfer was only to deprive his widow of her distributive share; and (2) the decedent retained control over the property after the transfer.⁵³ Subsequently, in *Newman v. Dore*, the Court of Appeals held that a decedent's motive in making an *inter vivos* transfer was irrele-

⁴⁸ See Garrison, *supra* note 24, at 1163 (noting that "inter vivos transfers were increasingly used in the 'evasion' of the widow's share"); see also Kwestel & Sepowitz, *supra* note 18, at 4 (stating that a person could disinherit his spouse through lifetime transfers of his assets, like Totten trusts and joint tenancies).

⁴⁹ See Rena C. Sepowitz, *Transfers Prior to Marriage and the Uniform Probate Code's Redesignated Elective Share - Why the Partnership Is Not Yet Complete*, 25 IND. L. REV. 1, 3-4 (1991) (explaining that Article II of the Uniform Probate Code made a significant step in limiting types of evasive devices a decedent may use to disinherit a spouse); see also Kwestel & Sepowitz, *supra* note 18, at 4 (pointing out that a testator can circumvent forced share requirements to a surviving spouse by transferring all of his property to a third person as a gift).

⁵⁰ THIRD REPORT, *supra* note 2, at 23.

⁵¹ THIRD REPORT, *supra*, note 2 at 23 (explaining the history preceding enactment of the EPTL); see also *First Report of the Advisory Committee*, *supra* note 5, at 2 (describing the trend that coincided with enactment of the EPTL to give spouses greater protection when the other spouse predeceases).

⁵² 286 N.Y.S. 814 (App. Div. 1936).

⁵³ See *id.* at 816-17 (holding that a spouse may not transfer his property *inter vivos* in such a way that allows him to retain control over the property in order to defeat the rights of the surviving spouse); see also *In re Estate of Crystal*, 352 N.E.2d 885, 887 (N.Y. 1976) (Wachtler, J., dissenting) ("In *Bodner* the First Department in attempting to balance the right to free alienation with the surviving spouse's right of election articulated a dual test by which to evaluate an *inter vivos* transfer. One aspect to consider was the degree of control retained and the other was the motive or intent underlying the transfer.").

vant in determining whether it was illusory.⁵⁴ Nonetheless, later decisions ignored the *Newman* holding and took into account the decedent's intention in transferring his property.⁵⁵

This confusion came to a head after *In re Halpern*, where the Court of Appeals found that the decedent's Totten Trusts, which named a beneficiary other than his spouse, were not illusory because they were not established with the intent to disinherit the decedent's spouse.⁵⁶ Contrary to prior case law, the Court did not base its decision on whether the decedent retained control over the accounts during his life. The decedent in *Halpern* certainly retained control, as a depositor can continue making withdrawals from and changes to a Totten Trust until his death, at which time the account vests in a named beneficiary.⁵⁷ The *Halpern* decision conflicted with *Newman*, where the Court of Appeals had previously held that a revocable *inter vivos* trust, over which the settlor retained the same degree of control as he would over a Totten Trust "was illusory insofar as an electing spouse was con-

⁵⁴ *Newman v. Dore*, 9 N.E.2d 966, 968 (N.Y. 1937) ("Motive or intent is an unsatisfactory test of the validity of a transfer of property. In most jurisdictions it has been rejected . . ."); see *President & Dirs. of Manhattan Co. v. Janowitz*, 14 N.Y.S.2d 375, 383 (Sup. Ct. 1939) (stating that the term "bona fide" as used in this case does not refer to the motive for making the gift, whether to deprive the wife of her property rights or not, but rather to the intent of the donor to divest himself of title to the property).

⁵⁵ See *Marine Midland Trust Co. v. Stanford*, 9 N.Y.S.2d 648, 651 (App. Div. 1939) ("The determining factor as to the validity of a trust is the intent with which the settlor transferred his property to the trustee. If illusory, there is no transfer; if made with the intent to transfer the actual title, it is effective."); see also *In re Accounting of Chase Nat'l Bank*, 108 N.Y.S.2d 122, 126 (App. Div. 1951) (focusing on whether the decedent had a good faith intent to transfer a present interest in considering whether a transfer was illusory).

⁵⁶ *In re Estate of Halpern*, 100 N.E.2d 120, 122 (N.Y. 1951) (finding Totten Trusts created by the decedent to be valid *inter vivos* transfers because they were not "intended only as a mask for effective retention by the settlor of the property which in form he had conveyed"); see *Newman*, 9 N.E.2d at 969 (holding that testator's conveyance was illusory, as it served only as a mask for his true intention of retaining the property he conveyed).

⁵⁷ Farlex Free Dictionary, available at <http://financialdictionary.thefreedictionary.com/Totten+trust> (last visited July 17, 2008) (defining a Totten Trust as "[a] trust in which the assets are deposited for a beneficiary but the grantor has complete control of the trust, including the right to reclaim the assets. The assets pass to the beneficiary upon the death of the grantor but are taxed as part of the grantor's estate"); see Kara Peischl Marcus, *Totten Trusts: Pragmatic Pre-Death Planning or Post-Mortem Plunder?*, 69 TEMP. L. REV. 861, 866 (1996) (defining a Totten Trust as "a deposit [a person makes] in a savings account in a bank or other savings organization in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust" (quoting RESTATEMENT (SECOND) OF TRUSTS § 58 (1987))).

cerned."⁵⁸ Legal minds struggled to determine whether *Halpern* set forth a new test exclusively for Totten Trusts, or overruled *Newman* by making determinative the decedent's motive in making any transfer.⁵⁹

The only certainty after *Halpern* was that a transfer considered illusory, under whichever test a court might apply, was invalid.⁶⁰ However, even the application of this well-settled principle proved troublesome. Courts were inconsistent in how they invalidated illusory transfers; some invalidated illusory transfers in their entirety, while others only invalidated these transfers to the extent necessary to satisfy a widow's elective share.⁶¹

Many considered the concept of the illusory transfer to be "nebulous" for reasons apart from the fractured case law on the subject.⁶² This was due, in part, to the fact that usually only a scant amount of evidence was admissible in an action to determine whether a transfer was illusory. Proving the intent of the de-

⁵⁸ *In re Estate of Agioritis*, 357 N.E.2d 979, 981 (N.Y. 1976).

⁵⁹ See *In re Estate of Crystal*, 352 N.E.2d 885, 938 (Wachtler, J., dissenting) ("Any doubt that the retention of control test articulated in *Newman* had been supplanted by the intent test was fostered by *In re Halpern* . . . [which] been interpreted in two ways. One view was that *Halpern* overruled *Newman* and that the only way a transfer would be considered illusory is if it was an invalid, sham transfer The opposing view was that *Halpern* simply created a special test with respect to Totten trusts.") (citations omitted); see also *Agioritis*, 357 N.E.2d at 981 (explaining that "[o]ur court rejected the 'motive' test in *Newman v. Dore*, . . . and held that a revocable *inter vivos* trust with a retained life interest with all investment and management powers reserved to the settlor was illusory insofar as an electing spouse was concerned").

⁶⁰ See *In re Chase Nat'l Bank of N.Y.*, 108 N.Y.S.2d 122, 126 (App. Div. 1951) (stating that a spouse could not be deprived of her elective share as a result of an illusory transfer); see also *Burns v. Turnbull*, 41 N.Y.S.2d 448, 448 (App. Div. 1943) (holding that the husband could not be deprived of the trust assets because the agreement was illusory).

⁶¹ See Yale Law Journal Co., *Protection of the Surviving Spouse's Statutory Share Against Inter Vivos Transfers by the Decedent*, 52 YALE L. J. 656, 661 (1943) (arguing that the *Newman-Krause* test of an illusory transfer does not decide the problem of whether illusory transfers will be invalidated in favor of the surviving spouse when the decedent has died intestate); see also Harvard Law Review Ass'n, *Husband and Wife - Rights of Wife Against Husband and in His Property - Widow's Statutory Share Does Not Extend to Totten Trusts*, 65 HARV. L. REV. 512, 512 (1952) (discussing case in which the New York appellate division declared Totten trusts invalid only to the extent necessary to give a widow the equivalent of her elective share under N.Y. Decedent Estate Law § 18).

⁶² See *In re Estate of Wechsler*, 640 N.Y.S.2d 184, 185 (App. Div. 1996) (holding that petitioner could not elect against an *inter vivos* trust nor could she "avail herself of the illusory transfer doctrine, which was abolished in 1966 by the implementation of the testamentary substitute scheme found in former EPTL 5-1.1"); see also Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 99 n.51 (1994) (stating that New York courts developed the nebulous concept of "illusory transfer" to rectify improper transfers until legislation was enacted to close or narrow the gap).

ceased spouse, which was necessary in some of these cases, was extremely difficult because the decedent was unavailable to testify by reason of his own death.⁶³ Further, New York's "Dead Man" statute bars from testifying an individual who engaged in a transaction with the decedent and who has an interest in the outcome in the litigation.⁶⁴ In most instances, this precluded the surviving spouse from testifying.

Due in part to the problems concerning spousal disinheritance, the New York legislature enacted the EPTL in 1965.⁶⁵ The legislative history to the EPTL indicates that the purpose of the legislative changes to the Decedent Estate Law's elective share provisions was "to modernize in substance and protect the rights of a surviving spouse."⁶⁶ The terms of the EPTL permit a surviving spouse to reach, through the exercise of her right of election, any of the decedent's "testamentary substitutes."⁶⁷ More specifically, EPTL § 5-1.1 provided that a spouse may reach, through the exercise of her right of election: (1) gifts causa mortis; (2) Totten trusts; (3) joint bank accounts held by the decedent and another person; (4) real estate owned by the decedent as a joint tenancy with another person; and (5) any disposition of property in "trust or otherwise, to the extent that the decedent at the date of his

⁶³ See *Agioritis*, 357 N.E.2d at 981 (stating that determining decedent's intent necessitates inquiry into the decedent's state of mind, which is problematic); see also *In re Morningstar's Will*, 257 N.Y.S. 240, 241-43 (Sur. Ct. 1932) (emphasizing the difficulty in testamentary interpretation).

⁶⁴ N.Y. C.P.L.R. 4519 (McKinney 2008) (providing that a person who will gain or lose as a result of the lawsuit is incompetent to testify as to a transaction with a person now dead against the executor or administrator of that dead person's estate); see *Tworowski v. Tworowski*, 696 N.Y.S.2d 637, 639 (Sup. Ct. 1999) (explaining that CPLR 4519 requires three elements before it is applicable: (1) any person "interested in the event" may not testify in his or her own behalf against (2) certain protected persons with a specified relationship to a decedent or mentally ill person (3) involving a transaction or communication with the decedent or mentally ill person).

⁶⁵ See THIRD REPORT, *supra* note 2, at 23, 181 (asserting the elective right under the Decedent's Estate Law was "diluted" and the purpose of the EPTL was to modernize the law and the need for reform in this area was a primary reason the Commission was created); see also *In re Will of Bogart*, 607 N.Y.S.2d 1012, 1013 (Sur. Ct. 1994) (noting that the purpose of EPTL 5-1.1A was to eliminate the unfairness to surviving spouses, eighty percent of whom are believed to be women, and paternalism in the law).

⁶⁶ THIRD REPORT, *supra* note 2, at 23.

⁶⁷ *Agioritis*, 357 N.E.2d at 981-82 (drawing from legislative history of the EPTL); see *In re Estate of Crane*, 649 N.Y.S.2d 1006, 1008 (Sur. Ct. 1996) (stating that provides a surviving spouse the option to take a share of the net estate, including testamentary substitutes, of the decedent spouse instead of the portion, if any, of the estate left to her under the will or passing to her by intestacy).

death retained, either alone or in conjunction with another person, by the express provisions of the disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal . . .”⁶⁸ This section was amended again in 1992, at which time it was renumbered as EPTL § 5-1.1-A and the following were added to the list of testamentary substitutes: (1) stocks held jointly by the testator and another person; (2) 401k, pension and retirement accounts so long as the beneficiary was named after September 1, 1992 or the beneficiary designation was changed after that date; (3) gifts inter vivos made within one year of the decedent’s death and exceeding \$11,000; (4) U.S. savings bonds and securities; (5) all real property located within or outside of the state; (6) money deposited in trust in the name of the decedent for the benefit of another person; and (7) property over which the decedent had a general power of appointment.⁶⁹

The EPTL contains additional protections for the surviving spouse aside from those found in § 5-1.1A. Section 5-1.2 further provides that a surviving spouse can be disqualified from exercising her right of election only where: (1) a final decree or judgment of divorce, annulment, nullity or dissolution that is recognized as valid in New York was in effect when the decedent spouse died; (2) the marriage was either a prohibited marriage or void as incestuous or bigamous as those terms are defined by the New York Domestic Relations Law (hereinafter DRL);⁷⁰ (3) a final decree or judgment of divorce, annulment, nullity or dissolution issued outside the state but not recognized as valid in New York was in effect when the decedent spouse died; (4) a final decree or judgment of separation, recognized as valid in New York, was in effect at the time of the decedent’s death and was rendered against the surviving spouse; (5) the surviving spouse abandoned the deceased spouse and abandonment continued until the time of death; or (6) the surviving spouse had a duty to support the decedent but failed to do so despite having had the means, unless the surviving spouse eventually resumed and continued providing support until the decedent’s death.⁷¹ These limited grounds

⁶⁸ N.Y. EST. POWERS & TRUSTS LAW §§ 5-1.1(b)(1)(A)–(E) (McKinney 2008).

⁶⁹ *Id.* §§ 5-1.1-A(b)(1)(A)–(I).

⁷⁰ N.Y. DOM. REL. LAW § 5 (McKinney 2008).

⁷¹ N.Y. EST. POWERS & TRUSTS LAW §§ 5-1.2(a)(1)–(6).

for disqualification fail to account for many circumstances in which a surviving spouse should not be entitled to elect against the decedent's will because she did not contribute to the decedent's life as a true spouse would have.

In going to extremes to protect the surviving spouse, the New York legislature has neglected to protect the decedent spouse and his estate. This is particularly important because the deceased spouse cannot defend his rights in death, and his heirs and representatives will struggle to do so without the benefit of his testimony. At least one member of the legal community has recognized this problem. In a 2000 decision, Surrogate Holtzmann observed that there are "numerous instances where the provisions of EPTL [§] 5-1.2 are insufficient to protect estates from unworthy surviving spouses."⁷² Accordingly, we, in New York, find ourselves at another crossroads in this area of estates law. Just as the EPTL was once believed to be the much-needed remedy for the inadequacies of certain parts of the Decedent Estate Law, New York again needs a statutory solution, only this time to ameliorate the shortcomings of the EPTL § 5-1.2.

II. PROBLEMS THAT HAVE RESULTED AND WILL RESULT FROM THE LIMITED GROUNDS FOR SPOUSAL DISQUALIFICATION UNDER EPTL § 5-1.2

A. *Problems Already Confronted By New York Courts*

Several cases have come before the New York courts in which a surviving spouse could not be disqualified under EPTL § 5-1.2, notwithstanding the fact that the presiding Surrogate believed that result to be unjust and inconsistent with public policy.⁷³ Specifically, Surrogates found that the language of the EPTL prevented them from disqualifying surviving spouses who had lived apart from, and had no communication with, their mates for more than a decade, as well as a surviving spouse who had never

⁷² See Margaret Valentine Turano, *Supplementary Practice Commentaries, N.Y. EST. POWERS & TRUSTS § 5-1.2* (McKinney Supp. 2008) (discussing *In re Estate of Lamos*, 313 N.Y.S.2d 781 (Sur. Ct. 1970), and *In re Estate of Carmona*, 223 N.Y.L.J. 92 (Sur. Ct. 2000)).

⁷³ See *In re Estate of Gonzalez*, No. 701P2204, 2005 N.Y. Misc. LEXIS 3463, at *10-*12 (Sur. Ct. 2005) (explaining decedent's spouse was not disqualified despite proposed legislation that would prohibit "laughing spouses" from inheriting).

lived with the decedent and married her solely to obtain U.S. citizenship.

i. Non-Judicial Divorces⁷⁴

To date, it remains very difficult for a couple to divorce in the state of New York.⁷⁵ Prior to 1967, the only ground for divorce in New York was adultery.⁷⁶ After 1967, the New York legislature added cruel and inhuman treatment, abandonment, and a jail term of three or more years as additional fault grounds for divorce.⁷⁷ The only way for a couple to obtain a no-fault divorce in New York is to execute a separation agreement and to live apart in substantial compliance with its terms for at least one year.⁷⁸ If the couple satisfies these requirements, they may seek to have their separation converted to a divorce.⁷⁹ If both spouses cannot

⁷⁴ For the purposes of this Note, the author refers to situations in which spouses sever all ties without legally divorcing as “non-judicial divorces.” Some states recognize these circumstances as “de facto divorces.” For example, Ohio permits couples that live separately and apart for at least one year, without more, to legally divorce. OHIO REV. CODE ANN. § 3105.01(B) (West 2007).

⁷⁵ See Neal R. Feigenson, *Extraterritorial Recognition of Divorce Decrees in the Nineteenth Century*, 34 AM. J. LEGAL HIST. 119, 157 (1990) (stating that, to date, it remains impossible to get divorced in New York absent a showing of fault on the part of one spouse or a one year separation accompanied by comprehensive agreement between the spouses that encompasses financial and custody issues); see also Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 637 (1991) (noting that “New York is one of four remaining states that permit divorce only upon a showing of fault or upon spousal agreement”).

⁷⁶ See Adriaen M. Morse Jr., Comment, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 608 n.12 (1996) (“With the enactment of the Divorce Reform Law of 1966, New York abandoned its position as the only State in the union which regarded adultery as the sole ground for absolute divorce” (quoting *Christian v. Christian*, 365 N.E.2d 849, 852 (N.Y. 1977))); see also J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 579–85 (2007) (asserting that adultery was the sole ground for divorce in New York until 1967 when the Divorce Reform Act of 1966, which provided for the additional grounds found today in N.Y. DOM. REL. LAW. § 170, was enacted).

⁷⁷ See N.Y. DOM. REL. LAW § 170(1)–(3) (McKinney 2008) (providing the grounds upon which a spouse can premise a divorce action); see also N.Y. DOM. REL. LAW, L. 1962, ch. 313, (repealed 1966) (declaring that adultery is the sole grounds for divorce).

⁷⁸ *Id.* § 170(6). In addition to these requirements, there are other procedural requirements. *Id.* Couples must acknowledge the agreement in the form required to entitle a deed to be recorded, and must also be filed with the county clerk in a county where either party resides. *Id.*; see *Id.* § 170 note (Bender, LEXIS through 2008 legislation) (Converting the Legal Separation to Divorce). A no fault divorce in New York requires affirmative proof that the couple complied with § 170(6).

⁷⁹ See Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex Between Domestic Relations Attorneys and their Clients*, 23 HARV. WOMEN'S L.J. 1, 5 n.328 (2000) (illustrating how states that do not have fault

come to such an agreement, either spouse may seek a court-ordered separation decree. However, the party seeking the decree must prove either a traditional fault ground for divorce or failure to support.⁸⁰ A separation decree can only be converted to a divorce decree after the parties have lived apart in substantial compliance with its terms for at least one year.⁸¹

Because it is both difficult and expensive to obtain a divorce,⁸² many couples do what, in effect, amounts to a non-judicial divorce. Simply stated, these couples part ways and live as if they had legally divorced.⁸³ They divide their property between themselves, live separately and apart from one another, rarely or never communicate, maintain separate finances, and ultimately lead separate, unmarried lives.⁸⁴ The failure to legally divorce in New York comes with at least one significant legal consequence: New York courts have held that under EPTL § 5-1.2, a spouse cannot be disqualified where the couple never legally divorced, but lived

grounds may have “quasi no-fault” grounds through this conversion mechanism (citing § 170(5)); see also N.Y. DOM. REL. LAW § 170 note (Bender, LEXIS through 2008 legislation) (Converting the Legal Separation to Divorce) (clarifying that in New York, a party may convert a legal separation into a divorce. These ‘quasi no fault’ grounds however are *not* automatic. New York requires grounds to be proven”) (italics in original).

⁸⁰ N.Y. DOM. REL. LAW § 170(5); see Bernard Rothman, Esq., http://www.newyorkdivorcelawyer.com/uncontested_divorce.html (last visited Aug. 10, 2008) (explaining how to obtain a separation decree).

⁸¹ N.Y. DOM. REL. LAW § 170(5); see Rothman, *supra* note 80 (detailing the requirements for converting a separation decree to a divorce).

⁸² See Amy C. Henderson, Comment, *Meaningful Access to the Courts?: Assessing Self-Represented Litigants’ Ability to Obtain a Fair, Inexpensive Divorce in Missouri’s Court System*, 72 U.M.K.C.L. REV. 571, 573 (2003) (“The price of obtaining a divorce [in the United States] with the help of a lawyer varies depending on the complexity of the case. For example, an uncontested divorce that does not go to court will cost around \$16,500, whereas a contested divorce that proceeds to trial could cost more than \$150,000. However, the average price for obtaining a divorce is around \$20,000.”); see also Janet A. Johnson, *Symposium on the Miller Commission of Matrimonial Law*, 27 PACE L. REV. 539, 540 (2007) (arguing that obtaining a divorce in New York is “expensive, emotionally draining and uncertain”).

⁸³ See *In re Estate of Lamos*, 313 N.Y.S.2d 781, 782 (Sur. Ct. 1970). Surrogate Sobel, in *Lamos*, described the surviving and decedent spouses’ living situation as one in which they lived apart for more than fourteen years and had absolutely no communication with one another. *Id.* Surrogate Sobel pointed out that Surrogate’s courts had encountered similar cases at the time *Lamos* was decided in 1970. *Id.* at 785. The court again encountered this situation in 2000 in *Carmona*. *In re Estate of Carmona*, 223 N.Y.L.J. 92 (Sur. Ct. 2000).

⁸⁴ See *Carmona*, 223 N.Y.L.J. 92 (describing how the spouses lived separate lives for nearly fourteen years); see also *Lamos*, 313 N.Y.S.2d at 782 (“The parties lived together for a short three years. Prior to Mrs. Lamos’ death in 1968, the parties had lived separately and apart without any communication whatsoever for over 14 years.”).

as if divorced for as many as fifty years.⁸⁵

For example, in *Matter of Lamos*, the deceased spouse, Mrs. Lamos, and the surviving spouse, Mr. Lamos, had lived apart and had no communication whatsoever for more than fourteen years prior to Mrs. Lamos's death.⁸⁶ Before their separation, they had lived together for only three years.⁸⁷ After Mrs. Lamos died, Mr. Lamos sought to elect against Mrs. Lamos's will.⁸⁸

Because no decree of divorce, separation, annulment or dissolution was in effect at the date of Mrs. Lamos's death, the only possible grounds for disqualifying Mr. Lamos were either that he had abandoned Mrs. Lamos, or that he had failed to support her.⁸⁹ In order to prove abandonment or failure to support, a decedent's estate must establish that the decedent, during his lifetime, would have been entitled to a decree of separation on those grounds.⁹⁰ To prove abandonment, the decedent's estate must show that the surviving spouse's departure from the marital abode was "unjustified and without the consent of the other spouse."⁹¹ To prove failure to support, the decedent's estate must show that the surviving spouse failed to support the deceased spouse although she desired such support, that the decedent had the means to provide support, and that the surviving spouse had not been guilty of misconduct that would have absolved the decedent of his duty to support her.⁹²

The burden of proving abandonment or breach of the duty to

⁸⁵ See Margaret Valentine Turano, *Supplementary Practice Commentaries*, N.Y. EST. POWERS & TRUSTS § 5-1.2 (McKinney Supp. 2008) (stating that couples who have lived apart for 50 years still cannot be disqualified under § 5-1.2); see also *Lamos*, 313 N.Y.S.2d at 782-85 (holding that a spouse could not be disqualified despite having lived apart from the decedent for fourteen years).

⁸⁶ *Lamos*, 313 N.Y.S.2d at 782.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 782-83.

⁹⁰ See *In re Estate of Mead*, 119 N.Y.S.2d 579, 581 (App. Div. 1953) (stating that what would be a successful establishment for a judgment for separation on grounds of either abandonment or neglect is sufficient to prove abandonment for these purposes); see also *Lamos*, 313 N.Y.S.2d at 783 (explaining the rule that grounds for abandonment must be sufficient to sustain a judgment of separation).

⁹¹ *Lamos*, 313 N.Y.S.2d at 783.

⁹² *Id.* at 784 (stating the elements which must be met for a husband who failed to support his wife to be found to have forfeited his right to elect against his wife's will (quoting *In re Estate of Barc*, 31 N.Y.S.2d 139 (Sur. Ct. 1941))).

support rests with the representatives of the decedent's estate.⁹³ Because of the decedent's unavailability, it is frequently impossible for the estate to prove its claims. If the burden rested with the surviving spouse to prove that he did *not* abandon the decedent or breach his duty to support her, it would also be nearly impossible for him meet this burden because his testimony would be subject to preclusion under the Dead Man's statute.⁹⁴ Essentially, either party would likely lose its case if saddled with the burden of proof. In actuality, because the burden rests with the estate, the estate is often the losing party, even when that result is not fair or just. This is precisely what happened in *Lamos*, where "[d]espite the proof of short cohabitation—and long separation without support—the witnesses called [by the decedent's estate] to establish [that the surviving spouse should be disqualified] failed to do so."⁹⁵

Accordingly, although Mr. and Mrs. Lamos had not lived together or acted as a married couple for more than a decade, Surrogate Sobel held that Mr. Lamos was entitled to elect against Mrs. Lamos's will.⁹⁶ However, Surrogate Sobel emphatically believed the outcome to be an "obviously unjust" result of the "present state of the law in this frequently recurring and troublesome area."⁹⁷

Similarly, in *In re Carmona*, the decedent, Mrs. Carmona, and her husband⁹⁸ had lived apart for 14 years prior to Mrs. Carmona's death.⁹⁹ Mrs. Carmona died without a will, leaving her hus-

⁹³ See *In re Estate of Maiden*, 31 N.E.2d 889, 889 (N.Y. 1940) (explaining that abandonment must be established by the party asserting it); see also *In re Estate of Rechtshaffen*, 16 N.E.2d 357, 358 (N.Y. 1938) (stating that a party alleging that a decedent's spouse should be disqualified from exercising his right of election bears the burden of proof).

⁹⁴ See N.Y. C.P.L.R. 4519 (McKinney 2008) (outlining that an interested party cannot testify as a witness in an action against the executor of the deceased person concerning a communication between the witness and the deceased person); see also *Lamos*, 313 N.Y.S.2d at 784 (stating that the surviving spouse is incompetent to testify to "transactions" between himself and the surviving spouse).

⁹⁵ *Lamos*, 313 N.Y.S.2d at 785.

⁹⁶ *Id.*

⁹⁷ *Id.* at 782.

⁹⁸ The opinion in this case does not refer to Mrs. Carmona's husband by a proper name, but only as "Mrs. Carmona's husband," seemingly to protect his identity as a result of the egregious allegations against him. For brevity's sake, he will be referred to here as "Mr. Carmona," while the author acknowledges that the opinion does not refer to him as such.

⁹⁹ *In re Estate of Carmona*, 223 N.Y.L.J. 92 (Sur. Ct. 2000).

band as her sole statutory distributee.¹⁰⁰ The Carmonas had a daughter, Angela, but she predeceased Mrs. Carmona by approximately four months.¹⁰¹ Mrs. Carmona's mother petitioned the court for letters of administration, arguing that Mr. Carmona was disqualified as a surviving spouse pursuant to EPTL § 5-1.2.¹⁰² Mr. Carmona asserted that he was not disqualified and sought to be appointed the administrator of Mrs. Carmona's estate as her sole statutory distributee.¹⁰³

At trial, Mrs. Carmona's mother, brother and nephew all testified that Mrs. Carmona and Angela had almost no relationship with Mr. Carmona in the 14 years before Mrs. Carmona's death.¹⁰⁴ They claimed the relationship ended because Mrs. Carmona had found that her husband engaged in sexual relations with his sister, and because Mr. Carmona had admitted to fathering two of his sister's children.¹⁰⁵ Mrs. Carmona's relatives further asserted that Mrs. Carmona and Angela moved out of the marital residence permanently at that time, and that they had little, if any, contact with Mr. Carmona thereafter.¹⁰⁶ Mr. Carmona denied that he ever had a sexual relationship with sister. He called his neighbors as witnesses, and they likewise testified that they never knew of any such sexual relationship.¹⁰⁷ Mr. Carmona and his neighbors further testified that Mrs. Carmona and Angela would often visit Mr. Carmona at the former marital residence, and that Mr. Carmona had offered some degree of financial support to his wife and daughter.¹⁰⁸

Surrogate Holzman noted that the burden of proving that Mr. Carmona had either abandoned the decedent or failed to support her rested with the petitioner, Mrs. Carmona's mother.¹⁰⁹ On the

¹⁰⁰ Compare *Carmona*, 223 N.Y.L.J. 92, with N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(2) (McKinney 2008) (providing that where a decedent dies without a will and is survived by a spouse and no issue, his entire estate passes to the surviving spouse by operation of law).

¹⁰¹ *Carmona*, 223 N.Y.L.J. 92.

¹⁰² *Id.*

¹⁰³ *Id.*; see N.Y. SUR. CT. PROC. ACT LAW § 1001(1)(a) (McKinney 2008) (stating that, where a decedent leaves a surviving spouse, letters of administration will issue to the surviving spouse).

¹⁰⁴ *Carmona*, 223 N.Y.L.J. 92.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

issue of abandonment, Surrogate Holzman found that Mr. Carmona had not abandoned Mrs. Carmona, because it was Mrs. Carmona who departed from the marital residence and both parties had consented to her departure.¹¹⁰ Though the court noted that a refusal to cease having sexual relations with his sister would have constituted constructive abandonment, it ultimately found that Mrs. Carmona's mother had not proven that to be true by a preponderance of the evidence.¹¹¹ On the issue of failure to support, Mrs. Carmona's mother also failed to meet her burden of proving that Mr. Carmona had the financial means to provide support and that Mrs. Carmona had sought such support.¹¹² For these reasons, Surrogate Holzman concluded that Mr. Carmona was not disqualified under EPTL § 5-1.2, and therefore Mrs. Carmona's mother was not entitled to inherit from her daughter in intestacy nor to be appointed the administrator of her daughter's estate.¹¹³

However, Surrogate Holzman did not end his opinion with the disposition of these issues. Instead, he dedicated three paragraphs to pointing out the shortcomings of EPTL § 5-1.2 and to recommending legislative changes thereto.¹¹⁴ Surrogate Holzman wrote that the result compelled by the statute in this case was "neither in accord with the probable wishes of the decedent nor . . . supported by any public policy considerations."¹¹⁵ Further, he wrote that Justice Sobel had been correct more than twenty years earlier in *Lamos* when he wrote that the provisions of EPTL § 5-1.2 are insufficient to protect estates from unworthy surviving spouses. In addition, he noted that since *Lamos* there have been "additional illustrations, including the instant case, of results which are contrary to the wishes of the decedent and benefit a survivor who had no right to expect to receive anything of pecuniary value from the decedent while she was alive."¹¹⁶ Finally, Surrogate Holzman recommended that the legislature address this problem by enacting a law that would allow a surviving spouse to be disqualified if a married couple mutually agreed to

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

part ways and then lived apart for a period of between three and five years.¹¹⁷

Surrogates Sobel and Holzman are not alone in their opinion that EPTL § 5-1.2 provides insufficient protection for the decedent spouse and his estate. Some legal scholars have also opined that the statute is inadequate, and have recommended that the legislature consider amending it.¹¹⁸ A proposal for legislative change can be found *infra* at Section III.

ii. Sham Marriages

Recently, the Bronx County Surrogate's Court considered a case in which the decedent and surviving spouse had married solely to enable the surviving spouse to become a U.S. citizen.¹¹⁹ The decedent, Julia Dominguez, perished aboard American Airlines Flight 587, which crashed in Queens, New York in 2001.¹²⁰ After Julia's death, her daughter, Ixia Hernandez, petitioned the court to disqualify Julia's husband, Diego Mercedes, from exercising his right of election.¹²¹ Ixia alleged that Diego was disqualified because the marriage was nothing more than a "sham green card marriage . . . [entered into so Diego could] gain favorable immigration status."¹²²

At trial, Diego testified that he married Julia for love, and that the two consummated the marriage on the night it occurred and at other times thereafter.¹²³ Several friends of Diego also testified

¹¹⁷ *Id.*

¹¹⁸ See Margaret Valentine Turano, Supplementary Practice Commentaries, N.Y. EST. POWERS & TRUSTS § 5-1.2 (McKinney Supp. 2008) (asserting that the author agrees with Surrogate Holzman that the New York legislature "should consider amending the statute" to avoid the sort of inequitable results seen in *Carmona* and *Lamos*); see also SURROGATE'S COURT ADVISORY COMM., REPORT OF THE SURROGATE'S COURT ADVISORY COMMITTEE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 21 (2004) [hereinafter REPORT OF THE SURROGATE'S COURT ADVISORY COMMITTEE] (recommending that "section 5-1.2(a) of the Estates, Powers and Trusts Law be amended to disqualify as surviving spouses persons who for a prolonged period prior to a decedent's death were married to the decedent in name only").

¹¹⁹ *In re Estate of Dominguez*, No. 082774/99, 2002 N.Y. Misc. LEXIS 1596, at *1-*2 (Sur. Ct. Nov. 18, 2002). In *Dominguez*, the decedent's daughter was petitioning for issuance of letters of administration to herself and not the decedent's spouse, who the decedent's daughter alleged was married to the decedent in a "sham green card marriage," thus being disqualified under EPTL § 5-1.2. *Id.* at *2.

¹²⁰ *Id.* at *1-*2.

¹²¹ *Id.*

¹²² *Id.* at *2.

¹²³ *Id.* at *2-*4.

that Diego and Julia held themselves out to be married, and one specifically testified that the two shared a bedroom while on vacation with him.¹²⁴ Diego further testified that, even though he resided in Canada throughout their marriage, he would frequently visit Julia in the Bronx and spend the night with her at her apartment, although he never permanently had a key to her home.¹²⁵ It was also established that immediately after three of Diego's other marriages, he had attempted to complete immigration paperwork in the United States or in Canada, but was never able to obtain citizenship status.¹²⁶

In contrast, Ixia testified that her mother's relationship with Diego was only platonic, and both Ixia and her sisters claimed that Diego had slept at their mother's apartment on only a few occasions, and always on the sofa by himself.¹²⁷ One of Ixia's sisters further testified that her mother told her she married Diego "for papers," and that she had slept in her mother's bedroom, with her mother, on the night Julia married Diego.¹²⁸ Julia's sister gave similar testimony to that of her nieces, claiming that Julia had told her that she married Diego in exchange for \$3,000 so that he could obtain citizenship.¹²⁹ In addition, Julia's boyfriend, Mateo Eurenna, testified that he had a continuous romantic relationship with Julia for eight years before her death, and that he never knew that Julia and Diego were married.¹³⁰

The court held that Ixia had proven, by clear and convincing evidence, that her mother married Diego solely to assist him in attaining citizenship.¹³¹ However, the court refused to disqualify Diego as Julia's surviving spouse under EPTL § 5-1.2.¹³² Although their marriage was likely voidable on the grounds of fraud, EPTL § 5-1.2 states that a spouse can be disqualified only where "[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

¹²⁴ *Id.* at *5.

¹²⁵ *Id.* at *6.

¹²⁶ *Id.* at *6-7.

¹²⁷ *Id.* at *7.

¹²⁸ *Id.* at *7-8.

¹²⁹ *Id.* at *9.

¹³⁰ *Id.* at *9-10.

¹³¹ *Id.* at *11.

¹³² *Id.* at *13.

state, was *in effect when the deceased spouse died.*"¹³³ Because no decree of annulment was in effect when Julia died, Diego could not be disqualified as a result of the "sham" marriage.¹³⁴ The court also declined to use its equity powers to "add a 'sham marriage for immigration purposes' as a statutory grounds for disqualification where the legislature has failed to enact such a provision."¹³⁵

In a lucky twist for Julia's family, however, the court disqualified Diego under EPTL § 5-1.2 on the grounds that the marriage was void as bigamous because Diego had never procured a valid divorce from his second wife and/or Julia had never procured a valid divorce from her first husband.¹³⁶ Had Julia's marriage to Diego not been bigamous, her family would have lost the battle over her estate.

The "sham marriage" situation differs from that of the non-judicial divorce because, with respect to the latter, husband and wife lived as such for a time before parting ways. In the instance of a sham marriage, the parties *never* actually lived together as husband and wife. However, in a sham marriage for immigration purposes, the parties actually intended to be married and to take advantage of the rights that flow from marriage, at least with respect to citizenship status. In the case of a non-judicial divorce, the parties intend to extinguish their marital relationship and the rights resulting from it. In either instance, two things are clear: (1) the couple's so-called marital relationship does not resemble a true marriage at law or in fact; and (2) each member of the couple did not intend to, or at least never contemplated, giving his or her spouse one-third of his or her estate.

B. A New Problem on the Horizon

In general, people today are living longer¹³⁷ and the elderly are

¹³³ N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a)(1) (McKinney 2008) (emphasis added).

¹³⁴ *Dominguez*, 2002 N.Y. Misc. LEXIS 1596, at *14.

¹³⁵ *Id.* at *16.

¹³⁶ *Id.* at *26–*27.

¹³⁷ See Gina Kolata, *So Big and Healthy Grandpa Wouldn't Even Know You*, N.Y. TIMES, Jul. 30, 2006, available at <http://www.nytimes.com/2006/07/30/health/30age.html?pagewanted=print> (observing that humans are living longer lives); see also JUDITH E. TINTINALLI, TINTINALLI'S EMERGENCY MEDICINE (6th ed. 2003), available at <http://www.accessmedicine.com/content.aspx?aID=610128> (projecting that by 2020, 25% of the population will be aged 65 or older).

relying heavily on non-familial caretakers.¹³⁸ This has placed many elderly individuals in a vulnerable position in which their caretakers have the ability to exploit them and their finances.¹³⁹ Recent cases have highlighted the alarming trend of caretakers and service providers who financially exploit their elderly employers after marrying them, and have held that such marriages are voidable on the grounds that the ward lacked capacity to marry.¹⁴⁰

In 2007, the New York State Supreme Court annulled the marriage of "A.S.", an 89-year old woman, and Victor Castro, her 57-year old chauffeur.¹⁴¹ A New York court adjudicated A.S. incapacitated and appointed her daughter, Carmen, as her guardian.¹⁴² The court gave Carmen many powers, including the power to seek an annulment of A.S.'s marriage to Victor.¹⁴³ From its inception, A.S.'s marriage was kept secret from Carmen and A.S.'s grandson, with whom she had close relationships.¹⁴⁴ Castro used the marriage to complete immigration papers necessary to bring his daughter to the United States from Ecuador two weeks after the alleged marriage ceremony took place.¹⁴⁵ Three years later, Carmen learned of her mother's marriage to Castro for the first time while her mother was hospitalized after having a heart at-

¹³⁸ See *In re Estate of Burke*, 441 N.Y.S.2d 542, 549 (App. Div. 1981) ("With the general increase in the longevity of men and women, the elderly population in this nation has increased and will continue to do so, and, with such demographic change, more and more of the elderly will find themselves in the care of nursing home proprietors."); see also TINTINALLI, *supra* note 137 (asserting that even a minor injury like a sprained ankle may render an elderly person incapacitated and that "many older persons need to rely on caretakers").

¹³⁹ Compare *Burke*, 441 N.Y.S.2d at 549 ("It is inevitable that the aged and infirm, under such circumstances, will become very dependent upon those who tend their wants, and a high degree of confidentiality will develop under which the aged will reveal to them their closest thoughts and the state of their financial affairs"), with *supra* note 137 and 138 and accompanying text (presenting the evidence that people are living longer lives).

¹⁴⁰ See *In re Joseph S.*, 808 N.Y.S.2d 426, 428-29 (App. Div. 2006) (holding that the annulment of a marriage is "an available remedy" where there is evidence that a party is "incapable of understanding the nature, effect, and consequences of the marriage"); *In re Application for A.S.*, No. 20493/062007, 2007 N.Y. Misc. LEXIS 2693, at *16 (Sup. Ct. Apr. 24, 2007) (illustrating that a marriage is declared null and void when a party is unable to understand "the nature, effect, and consequences of the marriage" (quoting *Joseph S.*, 808 N.Y.S.2d at 428)).

¹⁴¹ *Application for A.S.*, 2007 N.Y. Misc. LEXIS 2693, at *2.

¹⁴² *Id.* at *1.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *7.

¹⁴⁵ *Id.*

tack and stroke.¹⁴⁶ A.S.'s daughter also discovered that several of A.S.'s bank accounts had been depleted and that Castro's daughters were living rent-free in A.S.'s properties.¹⁴⁷ The court declared the marriage null and void under DRL § 140(c), on the ground that A.S. lacked capacity to marry and, in the alternative, under DRL § 140(e), on the ground that A.S.'s chauffeur had committed fraud by marrying A.S. solely to lawfully bring his daughter to the United States.¹⁴⁸

Similarly, in *In re Joseph S.*, the Appellate Division upheld a trial court's decision to annul the marriage of Joseph S. and his caretaker, Juanita Kho.¹⁴⁹ Kho was 43 years younger than Joseph, who was hard of hearing, suffered from severe short-term memory loss, and was entirely unable to care himself.¹⁵⁰ Although Joseph had not been diagnosed as suffering from any psychiatric or mental disease, the court annulled the marriage on the ground that Joseph lacked capacity to consent to marriage.¹⁵¹ The court found that Kho's motives were questionable, especially considering that Joseph had ceased his previously active social life and became isolated from numerous longtime trusted friends.¹⁵²

The facts of A.S. and *Joseph S.* portray greedy, non-familial caretakers who victimize their elderly and vulnerable employers. Unfortunately, in our society, elder abuse is becoming increasingly common.¹⁵³ The courts and the parties in these cases were fortunate because the actions to annul the marriages were initiated before the incapacitated individuals died. Had A.S. or Joseph S. died before the annulments of their respective marriages, their caretakers would have had the opportunity to exercise their spousal rights of election. According to the precedent set by the only case considering elder abuse and the right of election,¹⁵⁴ nei-

¹⁴⁶ *Id.* at *10.

¹⁴⁷ *Id.* at *12.

¹⁴⁸ *Id.* at *16-*17.

¹⁴⁹ *In re Estate of Joseph S.*, 808 N.Y.S.2d 426, 428 (App. Div. 2006).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See *In re Burke*, 441 N.Y.S.2d 542, 549 (App. Div. 1981) ("Although the vast majority of those who care for the aged are honest and dedicated professionals, the relationship is one from which the greedy and corrupt may find considerable gain.")

¹⁵⁴ *In re Application of Wang*, No. 2488/2006, 2008 N.Y. Misc. LEXIS 4031 (Sur. Ct. July 3, 2008).

ther spouse could have been disqualified, as EPTL § 5-1.2 requires an annulment to be in effect at the decedent's death in order to disqualify a spouse.

In *In re Application of Wang*, Irving Berk died at one hundred years of age, leaving an estate worth in excess of \$5 million to his sons and grandchildren.¹⁵⁵ Several months after Irving's death, his sons learned for the first time that their father had married his 47-year-old nurse, Judy Wang, within a year of his death.¹⁵⁶ Wang, who was not provided for in Irving's will, moved for summary judgment seeking to assert her right of election as Irving's surviving spouse.¹⁵⁷ Irving's sons opposed the motion, arguing that the marriage should be annulled because their father, who was 99-years-old at the time of the marriage, lacked the capacity to enter the marriage and the marriage was procured by fraud, duress or force.¹⁵⁸ The Kings County Surrogate's Court rejected these arguments and granted summary judgment to Wang.¹⁵⁹ Surrogate Johnson ruled that, even if a post mortem annulment were granted, it "would not defeat [Wang's] right of election as a surviving spouse as [her] right to elect against the Estate became fixed and unalterable upon Irving Berk's death."¹⁶⁰ Further, Surrogate Johnson stated that she could not "write disqualifications into EPTL § 5-1.2"¹⁶¹ and that even though the outcome "may appear incongruous . . . [it] is simply the state of the law."¹⁶²

III. A PROPOSAL FOR LEGISLATIVE CHANGE AND SUPPORTING POLICY REASONS

A. *Policy Reasons for Legislative Change*

Given the reluctance of courts to reinterpret EPTL § 5-1.2 despite the unjust consequences that sometimes result from its literal application, it is clear that legislative change is necessary. There are two main policy justifications for such change. First,

¹⁵⁵ *Id.* at *1–*2.

¹⁵⁶ *Id.* at *12.

¹⁵⁷ *Id.* at *1.

¹⁵⁸ *Id.* at *6, *12.

¹⁵⁹ *Id.* at *13.

¹⁶⁰ *Id.* at *7.

¹⁶¹ *Id.* at *12

¹⁶² *Id.*

the EPTL is not harmonious with the DRL. In certain situations where a marriage is voidable under the DRL, a deceased individual's estate can seek a post mortem annulment that terminates any rights to which surviving "spouse" would have been entitled. However, such a spouse may *still* elect to the decedent's will under the EPTL, which only permits disqualification where the annulment was effective at the date of the decedent's death. Second, when one examines the EPTL's legislative history, it is apparent that its drafters were entirely preoccupied with protecting the surviving spouse. This preoccupation has led to problems because that position is both extreme and outdated. Today's cultural climate is such that the surviving spouse needs somewhat less protection and the deceased's estate needs more than the EPTL presently provides. In particular, a shift in the traditional roles of husband and wife, the increased incidence of elder abuse, and changes to the notion of marriage itself warrant reconsideration by the legislature of the statutory grounds for spousal disqualification.

i. Tension between the EPTL and the DRL with respect to voidable marriages

An examination of the legislative history to the EPTL illustrates that the Commission provided no discussion of the disqualification of spouses in the case of voidable marriages. By its own words, the Commission never considered "the rules by which one would ascertain whether a particular claimant has entered into a valid marriage with the decedent," as doing so would have required "a textbook on the law of Domestic Relations."¹⁶³ The most significant problem that has resulted from this is that, in some instances, the EPTL effectively allows a so-called spouse to exercise her right of election, a right conferred only by marriage, even where the New York State Supreme Court has granted a post mortem annulment of that marriage.¹⁶⁴ More specifically,

¹⁶³ FOURTH REPORT, *supra* note 25, at 275.

¹⁶⁴ *See id.*; *see also* N.Y. DOM. REL. LAW § 140(c) (McKinney 2008); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 2008). The New York Domestic Relations law provides that a marriage may be annulled after the death of one of the spouses in certain circumstances. N.Y. DOM. REL. LAW § 140(c) (McKinney 2008). The Estates Powers and Trusts law, however, states that a spouse may only be disqualified if the annulment was in effect at the time of decedent's death. N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 2008). Therefore, a court may annul a marriage after the death of one of the parties, but

DRL § 140 specifically provides that annulments may be obtained after the death of one of the spouses in certain circumstances, while EPTL § 5-1.2 refuses to give force and effect to annulments that were not in effect at the time of the decedent's death.¹⁶⁵

The DRL provides that a post-mortem annulment may be obtained where the consent of the deceased spouse to the marriage was procured by force, duress or fraud,¹⁶⁶ and where one of the spouses was either mentally ill or mentally retarded and thus incapable of consenting.¹⁶⁷ After the death of the non-offending party, any family member that has an interest in avoiding the marriage may seek an annulment while the remaining spouse is still alive,¹⁶⁸ the effect of which is to put an end to the marriage from the beginning,¹⁶⁹ thus destroying it "as a source of rights and duties."¹⁷⁰

Nevertheless, EPTL § 5-1.2 provides that a post mortem decree of annulment will not result in the disqualification of a surviving spouse.¹⁷¹ Accordingly, the EPTL permits a person to inherit as though he were the surviving spouse of the decedent *even if* the

such annulment will not serve to disqualify the surviving spouse from inheriting by virtue of a non-existent marriage.

¹⁶⁵ Compare N.Y. DOM. REL. LAW §§ 140(c), (e) (McKinney 2008) (describing circumstances in which an action to annul a marriage may be brought after the death of one of the spouses to the marriage), *with* N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 2008) (providing that a decree of dissolution, separation, divorce or annulment must be in effect at the time of the decedent's death in order to disqualify his surviving spouse).

¹⁶⁶ N.Y. DOM. REL. LAW § 140(e) (McKinney 2008) (stating that an action to annul a marriage for fraud, duress or force "may also be maintained during the life-time of the [offending] party by the parent, or the guardian of the person of the party whose consent was so obtained, or by any relative of that party who has an interest to avoid the marriage, provided that in an action to annul a marriage on the ground of fraud the limitation prescribed in the civil practice law and rules has not run.").

¹⁶⁷ See N.Y. DOM. REL. LAW § 140(c) (McKinney 2008) ("An action to annul a marriage on the ground that one of the parties thereto was a mentally retarded person may be maintained at any time during the life-time of *either party* by any relative of a mentally retarded person, who has an interest to avoid the marriage. An action to annul a marriage on the ground that one of the parties thereto was a mentally ill person may be maintained . . . after the death of the mentally ill person in that condition, and during the life of the other party to the marriage, by any relative of the mentally ill person who has an interest to avoid the marriage.") (emphasis added).

¹⁶⁸ See *supra* note 166–67 and accompanying text.

¹⁶⁹ *Sleicher v. Sleicher*, 167 N.E. 501, 502 (N.Y. 1929) ("[A]nnulment when decreed, puts an end to it from the beginning."); *Gaines v. Jacobsen*, 127 N.Y.S.2d 909, 914 (App. Div. 1954) (commenting that an annulment destroys the marriage from the beginning).

¹⁷⁰ *American Surety Co. v. Conner*, 166 N.E. 783, 786 (N.Y. 1929).

¹⁷¹ N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 2008).

marriage is annulled by another court. In essence, the Supreme Court may declare the marriage “no more,” but the Surrogate’s Court will simply ignore that declaration. This nonsensical result makes it clear that: (1) it would have been wise for the Commission to have invested in a Domestic Relations Law textbook; and (2) legislative change is necessary to correct the discrepancy between these laws.

- ii. EPTL § 5-1.2 provides too much protection to the surviving spouse and too little to the deceased’s estate in light of modern developments.

The Commission’s report plainly states that its purpose, with respect to the laws concerning the spousal right of election, was to “evaluate the 30 years of experience with the [Decedent Estate Law] to see whether it [had] effectuated the reform it was designed to make or whether *some new method of protecting the surviving spouse [was] necessary.*”¹⁷² Going into the reform, the legislature quite obviously did *not* have the protection of the deceased spouse or his estate in mind. Further, the Commission’s report notes that those responsible for the creation of the elective share in New York promised that it would “end disinheritance of the surviving spouse by the deceased.”¹⁷³ What they did not realize was that eliminating spousal disinheritance would come only at the cost of enabling an unworthy spouse and, in some cases, a non-spouse,¹⁷⁴ to inherit from the decedent. The legislature’s choice to go to extremes in protecting the surviving spouse has brought us to the point where, as Justice Holzman aptly noted, the law is “insufficient to protect estates from unworthy surviving spouses.”¹⁷⁵

The Commission cannot be faulted for giving so much weight to the need to protect the surviving spouse. Indeed, before the enactment of the EPTL, spouses could, and did, evade the laws aimed at preventing spousal disinheritance by transferring their assets into non-testamentary forms.¹⁷⁶ Many surviving spouses

¹⁷² THIRD REPORT, *supra* note 2, at 191 (emphasis added).

¹⁷³ *Id.* at 209 (citing COMBINED REPORTS OF THE DECEDENT ESTATE COMMISSION, Legis. Doc. No. 70, at 19 (1928)).

¹⁷⁴ Such as in the case of a post-mortem annulment.

¹⁷⁵ *In re Estate of Carmona*, 223 N.Y.L.J. 92 (Sur. Ct. 2000).

¹⁷⁶ See *supra* notes 51–64 and accompanying text (detailing instances of spousal disinheritance and the principles behind the laws that sought to prevent disinheritance).

were left with nothing as a result. At the time, the problems facing the courts today were not as pervasive. However, in the face of modern problems, the laws must be amended to account for the results of changing times.

a. Women are no longer necessarily reliant upon their husbands for financial survival.

While early laws barring spousal disinheritance were designed to protect women, they are no longer unequivocally the weaker spouse in a marital relationship.¹⁷⁷ The roles of men and women, husband and wives, and the family itself have changed dramatically in recent years.¹⁷⁸ Many women manage to work and raise children on their own, without the assistance of a husband.¹⁷⁹ In other families, both husband and wife have full-time careers and the responsibilities of child-rearing are assumed, in part, by extended family or outside help.¹⁸⁰ Further still, in some families the husband assumes the responsibility of rearing the children and maintaining the home while the wife enjoys a successful ca-

¹⁷⁷ See John C. Welsh, *2000-2001 Survey of New York Law: Estates and Trusts*, 52 SYRACUSE L. REV. 375, 382 (2002) (explaining that, over time, a surviving spouse has been awarded increasing protection); see also *supra* note 19 and accompanying text.

¹⁷⁸ See Marion Crain, "Where Have All the Cowboys Gone?" *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1877 (1999) (emphasizing the dramatic changes that have occurred in the traditional gender order); see also Ronald Z. Domskey, *'Til Death Do Us Part . . . After That, My Dear, You're On Your Own: A Practitioner's Guide to Disinheriting a Spouse in Illinois*, 29 S. ILL. U.L.J. 207, 207 (2005) (noting that since the 1950's, "there has been unprecedented change, an evolution if you will, in the American family").

¹⁷⁹ See Crain, *supra* note 178 at 1877-78 (describing that "[t]he traditional male breadwinner/female homemaker model that once shaped duties and expectations in marriage is giving way to a model in which men and women function as coequal breadwinners"); see also Child Trends Data Bank, Family Structure, available at <http://www.childtrendsdata.bank.org/indicators/59FamilyStructure.cfm> (last visited Mar. 25, 2008) (stating that the percentage of single mothers has increased from 11 percent to 23 percent from 1970 to 2006).

¹⁸⁰ See J. Thomas Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 CASE W. RES. L. REV. 223, 236 n.67 (1987). In 1983, in 40.9% of families where the husband was employed, the wife was also employed. *Id.*; see U.S. Census Bureau, *Percent of Married-Couple Families with Both Husband and Wife in the Labor Force: 2006*, 2006 American Community Survey [hereinafter U.S. Census Bureau], available at http://factfinder.census.gov/servlet/GRTTable?_bm=y&-geo_id=01000US&-box_head_nbr=R2304&-ds_name=ACS_2006_EST_G00_&-redoLog=false&mt_name=ACS_2004_EST_G00_R2304_US30&-format=US-30&-CONTEXT=grt. According to the U.S. Census Bureau, in 2006, both husband and wife were in the work force in approximately 53% of all married couples in the United States. U.S. Census Bureau.

reer.¹⁸¹ It is no longer the case that a woman cannot provide for herself and her family in the absence of a man's financial contribution. While most elective share laws are worded in a gender-neutral manner, they are still based upon the idea that one spouse provides financially while the other, who cannot survive without the other, makes the home. Simply put, this is no longer the case. Accordingly, many of the reasons for having an ironclad right of election have become irrelevant.

b. The elderly are the new class of "weaker spouse" and the EPTL should be amended to protect them.

Elder abuse is a relatively new phenomenon.¹⁸² Today, people are living longer than ever before, and the elderly often lack the mental or physical facilities necessary to live on their own.¹⁸³ In many cases, elderly individuals require the assistance of live-in nurses or caretakers.¹⁸⁴ "It is inevitable that the aged and infirm, under such circumstances, will become very dependent upon

¹⁸¹ See U.S. Department of Labor, Bureau of Labor Statistics, Employment in Married-Couple Families, Apr. 28, 2006, available at <http://www.bls.gov/opub/ted/2006/apr/wk4/art05.html>. According to the U.S. Department of Labor, in 2005, in 6.5% of married couples, the wife was employed while the husband was not. *Id.*; see Crain, *supra* note 171, at 1877-78. "Dramatic changes have occurred in the traditional gender order [since 1974.] One of the most striking is the increased presence of women in the waged labor market." Crain, *supra* note 178, at 1877.

¹⁸² See generally THE NATIONAL CENTER ON ELDER ABUSE, AMERICAN PUBLIC HUMAN SERVICES ASSOCIATION & WESTAT, INC., THE NATIONAL ELDER ABUSE INCIDENCE STUDY: FINAL REPORT 1-2 (1998), www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse/ABuseReport_Full.pdf (discussing the prevalence of elder abuse in contemporary society). See Korpus, *supra* note 1, at 542-43 (emphasizing the prevalence of elder abuse and the need for tools to fight such abuse).

¹⁸³ See *In re* Application for A.S., No. 20493/062007, 2007 N.Y. Misc. LEXIS 2693, at *16-*17 (Sup. Ct. Apr. 24, 2007) (emphasizing that an elderly woman, who was incapacitated due to "a progressive and long-term mental disease" and incapable of understanding "the nature and consequences of marriage," was taken advantage of by her chauffeur, who fraudulently induced her to enter into marital relationships with him); see also Korpus, *supra* note 1, at 543 ("The elderly experience increased vulnerability to abuse from family members and caretakers as they become frail, dependent, and hampered by loss of physical and mental faculties.").

¹⁸⁴ See Barbara Coleman et al., AARP Public Policy Institute, *Long Term Care*, http://assets.aarp.org/rgcenter/health/fs27r_care.pdf (last visited July 22, 2008). In 1998, it was estimated that eight million elderly persons required long-term home health care. It has been projected that by 2018, 9.9 million elderly persons will require long-term care and, in 2030, 10.8 million elderly persons will require long-term care. *Id.*; see Jerry Resler, *Better Care for the Aging*, MILWAUKEE J. SENTINEL, Aug. 28, 2001. Resler stated that "[o]ver the next 20 years, the projected number of elderly Americans requiring long-term care is expected to double, to nearly 14 million." Resler, *supra* note 184.

those who tend their wants, and a high degree of confidentiality will develop under which the aged will reveal to them their closest thoughts and the state of their financial affairs.”¹⁸⁵ This makes the elderly vulnerable, and puts caretakers in a prime position to exploit and deceive.¹⁸⁶ As we have seen, some caretakers have done just that.

While any caretaker who marries his or her incapacitated ward must fear that the ward’s family or friends will seek to annul the marriage, this fear is largely extinguished at the death of the ward. Although an action for annulment after the ward’s death may result in extinguishment of the marriage itself, it will not extinguish the caretaker’s ability to lay claim to one-third of the decedent’s estate.¹⁸⁷ This results in a dramatic role-reversal – now, the prevailing concern is not that the surviving spouse will be left penniless, but that the surviving spouse will deprive the decedent’s other heirs of that which is rightfully theirs. In short, a surviving spouse in these circumstances may be unjustly enriched simply by squirming through a loophole in the EPTL.¹⁸⁸

- c. There is no longer a stigma associated with terminating a marriage, and people frequently end their marriages, at law and in fact, without hesitation.

Another significant societal change is the increasing prevalence of divorce.¹⁸⁹ In considering the right of election, the legisla-

¹⁸⁵ *In re Estate of Burke*, 441 N.Y.S.2d 542, 549 (App. Div. 1981).

¹⁸⁶ Korus, *supra* note 1, at 544 (explaining that, as the elderly get older, they become more likely to be emotionally, physically, or financially abused); see Gina Salamone, *Secrets & Lies: The case of Brooke Astor highlights concerns of Elder Abuse in the City*, N.Y. DAILY NEWS, July 30, 2006 (reporting that the elderly are commonly subjected to psychological and emotional abuse “but it’s usually associated with another type of abuse.”).

¹⁸⁷ See generally N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 2008) (providing that a spouse may only be disqualified on the basis of divorce, annulment, dissolution or separation where a decree was in effect on decedent’s date of death); *Bennett v. Thomas*, 327 N.Y.S.2d 139, 140 (App. Div. 1971) (stating that the husband is a surviving spouse for election purposes unless an annulment was in effect when the deceased spouse died).

¹⁸⁸ See THIRD REPORT, *supra* note 2, at 209 (noting that, even at the time of the Commission’s report in 1964, critics of the right of election had suggested that the right does not protect the surviving spouse, but “enriches her at the expense of others dependent on the testator’s bounty”); see also *supra*, note 15 and accompanying text.

¹⁸⁹ See Oldham, *supra* note 180, at 236 (asserting that recent social changes, such as the acceptance of divorce at will by most states, have significantly altered the institution of marriage); see also Glenn T. Stanton, *Fact Sheet on Divorce in America*, Smartmarriages.com, http://www.smartmarriages.com/divorce_brief.html (last visited Aug. 11, 2008)

tive history to the EPTL noted that “[i]n the vast majority of cases, there is not family disharmony, at least during the decedent’s lifetime.”¹⁹⁰ At present, however, it is the unfortunate truth that family disharmony is common.¹⁹¹ Though statistics vary, most sources estimate that approximately 40% to 50% of marriages will end in divorce.¹⁹² In contrast, the incidence of divorce in 1960 was about half of what it is today.¹⁹³ These figures do not account for the very real problem posed by the number of couples who parted ways without obtaining a legal divorce, separation, or annulment.

The legislature flirted with the idea of addressing the non-judicial divorce in 1992, when it amended various provisions of the EPTL based upon six reports containing the findings and recommendations of the EPTL-SCPA Legislative Advisory Committee (hereinafter “Advisory Committee”).¹⁹⁴ The first report

(noting that the “number [of] currently divorced adults quadrupled from 4.3 million in 1970 to 17.4 million in 1994”).

¹⁹⁰ THIRD REPORT, *supra* note 2, at 213.

¹⁹¹ See *First Report of the Advisory Committee*, *supra* note 5, app. 1.04[2] (explaining that “the destabilization of marriage” has become prevalent in recent years, and that there has been a “tremendous increase in divorce”); see also Stanton, *supra* note 182 (highlighting that the “fastest growing marital status category was divorced persons”).

¹⁹² See Glenn T. Stanton, *Do Half of All American Marriages Really End in Divorce?*, Family.org, <http://www.family.org/socialissues/A000000596.cfm#footnoteRef4> (last visited July 22, 2008) (asserting that marriages formed today have between 41–43% probability of ending in divorce); see also Barbara DaFoe Whitehead & David Popenoe, *The State of Our Unions: 2004, The Social Health of Marriage in America, The National Marriage Project*, June 2004, available at <http://marriage.rutgers.edu/Publications/Print/PrintSOOU2004.htm> (stating that, for couples marrying in recent years, the lifetime probability of divorce is close to 50%).

¹⁹³ See William A. Galston, *Divorce American style*, BNET: PUBLIC INTEREST, Summer 1996, http://findarticles.com/p/articles/mi_m0377/is_n124/ai_18579233 (noting that in 1960 only sixteen percent of marriages ended in divorce compared to 40 percent today); see also Whitehead & Popenoe, *supra* note 192 (stating that the divorce rate in 1960 was approximately half of what it is today).

¹⁹⁴ See generally *First Report of the Advisory Committee*, *supra* note 5, app. 1.01 (submitting the “first report covering the progress of the Committee’s work from May 15, 1990 through March 18, 1991); *Second Report of the EPTL-SCPA Advisory Committee*, in 13-2 WARREN’S HEATON ON SURROGATE’S COURT PRACTICE app. 2.01 (2007) [hereinafter *Second Report of the Advisory Committee*] (updating the work of the expanded Advisory Committee); *Third Report of the EPTL-SCPA Advisory Committee*, in 13-3 WARREN’S HEATON ON SURROGATE’S COURT PRACTICE app. 3.01 (2007) [hereinafter *Third Report of the Advisory Committee*] (recommending “that the New York State Legislature enact a New York Prudent Investor Act (NYPIA)”); *Fourth Report of the EPTL-SCPA Advisory Committee*, in 13-4 WARREN’S HEATON ON SURROGATE’S COURT PRACTICE app. 4.01 (2007) (hereinafter *Fourth Report of the Advisory Committee*) (recommending “that New York adopt legislation governing substantive and procedural aspects of lifetime trusts”); *Fifth Report of the EPTL-SCPA Advisory Committee*, in 13-5 WARREN’S HEATON ON SURROGATE’S COURT

pointed out that, in these cases, “[i]t is frequently impossible [for a decedent’s estate] to establish abandonment with competent and adequate proof, in part because of evidentiary prohibitions.”¹⁹⁵ To ease this burden, the Advisory Committee recommended that the burden of proof shift to the surviving spouse to disprove abandonment where “the spouses [lived] separate and apart for a continuous period of five years, up to and including the time of death of the deceased spouse, and . . . neither spouse received support from the other.”¹⁹⁶ Further, the Advisory Committee noted that whether either spouse consented to the abandonment should be irrelevant.¹⁹⁷ The proposed law, which was to be embodied in EPTL § 5-1.2(b), stated that:

[i]n any action or proceeding in which any party seeks to disqualify the spouse under subparagraph (a)(5) of this section, the burden of establishing to the court having jurisdiction that the spouse abandoned the deceased spouse, and that such abandonment continued until the time of death, shall be upon the party seeking to disqualify the spouse, except however, that if the spouse and the deceased spouse had lived separate and apart for a continuous period of at least five years, and such separation continued until the time of death of the deceased spouse, during which time neither spouse received support from the other, the surviving spouse shall have the burden of proving absence of abandonment on the part of the surviving spouse.¹⁹⁸

Despite the Advisory Committee’s recognition of this ongoing problem, EPTL § 5-1.2(b) was never enacted¹⁹⁹ and the statute is

PRACTICE app. 5.01 (2007) (hereinafter *Fifth Report of the Advisory Committee*) (recommending “that the New York State Legislature enact additions to Article 11 of the Estates, Powers and Trusts Law to make changes in the definition of trust accounting income); *Unnumbered Report of the EPTL-SCPA Advisory Committee*, in 13-6 WARREN’S HEATON ON SURROGATE’S COURT PRACTICE App. 6.01 (2007) [hereinafter *Unnumbered Report of the Advisory Committee*] (proposing “amendments to the SCPA and EPTL”). See *First Report of the Advisory Committee*, *supra* note 5, app. 1.01, at Q (discussing the scenario described by the author as a “non-judicial divorce”).

¹⁹⁵ See *First Report of the Advisory Committee*, *supra* note 5, App. 1.01, at Q (discussing the scenario described by the author as a “non-judicial divorce”).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (stating that “[s]pousal consent or non-consent to the abandonment would not be an issue”).

¹⁹⁸ *Id.*

¹⁹⁹ The proposed addition of sub-section (b) remains absent from EPTL § 5-1.2. Compare *First Report of the Advisory Committee*, *supra* note 5, app. 1.01, at Q (containing the pro-

the same today as it was in 1965 – centered on protected the surviving spouse rather than the decedent's estate.

B. Proposed Amendments to EPTL § 5-1.2

There are several ways that EPTL § 5-1.2 might be amended to remedy the aforementioned problems, thereby providing adequate protection for both the surviving spouse and the deceased spouse's estate. First, the legislature should harmonize the disqualification provisions of the EPTL with the provisions governing the annulment of voidable marriages under the DRL. Second, the legislature should disqualify the surviving spouse where a marriage was effectively ended by a non-judicial divorce. Finally, the legislature should enact a "catch-all provision" that permits Surrogates to disqualify a surviving spouse when it is in the interest of justice and fairness to do so.

i. Consistency Between the EPTL and DRL

The EPTL should not be permitted to counteract the DRL by providing that, in effect, a nullified marriage still somehow exists as a source of rights when brought behind the doors of the Surrogate's Court. Accordingly, EPTL § 5-1.2 should be amended to provide that a decree of annulment disqualifies a surviving spouse, even where it is procured after the death of the deceased spouse pursuant to the DRL. This amendment would remedy the inequitable results discussed above in the case of marriages resulting from elder abuse and sham marriages.

However, the amendments should be tailored to ensure the expedient and final disposition of all actions. This concern arises because the DRL permits a post mortem annulment during the remaining spouse's life, potentially even years after the decedent's death.²⁰⁰ If a decedent's estate is settled, all assets having

posed language for EPTL § 5-1.2), with N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 2008) (failing to incorporate that proposed language).

²⁰⁰ See N.Y. DOM. REL. LAW § 140(c) (McKinney 2008) (An action to annul a marriage on the ground that one of the parties thereto was a mentally ill person may be maintained at any time during the continuance of the mental illness, or, after the death of the mentally ill person in that condition, and during the life of the other party to the marriage, by any relative of the mentally ill person who has an interest to avoid the marriage."); see also *id.* § 140(e) ("Any such action may also be maintained during the life-time of the other party by the parent, or the guardian of the person of the party whose consent was so obtained, or by any relative of that party who has an interest to avoid the marriage, provided that

been distributed, an annulment obtained thereafter should not require the surviving spouse to reimburse the estate. This could lead to protracted legal battles long after a decedent's death, and in circumstances in which the surviving spouse is financially unable to reimburse the estate. Anyone interested in nullifying the marriage, therefore, must do so before, or concurrently with the probate of the estate. The probate proceedings should be stayed pending the outcome of the annulment proceedings when necessary. But, after an estate is settled, the interests of judicial economy require that the issue of spousal disqualification be laid to rest once and for all.

Critics may suggest that it is actually in the interest of judicial economy to *prevent* more posthumous matrimonial trials, which will likely result from a change in the EPTL's disqualification provisions. In its report, the Commission lamented the difficulty of such trials, describing the Surrogate's task as "onerous" because "one party is unable to testify by reason of death, and the other is rendered an incompetent witness because of the inhibition . . . against testimony by a survivor respecting personal transactions with a decedent."²⁰¹ However, no matter how onerous these trials may be, the Domestic Relations Law explicitly authorizes these actions. The members of the judiciary, therefore, must hear such cases and dispose of them to the best of their ability notwithstanding their "onerous" nature.

ii. Disqualification in the Event of Non-Judicial Divorce

EPTL § 5-1.2 should be amended to provide for disqualification of a surviving spouse where, during the lifetime of the decedent spouse, the couple: (1) agreed to part ways, or where one party did not object to the departure of the other; (2) physically separated and lived apart; (3) divided or disposed of all jointly owned property and assets; and (4) maintained complete financial independence of one another. All of these requirements must be satisfied both continuously and simultaneously for a minimum of

in an action to annul a marriage on the ground of fraud the limitation prescribed in the civil practice law and rules has not run.") (emphasis added); see N.Y. C.P.L.R. 213(8) (McKinney 2008) ("[A]n action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.").

²⁰¹ FOURTH REPORT, *supra* note 25, at 279.

three years at the time of decedent's death. These conditions are rigid enough to ensure that a spouse can only be disqualified where no marriage existed in fact despite its existence at law. In addition, the minimum time period makes certain that the separation was more than likely to be permanent and that reconciliation would have been highly improbable had the decedent lived beyond his date of death.

Disqualifying a surviving spouse in the case of a non-judicial divorce is supported by public policy, because the policy reasons for barring spousal disinheritance are inapplicable. One such reason is to protect the surviving spouse from being unable to sustain herself in the wake of the decedent spouse's death.²⁰² That concern is irrelevant in the case of non-judicial divorce because the parties no longer provide financial support to one another. They maintain separate finances and lead monetarily separate existences, and must have done so for several years to result in disqualification. Therefore, the death of one spouse does not render the other financially unable to survive.

A second policy reason for the bar to spousal disinheritance is that spouses are entitled to share in each other's estates because of the "contribution" that each spouse makes to the other's life.²⁰³ However, the spouses of a non-judicial divorce make no such contribution to each other's lives. They live apart over a period of multiple years. In reality, they have no relationship, much less the relationship of a married couple. Therefore, neither one has any moral entitlement to a share in the other's estate.

Critics may argue that such entitlement exists as a result of contributions made during the period in which the parties lived together as a married couple. However, the non-judicial divorce involves the consent, either affirmative or passive, of both parties to end their relationship. This consent effectively constitutes a waiver by each party of the right to share in the other's estate, because neither party has any reason to expect that he should inherit from a person with whom he has no relationship.²⁰⁴ And,

²⁰² See *supra* note 25 and accompanying text.

²⁰³ See *supra* note 19 and accompanying text.

²⁰⁴ See *In re Estate of Carmona*, 223 N.Y.L.J. 92 (Sur. Ct. 2000) ("[The provisions of EPTL § 5-1.2 are insufficient to protect a decedent's estate and therefore cause results that are] contrary to the wishes of the decedent and benefit a survivor who had no right to expect to receive anything of pecuniary value from the decedent while she was alive. Those who are willing to live apart from their spouses for many years, and who have not

if one of the parties were to depart without the consent of the other, the facts would no longer support a finding of a non-judicial divorce. In that case, the DRL provisions concerning spousal abandonment would govern.²⁰⁵

iii. Catch-All Provision

Recognizing that unforeseeable situations might arise, the legislature has often included a “catch-all” provision in statutes.²⁰⁶ These provisions provide courts with the ability to bring a certain act within the purview of a statute when it is fair or just to do so, notwithstanding that the statute does explicitly cover that act.

Adding a catch-all provision to EPTL § 5-1.2 would permit Surrogates, like Sobel and Holzman, to disqualify a spouse in the interests of justice. Because the right of election concerns spousal and familial relationships, which evolve over time, a catch-all provision would also permit Surrogates to exercise their judgment in the absence of legislation that is updated every time the social climate changes. Such a provision might read: “A husband or wife is a surviving spouse unless it is established that the

in any way been dependent upon their spouses while they have been separated, should also be obliged to stay away from their spouses' property after death unless there is a will which provides to the contrary.”); *see also In re Estate of Lamos*, 313 N.Y.S.2d 781, 785 (Sur. Ct. 1970) (stating that § 5-1.2 of the EPTL is insufficient to protect estates from unworthy surviving spouses leading to frequent “unjust and often even unconscionable” results).

²⁰⁵ *See* N.Y. DOM. REL. LAW § 170 (2) (McKinney 2008). The Domestic Relations Law defines abandonment as a voluntary, unjustified departure from the marital residence by one spouse, who has no intention of returning, without the consent and against the will of the other for a minimum of one year. *Id.*; *see Wu v. Wu*, 661 N.Y.S.2d 918, 919 (Sup. Ct. 1997).

²⁰⁶ *See* N.Y. C.P.L.R. 213(1) (McKinney 2008) (declaring that “[t]he following actions must be commenced within six years: 1. an action for which no limitation is specifically prescribed by law”); *see also* N.Y. CRIM. PRO. LAW § 60.42(5) (McKinney 2008) (providing that “[e]vidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the penal law unless such evidence: . . . 5. is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice”) (emphasis added); *see also* N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney 2008) (stating that “[i]n determining an equitable disposition of property . . . the court shall consider: . . . (13) any other factor which the court shall expressly find to be just and proper”); *see also* N.Y. S.C.P.A. § 707(1)(e) (McKinney 2008) (proscribing that “[l]etters may issue to a natural person or to a person authorized by law to be a fiduciary except . . . (e) one who does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office”) (emphasis added).

classification of the husband or wife as a 'surviving spouse' would result in a miscarriage of justice."

Critics may argue that a catch-all provision would "open the floodgates" of litigation and negate years of attempting to adequately protect surviving spouses. However, all Surrogates should be charged with understanding the historical background of the bar to spousal disinheritance and the grounds for spousal disqualification, and should therefore recognize that the catch-all provision would apply only if extreme injustice would otherwise result. Whether courts would employ the provision too liberally is something that only practice will reveal. A clear legislative history to the provision would be a safeguard against abuse and would provide appellate courts with a guide for overturning lower court decisions outside the intended scope of the catch-all.

IV. A TEMPORARY SOLUTION FOR OUR SURROGATES: A BLEND OF COURAGE AND EQUITABLE ESTOPPEL

A. *Overview of Equitable Estoppel and Its Role in Surrogate's Court*

In the absence of further legislation, Surrogates in New York should turn to the doctrine of equitable estoppel in order to achieve just results in some of these cases. "The purpose of equitable estoppel is to preclude a person from asserting a right [when he or she] has led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted."²⁰⁷ Courts invoke the doctrine "as a matter of fairness."²⁰⁸ Equitable estoppel "may and has been applied in statutory proceedings by courts of limited jurisdiction."²⁰⁹ Accordingly, a Surrogate's Court can employ the doctrine despite the fact that the proceeding before it

²⁰⁷ *Shondel J. v. Mark D.*, 853 N.E.2d 610, 613 (N.Y. 2006).

²⁰⁸ *Id.*; accord *Charles v. Charles*, 745 N.Y.S.2d 572, 575 (App. Div. 2002) (explaining that "estoppels are equitable doctrines used to promote fairness and justice").

²⁰⁹ *In re Baby Boy C.*, 638 N.E.2d 963, 967 (N.Y. 1994); see *In re Estate of Orejas*, No. 229-P/03, 2006 WL 1707950, at *3-*4 (N.Y. Sur. Ct. June 22, 2006) (applying doctrine of equitable estoppel to bar executor from asserting statute of limitations defense against surviving spouse's elective share because executor had concealed from the spouse fact that there was a will to which she could object).

may be governed by the EPTL.²¹⁰

B. *Elements of Proof in an Equitable Estoppel Claim*

In order to equitably estop a party from asserting a particular right or claim, the party arguing for estoppel must prove three elements: (1) conduct by the party to be estopped which amounts to a misrepresentation or concealment of material facts or, at least, which was calculated to convey the impression that the facts are otherwise and inconsistent with those which the party subsequently seeks to assert; (2) the party to be estopped intended that the other party would act upon this conduct; and (3) the party to be estopped had actual or constructive knowledge of the real facts.²¹¹ Additionally, the party asserting estoppel must further prove that he: (1) lacked knowledge and the means of knowledge of the truth as to the facts in question; (2) acted in good faith; (3) relied on the words or conduct of the party to be estopped; and (4) experienced a prejudicial change in his or her position in a material way.²¹²

²¹⁰ See *Baby Boy*, 638 N.E.2d at 967 (employing the doctrine of equitable estoppel); see also *Orejas*, 2006 WL 1707950, at *3-*4 (invoking equitable estoppel).

²¹¹ See *Werking v. Amity Estates, Inc.*, 137 N.E.2d 321, 327 (N.Y. 1956) (declaring that “to constitute estoppel, ‘the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another and which act or admission is inconsistent with the claim he proposes now to make’” (quoting *New York Rubber Co. v. Rothery*, 14 N.E. 269, 271 (N.Y. 1887))); see also *Benincasa v. Garrubbo*, 529 N.Y.S.2d 797, 800 (App. Div. 1988) (stating that the essential elements for equitable estoppel are “(1) conduct which amounts to a false representation or concealment of material facts, (2) intention that such conduct will be acted upon by the other party, and (3) knowledge of the true facts.”); *In re Estate of Carr*, 473 N.Y.S.2d 179, 182 (App. Div. 1984) (asserting that the three necessary elements for estoppel are “(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts” (quoting 21 N.Y. JUR. 2D ESTOPPEL § 21 (2008))).

²¹² *Walls v. Levin*, 540 N.Y.S.2d 623, 625 (N.Y. 1989) (detailing that “[t]he party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position” (citing *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 430 N.Y.S.2d 179, 187 (App. Div. 1980))); *Holm v. CMP Sheet Metal*, 455 N.Y.S.2d 429, 433 (App. Div. 1982) (declaring that New York requires that “the party asserting estoppel [prove] (1) lack of knowledge of the true facts; (2) good faith reliance; and (3) a change of position” (citing 21 N.Y. JUR. 2D ESTOPPEL § 21 (2008))).

C. *Equitable Estoppel Applied in the Case of Spousal Disqualification*

A review of case law reveals that equitable estoppel has not been frequently applied in disputes concerning spousal disqualification. However, in at least one case, a Surrogate has employed the doctrine.

In *In re Mattox*, the court applied the doctrine of equitable estoppel in order to bar a woman from exercising her right of election where she had misled the decedent to believe she had obtained an *ex parte* divorce from him.²¹³ Based on this misrepresentation, the decedent allegedly married another woman at common law and in a religious ceremony.²¹⁴ Upon his death, the decedent's first wife attempted to elect against his will, revealing for the first time that she had never obtained a divorce and that, therefore, the decedent's second marriage was void as bigamous.²¹⁵ EPTL § 5-1.2(a)(2) provides that a spouse in a bigamous marriage is disqualified from exercising her right of election.²¹⁶ Accordingly, the decedent's first wife moved for summary judgment, arguing that the plain language of the EPTL compelled a finding that the decedent's second wife was disqualified, leaving his first wife free to elect to the decedent's will.²¹⁷ However, the decedent's second wife argued that the decedent's first wife must be equitably estopped because the decedent had relied on her intentional misstatement.²¹⁸ The court agreed with the decedent's second wife, holding that the doctrine of equitable estoppel could be invoked in these circumstances and that a trial on that issue was necessary.²¹⁹

D. *How Equitable Estoppel Could Be Applied to Avoid the Kinds of Injustice Discussed Above*

Equitable estoppel does not lend itself to instances of non-

²¹³ *In re Estate of Mattox*, 226 N.Y.L.J. 57 (Sur. Ct. 2001).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* (declaring that "any alleged marriage between the decedent and the respondent was void as bigamous"); see N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 2008) (establishing that a husband or wife is a spouse within statutory meaning "unless it is established ... [that] [t]he marriage was void ... as bigamous").

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

judicial divorce because the surviving spouse in those cases did not misrepresent or conceal material facts. However, equitable estoppel should be employed in cases like *In re Application of Wang*. In such instances, a caretaker is a party to the marriage but conceals it or fails to disclose its existence in order to prevent family members from seeking an annulment. Further, the decedent's family does not know of the marriage during the decedent's lifetime. The decedent's family relies on the caretaker's silence with respect to the existence of a marriage in not taking action to terminate it. Finally, the family experiences a detrimental and material change in position insofar as their shares of the decedent's estate will be reduced if the caretaker-widow is able to exercise her right of election.

While it is theoretically possible for a decedent's family to prevail on an equitable estoppel claim, Surrogate Johnson expressly rejected this argument in *In re Application of Wang*.²²⁰ The decedent's sons argued that Wang stood in a fiduciary relationship to their father because he was vulnerable as a result of his infirmity and she was his caretaker.²²¹ Further, they claimed that Wang breached her fiduciary duty by failing to disclose the marriage to them during their father's life.²²² The Court declined to invoke equitable estoppel on the grounds that Berk's sons had not cited any case law in which the doctrine had been employed in similar circumstances.²²³ This reason for not estopping Wang is unsound, as the dearth of case law on the issue should not prevent the court from applying equitable estoppel. The doctrine is meant to be applied on a case-by-case basis, and the fact that an issue is one of first impression should not render an equitable estoppel argument untenable.

Ultimately, even in the face of *In re Application of Wang*, Surrogates presiding in these cases should estop an unworthy spouse because equitable principles permit them to do so, because justice dictates that they should, and because it will send a message to the legislature that a literal application of the statute does not adequately guard against potential injustice.

²²⁰ *In re Application of Wang*, No. 2488/2006, 2008 N.Y. Misc. LEXIS 4031 (Sur. Ct. July 3, 2008).

²²¹ *Id.* at *8.

²²² *Id.*

²²³ *Id.* at *9.

CONCLUSION

The bar to spousal disinheritance is age-old and deeply engrained in our laws. Though this might make it difficult to move away from the historical view that a surviving spouse is entitled to nearly absolute protection, it is nonetheless time to move in that direction. The injustices that have befallen the relatives of some decedents are unacceptable. A call for legislative action has been mounting, and will continue to do so, as further cases that illustrate the inadequacy of EPTL § 5-1.2 make their way through the New York courts.