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Elizabeth A. Marcuccio
emarcuccio@siena.edu

Colin Dwyer

THE EVOLUTION OF THE "SURVIVING SPOUSE" UNDER THE ESTATES POWERS AND TRUSTS LAW

by

Elizabeth A. Marcuccio*
Colin Dwyer**

I. INTRODUCTION

Under the Estates Powers and Trusts Law (EPTL) the concept of the surviving spouse was originally used as a proxy for the person closest to and/or most dependent upon the deceased spouse; the natural object of the deceased spouse's bounty. As a result the surviving spouse has priority to administer the deceased spouse's estate, as well as priority of intestate distribution. In addition the surviving spouse has the right to take an elective share of the deceased spouse's estate. Since these rights are significant, should they be automatically available to all individuals who meet the statutory definition of "surviving spouse"? What of spouses who remain married but live apart for years? What of married partners who develop fulfilling committed relationships with other persons, without formally divorcing their spouse?

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* Associate Professor of Business Law, Siena College
** Adjunct Professor of Business Law, Siena College

What of surviving spouses who wrongfully enter into marriages with incapacitated individuals solely to manipulate a testamentary scheme for their own financial gain? Marriage is now understood as an economic partnership rather than a sacred contract for life. Thus the current estate concept of "surviving spouse" may no longer serve the purpose for which it was originally intended.

II. MARRIAGE OF CONVENIENCE

An important question to address is whether an individual should be entitled to the benefits that accrue to a surviving spouse if she effectively is in a marriage of convenience. In the *Estate of Shoichiro Hama*[1] the Court examined this issue. In *Hama* the spouse, Yuko Machida, worked for the decedent and they dated with the understanding that their relationship was not exclusive. In late 2004, with decedent's knowledge, Machida began a relationship with Travis Klose, with whom she and the decedent socialized. Early in 2005 Klose moved to Japan, and in May 2005 Machida moved into the decedent's apartment.[2]

In 2006 decedent told his accountant that he intended to sell his condominium apartment in Manhattan. Decedent was informed that there would be a capital gains tax on the sale of approximately $60,000. When asked by the decedent what could be done to mitigate this tax, the accountant stated, in jest, that if the decedent was married on the date that the apartment was sold, there would be no capital gains tax. A few weeks later, on July 7, 2006, decedent married Machida. Decedent sold his apartment on September 6, 2006, and in November 2006 decedent informed his accountant that he wanted to

divorce Machida.[3] Due to the large tax savings decedent received because of his marriage, his accountant advised him against divorce, and recommended that he stay married for approximately two years.

In 2007 decedent and Machida moved to Japan. Here, with decedent's knowledge, Machida continued her relationship with Klose. Feeling pressure from her parents, Machida registered in Japan as being married to Klose. Decedent was fully aware of her plan to register as married to Klose, and acted as a witness to said marriage, signing the marriage certificate and affixing his personal seal.[4] Despite this "registration" or "marriage", decedent still considered himself legally married to Machida and entitled to the tax benefits that resulted from that marriage. In August 2009 decedent contacted his accountant by email and discussed his intention to sell another apartment in New York. He also asked whether he could now obtain a divorce from Machida. Due to the tax savings decedent could realize on the upcoming real estate transaction, his accountant again advised against divorce. Decedent died without a will on September 4, 2009, leaving an estate of approximately $1.5 million subject to administration in New York. He was survived by his parents and Machida, his "surviving spouse".[5]

On December 4, 2009, Machida petitioned for the issuance of letters of administration to herself and her designee, and on January 11, 2010, decedent's parents cross-petitioned for the same.[6] Temporary Letters of Administration were issued to Machida's designee. The designee of decedent's parents filed a motion for summary judgment seeking revocation of the temporary letters and dismissal of Machida's administration petition based on the claim of spousal abandonment.[7]

III. SPOUSAL ABANDONMENT

The Estates Powers and Trusts Law (EPTL) provides that a husband or wife is a surviving spouse unless it is established that said spouse abandoned the deceased spouse, and such abandonment continued until the time of death.[8] The statute contains no definition of "abandonment," but historically, the courts have recognized the requirements of the Domestic Relations Law (DRL) as implicit in the EPTL.[9] The standard used to determine if a surviving spouse abandoned the decedent is the same standard used to determine whether the party would have been entitled to a decree of separation or divorce on the grounds of abandonment.[10] The DRL states that the abandonment must be for a period of one or more years,[11] and long-standing case law further states that departure from the marital abode or living apart is not enough to constitute abandonment. In *Matter of Maiden* the Court defined abandonment as the unjustified departure of a spouse from the marital home without the consent of the other spouse.[12]

That abandonment must include lack of consent by the spouse that was left behind continues to be the law to this day.[13] Even if the decedent and the surviving spouse lived apart for decades, without evidence that the spouse's departure was without the decedent's consent, there is no abandonment.[14] The burden of proof as to abandonment, including lack of consent, is on the party alleging it.[15] Applying this standard to the *Hama* case, the Court found that the decedent's parents could not meet the burden of proof. The decedent's participation in the registration of Machida's marriage to Klose is the exact opposite of the "lack of consent" needed to find abandonment.[16] The Court, however, did not rely on these

cases when deciding *Hama.* Instead the Court turned to another appellate decision, *Matter of Oswald*[17] in deciding this case.

IV. THE IMPACT OF OSWALD

In *Matter of Oswald* the "surviving spouse" alleged the he and the decedent had entered into a common law marriage in Pennsylvania some years prior to the decedent's death. The parties subsequently exchanged mutual releases, and each went on to marry another.[18] The Court found that there was abandonment, quoting language in the trial court opinion in *Matter of Bingham*[19]. "The court knows of no more convincing evidence of abandonment than the public ceremonial remarriage of the petitioner to another woman in the lifetime of the decedent and his cohabitation with such woman as husband and wife."[20] Here, instead of focusing on the lack of consent of the spouse left behind, the Court's focus is entirely on the intent of the spouse who left, defining abandonment as desertion of a spouse with the intent not to return, or with the intent that the marriage should no longer exist.[21] This is contrary to prior case law.

The Court of Appeals affirmed *Oswald* without opinion.[22] Thus it is unknown whether the Court agreed that abandonment could be found based upon the leaving party's intent not to return, creating an exception to its longstanding *Maiden*[23] decision, or whether the Court agreed that a marriage never existed, which was a hotly contested issue in this case. In the end, in deciding *Hama* the Court found that whether *Oswald* did or did not partially overrule or create an exception to *Maiden* was ultimately for the Court of Appeals to determine, and held that Machida had abandoned the decedent, thereby losing her rights as a surviving spouse.[24]

V. PUBLIC POLICY

For decades the courts have been applying the abandonment requirements of the Domestic Relations Law to determine whether an individual qualifies as a surviving spouse under the EPTL. The abandonment disqualifications of EPTL 5-1.2 (5) apply to three distinct issues relating to a deceased spouse's estate: the right to serve as administrator,[25] the right to an intestate share,[26] and the right to elect against a will where the surviving spouse is left less than one-third of the deceased spouse's estate. [27] If the deceased spouse meets the definition of a "wronged" spouse who is eligible for a divorce based on abandonment under the DRL, the living spouse does not qualify as a "surviving spouse" and is not entitled to the related benefits.

The Court in *Hama* examined the history of spousal relationships under New York's divorce law, noting that in 2010 New York did away with fault-based divorce, the system from which the concept of abandonment first arose. Now whether a spouse seeking a divorce was truly "wronged" by having been left against his or her wishes, with the accompanying burden of proving lack of consent, becomes far less important, if not irrelevant. Therefore the strict definition of abandonment in the DRL, which has been carried over into the EPTL, may no longer be valid or justified.[28]

VI. WRONGFUL MARRIAGES

Another issue that courts have addressed is whether a "surviving spouse" is entitled to an elective share if the marriage occurred while the decedent lacked the requisite mental capacity to enter into a marriage contract. New York does not have a statute that specifically addresses this situation. In *Campbell v. Thomas*[29] the decedent was diagnosed with terminal cancer and severe dementia due to Alzheimer's

disease early in 2000. His daughter, who was also his primary caretaker, took a one-week vacation in February 2001. Decedent, who was then 72 years old, was left in the care of Nidia Thomas, then 58. During this time Nidia and the decedent were secretly married, and Nidia subsequently transferred certain assets of the decedent into her name.[30]

In March 2001 decedent's daughter learned of the marriage. She confronted the decedent, who had no awareness of the marriage and adamantly denied that it occurred. Decedent died in August 2001.[31] In November 2001 decedent's children commenced an action in Supreme Court seeking a judgment declaring Nidia's marriage to the decedent to be null and void. The complaint was later amended to add causes of action alleging undue influence, conversion and fraud.[32] In January 2003 decedent's son was issued letters of administration C.T.A., and in May 2003 Nidia filed a right of election in Surrogate's Court.[33] Decedent's children moved for summary judgment in Supreme Court, submitting affidavits detailing the decedent's mental state over the past three years. Due to his dementia decedent had become extremely forgetful and experienced great confusion as to who various individuals were. The decedent's primary physician and neurologist confirmed that decedent did not have the mental capacity to provide for himself or understand his legal and financial affairs.[34] This information had been conveyed to Nidia.[35]

In opposition to the children's motion for summary judgment and in support of her cross motion for the same, Nidia submitted her own affidavit stating that she had had a 25-year, non-exclusive relationship with the decedent during which he asked her to marry him four times. She stated that he had the requisite mental capacity to enter into the marriage vows, even though he did have moments of forgetfulness. The affidavits of the pastor who performed the marriage and the

two witnesses to the marriage each asserted that the decedent knew he was marrying Nidia, however the pastor, when deposed, stated that he would not have performed the ceremony if he knew of the decedent's medical condition.[36]

The Supreme Court denied both motions for summary judgment and the decedent's children appealed. In 2007 the Second Department remitted the matter to the Supreme Court for the entry of judgment declaring the marriage and all asset transfers by Nidia null and void due to decedent's lack of capacity to understand his actions and inability to consent.[37] The Supreme Court issued an order consistent with the ruling of the Appellate Division.[38] Nidia appealed.

VII. STATUTORY INTERPRETATION

On appeal Nidia contended that pursuant to the relevant statutes, she should be considered the decedent's surviving spouse at the time of the decedent's death even if the marriage is subsequently annulled or voided. Therefore she is entitled to an elective share of the decedent's estate. The Domestic Relations Law states that if a party to a marriage is "incapable of consenting to a marriage for want of understanding" such marriage is voidable.[39] The DRL defines a voidable marriage as void from the time its nullity is declared by a court of competent jurisdiction.[40] The Court disagreed with Nidia's reasoning, stating that under the DRL the distinction is not that void marriages are nonexistent from the beginning, while voidable marriages are valid until declared void. Rather both void and voidable marriages are void from their beginning, the difference between them being that parties to a void marriage are free to treat the marriage as a nullity without the involvement of a court, while a voidable marriage may be treated as a nullity only if a court decrees it so.[41]

The Court then examined whether its determination that Nidia's marriage to the decedent was null and void rendered the marriage void from its beginning for purposes of the right of election. The DRL provides:

> 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.[42]

Yet the EPTL provides that a husband or wife is considered a "surviving spouse" with a right of election against the deceased spouse's estate unless a final decree or judgment of divorce or annulment was in effect when the deceased spouse died or that under the DRL the marriage was void as incestuous, bigamous or a prohibited remarriage.[43] As the Court in *Campbell* noted, this provision appears to render the right of family members to obtain a post-death annulment largely illusory.[44] The marriage between Nidia and the decedent was not declared a nullity until the Court declared it so in January 2007, more than five years after the decedent's death. Thus under the EPTL Nidia technically had a legal right to an elective share as a surviving spouse.[45] However the literal terms of a statute should not be rigidly applied if to do so would allow the statute to be an instrument for the protection of fraud.[46]

VIII. EQUITABLE PRINCIPLES

The Court in *Campbell* acknowledged that the Supreme Court is a court of equity as well as law, and is empowered to grant relief consistent with the principle that a person should not be permitted to profit from her own fraud.[47] Pursuant to this doctrine, the wrongdoer is deemed to have forfeited the benefit that would flow from her wrongdoing. The Court found that there were ample facts to conclude that Nidia was aware of the decedent's lack of capacity to consent to marriage, and that she took unfair advantage of his condition for her own pecuniary gain, at the expense of the decedent's heirs. Since she procured the marriage through overreaching and undue influence, Nidia should not be permitted to benefit from that conduct. Therefore, she has forfeited any rights that would flow from that marital relationship, including her statutory right to an elective share of decedent's estate.[48]

That Nidia had known the decedent for 25 years, had a close relationship with him, and had legitimately been named as one of the beneficiaries of his retirement account does not reduce her culpability. These facts indicate that Nidia was in a position of trust, which she abused, and that she could not plausibly deny awareness of the decedent's mental incapacity.[49] Under these circumstances equity intervenes to prevent unjust enrichment of the wrongdoer.[50] The Court found that this result was necessary not only to protect incapacitated individuals and their rightful heirs from overreaching and undue influence; it was also necessary to protect the integrity of the courts themselves.[51]

IX. CONCLUSION

The current estate definition of "surviving spouse" is largely based on the antiquated societal definition of "marriage". The shifting concept of what constitutes a family, the alterations in economic dependence and the need to protect

the elderly in an aging society all suggest the need to review the statutory protections afforded a surviving spouse. This is especially true when individuals marry solely to obtain financial gain. One question deserves consideration: Does it matter whether it was the decedent or the surviving spouse who entered into the marriage to attain a financial windfall?

In the *Estate of Shoichiro Hama*[52] the decedent married Machida solely to avoid $60,000 of capital gains tax upon the sale of his Manhattan condominium. This is evident from the decedent's behavior. Decedent married Machida "a few weeks" after he learned of the tax advantages of being married. Four months after the marriage and two months after the sale of his condominium, decedent wanted a divorce.[53] Although it is unknown whether Machida was financially compensated for marrying the decedent, it was the decedent who initiated the marriage to obtain favorable treatment under the income tax laws. The Court found that Machida had abandoned the decedent, thereby losing her rights as a surviving spouse, even though prior case law did not dictate this result. Did the decedent, a sophisticated businessman who exploited the institution of marriage for financial gain, deserve the Court's sympathy? He could have easily entered into a prenuptial agreement to prevent Machida from obtaining the statutory rights of a surviving spouse. This is not true of incapacitated individuals who are enticed into marriage by wrongdoers.

In *Campbell v. Thomas*[54] the decedent's caregiver, Nidia, was well aware of the decedent's lack of capacity when she secretly married him. It appears from the facts of the case that Nidia's sole purpose in marrying the decedent was to obtain the financial benefits of a surviving spouse upon the decedent's death. Here the Court rightfully exercised its equitable powers to prevent Nidia from benefiting from her wrongdoing, and declared that she forfeited her rights as a

surviving spouse. In light of these cases, who can qualify as a "surviving spouse" under the relevant statutes deserves careful consideration by the New York legislature.

ENDNOTES

[1] *Estate of Shoichiro Hama*, 2009-4505 NYLJ 1202579753326, at 1 (Sur Ct, New York County, Decided November 26, 2012).
[2] *Id.* at 2.
[3] *Id.*
[4] *Id.* at 3.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 4.
[8] N.Y. Est. Powers & Trusts Law § 5-1.2 (a)(5) (McKinney 1999).
[9] *Estate of Shoichiro Hama*, at 5.
[10] 2-32 Warren's Heaton Surrogate's Court Practice § 32.13 (2) (2012).
[11] N.Y. Dom Rel. Law § 170 (2) (McKinney 2010).
[12] *Matter of Maiden*, 284 NY 429, 432 (1940); accord, e.g. *Matter of Barc*, 177 Misc 578 (Sur Ct Kings County 1941), affd 266 AD 677 (2d Dept 1943), lv denied 266 AD 742 (2d Dept 1943).
[13] *Estate of Shoichiro Hama*, at 5.
[14] *Matter of Morris*, 69 AD3d 635 (2d Dept 2010).

[15] *Matter of Rechtschaffen*, 278 NY 336 (1938); *Matter of Ruff*, 91 AD2d 814 (3d Dept 1982).
[16] *Estate of Shoichiro Hama*, at 5.
[17] *Matter of Oswald*, 43 Misc 2d 774 (Sur Ct, Nassau County 1964), affd 24 AD2d 465 (2d Dept 1965), affd 17 NY2d 447 (1965).
[18] *Matter of Oswald*, at 775.
[19] *Matter of Bingham*, 178 Misc 801 (Sur Ct, Kings County 1942), affd 265 AD 463 (2d Dept 1943), rearg denied and lv denied 266 AD 669 (2d Dept 1943).
[20] *Matter of Bingham*, 178 Misc at 805 (Sur Ct, Kings County 1942).
[21] *Estate of Shoichiro Hama*, at 7.
[22] *Matter of Oswald*, 17 NY2d 447 (1965).
[23] *Matter of Maiden*, 284 NY 429, 432 (1940).
[24] *Estate of Shoichiro Hama*, at 8.
[25] N.Y. Surr. Ct. Proc. Act § 1001 (McKinney 2011).
[26] N.Y. Est. Powers & Trusts Law § 4-1.1 (McKinney 2012).
[27] N.Y. Est. Powers & Trusts Law § 5-1.1-A (McKinney 1999).
[28] *Estate of Shoichiro Hama*, at 10.
[29] *Campbell v. Thomas*, 73 AD 3d 103, 103 (2d Dept 2010).
[30] *Id.* at 105-106.
[31] *Id.* at 106-107.
[32] *Id*. at 106.
[33] *Id*.
[34] *Id*. at 108.
[35] *Id*. at 107.
[36] *Id.* at 108, 109.
[37] *Campbell v. Thomas*, 36 AD 3d 576, 576 (2d Dept 2007).
[38] *Campbell v. Thomas*, 73 AD 3d 103, 110 (2d Dept 2010).
[39] N.Y. Dom. Rel. Law § 7 (2) (McKinney 2010).

[40] N.Y. Dom. Rel. Law § 7 (McKinney 2010).
[41] *Campbell v. Thomas*, 73 AD 3d 103, 111 (2d Dept 2010).
[42] N.Y. Dom. Rel. Law § 140 (c) (McKinney 2010).
[43] N.Y. Est. Powers & Trusts Law § 5-1.2 (a) (McKinney 1999).
[44] *Campbell v. Thomas*, 73 AD 3d 103, 115 (2d Dept 2010).
[45] N.Y. Est. Powers & Trusts Law § 5-1.2 (McKinney 1999).
[46] *Campbell v. Thomas*, 73 AD 3d 103, 115 (2d Dept 2010).
[47] *Id*. at 116.
[48] *Id*. at 117-118.
[49] *Id*. at 118.
[50] *Id*. at 119.
[51] *Id.*
[52] *Estate of Shoichiro Hama*, 2009-4505 NYLJ 1202579753326, at 1 (Sur Ct, New York County, Decided November 26, 2012).
[53] *Id.* at 2.
[54] *Campbell v. Thomas*, 73 AD 3d 103, 103 (2d Dept 2010).