Mississippi College Law Review

Volume 3 | Issue 1 Article 7

6-1-1982

Wills - Spousal Desertion - Tillman v. Williams

Linda D. Bounds

Custom Citation

3 Miss. C. L. Rev. 111 (1982-1983)

Wills—Spousal Desertion—*Tillman v. Williams*, 403 So.2d 880 (Miss. 1981).

Narvel Tillman and Ada Broadnex Tillman were married in April, 1948. Mrs. Tillman died testate on November 27, 1977, and her will was probated. The will devised all of her property to three different persons but made no provisions for her husband. Mr. Tillman filed a petition to be recognized as her heir and to be declared by law[1] owner of one-half of his wife's real and personal property.[2] Mr. Tillman further alleged in his petition that he had no separate property.[3] Thadys Victoria Williams, Executrix, filed an answer to the petition denying that Narvel Tillman was entitled to a one-half interest in the property owned by the deceased on the grounds that he deserted Mrs. Tillman many years before her death.[4]

At the hearing, the testimony of several witnesses established that Mr. Tillman and his wife parted company fifteen to twenty years prior to Mrs. Tillman's death. The only fact that was established with any certainty was that Mr. Tillman had moved to an adjoining county. None of the testimony established a reason for the separation or any other relevant facts.[5]

Narvel Tillman was tendered as a witness by his attorney, but on the basis of the Dead Man Statute[6] an objection to his testimony was sustained by the court.[7] The proffered testimony of Mr. Tillman was that he and Mrs. Tillman were married in 1948, and that they had no children.[8] They were not divorced, and "even though he and decedent were not living together, they were not separated."[9] He then offered an explanation as to why

1. MISS. CODE ANN. § 91-5-27 (1972). That section provides:
If the will of the husband or wife shall not make any provision for the other, the survivor of them shall have the right to share in the estate of the deceased husband or wife, as in the case of unsatisfactory provision in the will of the husband or wife for the other of them. In such case a renunciation of the will shall not be necessary, but the rights of the survivor shall be as if the will had contained a provision that was unsatisfactory and it had been renounced.
2. Tillman v. Williams, 403 So.2d 880, 880 (Miss. 1981).
3. Brief for Appellant at 2, Tillman v. Williams, 403 So.2d 880 (Miss. 1981).
4. Brief for Appellee at 2, Tillman v. Williams, 403 So.2d 880 (Miss. 1981).
5. 403 So.2d at 880.
6. MISS. CODE ANN. § 13-1-7 (1972). That sections provides:
A person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person, which originated during the lifetime of such deceased person or to establish any claim he has transferred since the death of such decedent. But such person so interested shall be permitted to give evidence in support of his claim or defenses aginst the estate of a deceased person which originated before the ward became non compos mentis. But this shall not apply to claims or defenses which arose in the course of the administration of the estate of such person.
7. Brief for Appellee at 2-3, Tillman v. Williams, 403 So.2d 880 (Miss. 1981).
8. Brief for Appellant at 3, Tillman v. Williams 403 So.2d 880 (Miss. 1981).
9. Brief for Appellee at 3, Tillman v. Williams, 403 So.2d 880 (Miss. 1981).

they were not living together.[10] Tillman further testified that he had signed up for veterans' benefits and that his wife was receiving the same allowance as he was.[11]

There was an indication at the hearing that the deceased had received regular government benefit checks as a result of the marriage. There was, however, no positive proof on this issue.[12]

The chancellor decreed that Narvel Tillman was prohibited from being an heir of his wife on the grounds that "he had deserted the deceased and totally abandoned her as to support."[13]

The Mississippi Supreme Court reversed and rendered a decree granting Tillman an undivided one-half interest in the real and personal property owned by the deceased at the time of her death.[14] The court stated that the statute here in question had to be strictly construed unless there was a clear desertion and abandonment sufficient to raise an estoppel.[15] A review of the record indicated that there was not substantial evidence to show a desertion or abandonment. At most, only a separation was proved.[16]

PROTECTING THE SURVIVING SPOUSE FROM DISINHERITANCE OR RECEIVING LESS THAN HIS FAIR SHARE.

The protection of a surviving spouse from disinheritance or receiving less than his fair share from the estate of the deceased spouse has been a problem since the early common law. At common law, the rights of a husband or wife in the estate of the spouse were created by law as an incident of marriage.[17] The spouse could not deprive the survivor of these rights by alienation or by will.[18]

Based on the concept that a husband was the guardian of his wife, he had the right by marriage to a life estate in all the lands of which she was seized of a freehold estate at any time during

10. The offered explanation, as stated in the Appellee's brief, was that he served six months in the county jail and had been placed under a $5000.00 peace bond. The decedent refused to let him come home when he got out because she was afraid of him. *Id.*

11. Brief for Appellant at 4, Tillman v. Williams, 403 So.2d 880 (Miss. 1981).

12. 403 So.2d at 881. The self-contradictory testimony of the issue was presented by a witness for Narvel Tillman. The witness testifies on direct examination that the deceased was receiving two checks, one for $178.00 and another for $109.00. On cross-examination she testified that the decedent was not getting two checks, that she did not see the amounts of the checks but obtained this knowledge from seeing checks received by Narvel Tillman after the decedent died. Brief for Appellee at 3, Tillman v. Williams, 403 So.2d 880 (Miss. 1981).

13. Tillman v. Williams, 403 So.2d 880, 881 (Miss. 1981).

14. *Id.* at 882.

15. *Id.* at 881.

16. *Id.* at 882.

17. Day v.Cochran, 24 Miss. 261, 274 (1852) (curtesy); Hinds v. Pugh, 48 Miss. 268 (1873) (dower).

18. Wells v. Thompson, 13 Ala. 793, 804 (1848) (curtesy); *In re* Noble's Estate, 194 Iowa 733, 735, 190 N.W. 511, 512 (1922); Bomar v. Wilkins, 154 S.C. 64, 68, 151 S.E. 110, 112 (1930) (dower).

the marriage. Upon marriage the spouses became jointly seized in the estate, and it endured only for their joint lives, being dissolved by death or divorce.[19] When issue was born alive, capable of inheriting the wife's estate, the husband's estate became a tenancy by curtesy initiate. This estate lasted for the term of the husband's own life and he had sole seisen.[20] At the wife's death, this became an estate by curtesy consummate. This estate was of the same general nature and subject to the same incidents as curtesy initiate.[21]

The estate of dower was the provision made by the law for the sustenance of the widow and for the nurture and education of her young children.[22] It consisted of the use during her natural life, after the death of her husband, of one-third of the real estate of which her husband was beneficially seized at anytime during coverture of a title inheritable by children of the marriage.[23]

The common law estates of dower and curtesy were estates by purchase, not descent, and neither surviving spouse was technically an heir of the deceased spouse.[24] These estates were derivative; that is, the interest of the surviving spouse could not outlast the basic estate from which it was derived. The estate taken by the surviving spouse was subject to the same infirmities to which the basic estate was subject.[25]

At common law, a devise or bequest by a husband or wife to the surviving spouse was presumed to be *in addition to* rights to the estate of dower or curtesy.[26] The fact that allowing both would reduce the amount of the testamentary gifts to the other beneficiaries did not overcome this presumption.[27] Under this rule the testator's intent to make the gift *in lieu of* the common law estate had to be clear. In such a case the spouse would be forced to elect between the two.[28]

19. J. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY § 11, at 72 (1962).

20. *Id.* Day v. Burgess, 139 Tenn. 559, 565 202 S.W. 911, 912 (1918).

21. Day v. Cochran, 42 Miss. 261, 274 (1852); Richardson v. Richardson, 150 N.C. 549, 64 S.E. 510 (1909).

22. Hinds v. Pugh, 48 Miss. 268 275 (1873).

23. Quinn v. Coleman, 42 Miss. 386, 395 (1869).

24. Higginbotham v. Higginbotham, 177 Ky. 271, 274, 197 S.W. 627, 628 (1917); Gray v. Whittemore, 192 Mass. 367, 372 78 N.E. 422, 424 (1906).

25. For example, if the husband acquired a fee simple estate subject to an option in a third person to buy the land, the widow's dower was also subject to that option. Forte v. Carvso, 336 Mass. 476, 481, 146 N.E. 2d. 501, 504 (1957); Matlack v. Arend, 2 N.J. Super. 319, 330, 63 A.2d. 812, 817 (1949).

26. Mead v. Phillips, 135 F.2d 819, 824 (D.C. Cir. 1943); Brown v. Brown, 55 N.H. 106, 107 (1875).

27. Bomar v. Wilkans, 154 S.C. 64, 68, 151, S.E. 110, 112 (1930).

28. *In re* Whitneys Estate, 171 Cal. 750, 760, 154 P. 855, 859 (1916); McHan v. McHan, 168 Ga. 798, 800, 149 S.E. 198, 199 (1929); Bank of Commerce v. Trigg, 138 Okla. 216, 218, 280 P. 563, 565 (1929).

These common law rules worked a restraint on alienability since neither spouse could be deprived of his interest. The rules were especially harsh on the wife since the husband had total control of her land, rents, and profits during coverture. Equity first recognized this problem and granted some relief by the establishment and recognition of a separate estate for the wife. With such an estate, land could be conveyed to a married woman for her sole and separate use.[29] Though no particular words were necessary to create this estate, the intent of the grantor had to be clearly manifested.[30]

Following enactments in England affecting the estate of dower and curtesy,[31] these common law estates have undergone material statutory modification in most U.S. jurisdictions. In some jurisdictions they have been totally abolished.[32] In jurisdictions where no statutory modifications have been enacted, curtesy and dower exist as they did at common law. The statutes in other jurisdictions are merely declaratory of the common law. In the states where dower and curtesy have been expressly abolished, the interest of the surviving spouse is the distributive share of the estate of the deceased which the survivor would have taken had the spouse died intestate. This share is referred to as the statutory forced share since the survivor is allowed to take the distributive share despite the provisions of the will. Thus the deceased is precluded from defeating by his will the distributive share of the surviving spouse as provided by law. This is a well established fact, as the court noted in *In Re Noble*:[33] "The decedent cannot, by the provisions of his will, in any manner, deprive the widow of her distributive share of one-third of his estate. This rule has been so frequently declared and so universally recognized that citation of authorities in support of the same is wholly unnecessary."[34] The interest granted the surviving spouse by statute is frequently a fractional share in fee simple in the realty owned by the deceased at the time of his death.[35] In addition, statutes have reversed the common law presumption with respect to a devise or bequest to a surviving spouse in the will of the decedent, providing that provi-

29. Rosberry v. Harville, 90 Ga. 530, 537, 16 S.E. 299, 301 (1892); Small v. Field, 102 Mo. 104, 120, 14 S.E. 815, 818 (1890); Hays v. Leonard, 155 Pa. 474, 478, 26 A. 664, 665 (1893).

30. Grand Gulf Bank v. Barner, 10 Miss. 165 (1844).

31. Dower Act of 1834, 3 & 4 Wm. 4, ch. 105, § 4 (providing for destruction of dower by deed or will) and Real Property Act of 1925, 15 Geo. 5, ch 23, § 48 (1925).

32. J. C. MOYNIHAN, *supra* note 19, at 56 (dower); *Id.* at 55 (curtesy).

33. 194 Iowa 733, 190 N.W. 511 (1922).

34. *Id.* at 735, 198 N.W. at 512.

35. For a summary of the statutes from various jurisdictions see 3 VERNIER, AMERICAN FAMILY LAW §§ 189, 216 (1971).

sions in the will of the deceased for the surviving spouse are in lieu of the rights given to the survivor by law unless a contrary intent appears.[36] This presumption is overcome by any provision of the will showing an intent that the devise or bequest is in addition to the rights existing independent of the will.[37]

MISSISSIPPI'S DISTRIBUTIVE SHARE

Mississippi was the first of states to emancipate and recognize the rights and responsibilities of married women.[38] On February 15, 1839, Mississippi enacted An Act For The Protection and Preservation Of The Rights and Property Of Married Women,[39] which was amended February 28, 1846.[40] This act provided that any married woman could be seized or possessed in her own name of any real or personal property by direct bequest, demise, gift, purchase, or distribution other than that coming from her husband after coverture. The present act has been unchanged since 1880 and gives a married woman the same rights and responsibilities with regard to the possession and ownership of land as she would have if she were not married.[41]

In 1880,[42] Mississippi abolished dower and curtesy.[43] In their place, a distributive share was provided for the surviving spouse by statute.[44] The statutes enacted apply equally to both the husband and the wife.

Mississippi's descent and distribution statute[45] provides that if a husband or wife dies intestate, the surviving spouse is entitled to the entire estate in fee simple if there are no children or descendants of children. If there are children or descendants of such, the spouse is entitled to a child's share.[46]

The making of a will is not a right that existed at common law nor is it a right granted under the constitution. Rather, it is a privilege that is granted by statute.[47] Under the Statute of Wills,

36. Hasting v. Clifford, 32 Me. 132, 133 (1850); Heald v. Kilgore, 84 N.H. 309, 310, 149 A. 866, 867 (1930); Corry v. Lamb, 45 Ohio St. 203, 207, 12 N.E. 660, 661 (1887).

37. Bowers v. Lillies, 187 Ind. 1, 10, 115, N.E. 930, 933 (1917); Hardy v. Scales, 54 Wis. 452, 455, 11 N.W. 590, (18812).

38. MORSE, MISSISSIPPI WILLS, § 4.1 at 50 (1968).

39. 1839 MISS. LAWS, ch. 46.

40. 1846 MISS. LAWS, ch. 13.

41. MISS. CODE ANN. § 93-3-1 (1972).

42. MISS. CODE § 1170 (1980).

43. Dower and curtesy remain abolished today. MISS. CODE § 93-3-5 (1972).

44. MISS. CODE ANN. § 91-1-7 (1972).

45. *Id.*

46. The descent and distribution statutes are equally applicable to personal property. *Id.* at § 91-1-11.

47. *In re* Estate of McKellar, 380 So.2d 1273, 1275 (Miss. 1980); Mississippi College v. May, 241 Miss. 359, 369, 128 So.2d 557, 560 (1961).

married women had no power to devise or bequeath their property.[48] This infirmity was abrogated by the Married Woman's Property Acts.[49] Under the present statute, the privilege of making a will extends to every person eighteen years of age and older who is of sound mind.[50]

Mississippi statute provides that any provision in the will of the deceased for the surviving spouse will be a bar to the distributive share.[51] However, the spouse is protected in the case of unsatisfactory provisions in the will of the deceased.[52] According to this statute, a surviving spouse may renounce the provisions made in the will and, by such renunciation, become entitled to the portion of the estate to which he would have been entitled had the spouse died intestate, up to the limit of one-half of the estate. The code also provides for a surviving spouse who is completely omitted from the will of the deceased.[53]

This right to renounce results from the doctrine of election and gives to the surviving spouse the right to choose between the provisions of the will and the allowance as provided by statute.[54] If the benefits under the will are elected, the entire contents of the will must be adopted and any rights inconsistent with it must be renounced.[55] This right to renounce and the scope and extent of its benefits depend on the statute conferring the right,[56] and such rights are construed as if the testator died intestate.[57] The right to elect is personal to the surviving spouse and may not be exercised by his creditors or personal representatives.[58] Renunciation has no effect on the validity of the will but merely on the amount of property received under it.[59] When the surviving spouse renounces the will and elects to take the statutory forced share, the testamentary gifts are abated ratably to make up such share. The will is then enforced and given effect and the spouse becomes a tenant in common with the other beneficiaries of the will.[60]

48. Lee v. Bennett, 31 Miss. 119, 124 (1856).
49. Kelly v. Alred, 65 Miss. 495, 497, 4 So. 551, 551 (1888).
50. MISS. CODE ANN. § 91-5-1 (Supp. 1981).
51. *Id.* at § 91-5-23 (1972).
52. *Id.* at § 91-5-25 (Supp. 1981).
53. *Id.* at § 91-5-27 (1972); *See also supra* note 1 and accompanying text.
54. McGaughey v. Eades, 78 Miss. 853, 857, 29 So. 516, 517 (1901).
55. *Id.*
56. Mullins v. Mullins, 239 Miss. 751, 125 So.2d 93 (1960).
57. Campbell v. Casen, 206 Miss. 420, 438, 40 So.2d 258, 260 (1949).
58. Carter v. Harvey, 77 Miss. 1, 6, 25 So. 862, 863 (1899); Mullins v. Mullins, 239 Miss. 751, 755, 125 So.2d 93, 95 (1960). *But see* Hardy v. Richards, 98 Miss. 625, 634, 54 So. 76, 77 (1911) (holding that where the wife is *non compos mentis* renunciation may be made for her by her guardian with approval of the court).
59. Edwards v. Edwards 193 Miss. 889, 894, 11 So.2d 450-52 (1943).
60. Gordin v. James, 86 Miss. 719, 740-41, 39 So. 18, 20 (1905).

The right of the husband or wife to renounce the will of the deceased spouse is limited under Mississippi law by the value of his estate.[61] If the survivor has a separate estate, equal in value to the statutory share, there is no right of renunciaton. However, if the separate estate is less than the statutory share, the spouse may dissent to the will and have the deficiency made up. No prohibition exists against renuncation if the separate estate is equal to one-fifth or less of the value of the statutory share. Thus, the scope and extent of the benefits of renunciation also depend on the value of the surviving spouse's separate estate.[62]

EFFECT OF ABANDONMENT, DESERTION AND NON-SUPPORT ON THE RIGHT TO CLAIM DISTRIBUTIVE SHARE

The question of whether a survivor who has abandoned or failed to support his deceased spouse is entitled to his distributive share has received varying treatment from jurisdiction to jurisdiction. The answer often depends either on the statute granting the distributive share, or on the existence of statutes specifically calling for a forfeiture of the rights of a spouse due to abandonment or non-support. Unless the forfeiture is declared by statute, the courts usually will not engraft an exception to the statutory right of the surviving spouse in the deceased's estate.[63] Where statutes do exist which bar a surviving spouse from claiming his distributive share due to conduct on his part amounting to abandonment or nonsupport, evidence of one of the grounds calling for forfeiture will be sufficient.[64] Generally, under such statutes, evidence must

---

61. MISS. CODE ANN. § 91-5-29 (1972).

62. Banks v. James 264 So.2d 387 (Miss. 1972) (formula for determining if the estate is of equal or lesser value); Biggs v. Roberts, 237 Miss. 406, 115 So.2d 151 (1959) (estate of greater value); Carter v. Evans, 230 Miss. 803, 94 So.2d 237 (1957) (estate of lower value); Davis v. Miller, 202 Miss. 880, 32 So.2d 871 (1947) (formula for determining if estate of equal or lesser value); *In re* Bullock's Estate, 239 So.2d 925 (Miss. 1970) (no separate estate); Meyers v. Laird, 230 Miss. 675, 93 So.2d 828 (1957) (estate of equal value).

63. Nolen v. Doss, 133 Ala. 259, 31 So. 969 (1902); Meyer's Adm'r v. Meyers, 244 Ky. 248, 50 S.W.2d 81 (1932); Estate of Cofe, 98 Me. 415, 57 A. 584 (1904); *In re* Estate of Torres, 61 Nev. 156, 120 P. 2d 816 (1942); Martin v. Swanton, 65 N.H. 10, 18 A. 170 (1889); Newland v. Holland, 45 Tex. 588 (1876).

64. *In re* Micka's Will, 116 N.Y.S.2d 699 (1951), *Aff'd*, 280 A.D. 899, 115 N.Y.S.2d 660 (1952) (grounds in alternative, not conjunctive); Buckley Estate, 348 Pa. 311, 35 A.2d 69 (1944) (Either non-suport or desertion would support forfeiture).

be established that would be sufficient to support a divorce or judicial separation.[65] In addition, the full period of time specified by the statute must be shown,[66] but the forfeiture generally will not be found if the separation is condoned or followed by a reconciliation.[67]

Where the separation is by consensual agreement between the husband and wife, the court generally will not find a forfeiture[68] unless one of the parties, after the separation, is guilty of conduct inconsistent with a continuing marital relationship.[69] If the deceased had initiated the separation wrongfully, the fact that the surviving spouse, subsequent to the separation, engaged in conduct inconsistent with a continued marital relationship, such as adultery, has been held not to result in a forfeiture.[70]

Abandonment or desertion resulting in a forfeiture is generally not found where the surviving spouse was justified in leaving due to misconduct of the deceased.[71] However, misconduct on the part of the surviving spouse may be found to amount to a constructive abandonment depriving the guilty spouse of his right to share in the other's estate.[72]

65. *In re* Wandmayer's Estate, 178 Misc. 464, 34 N.Y.S. 2d 928 (1942) (husband barred because he left wife, without attempt to take her with him, and settled in his native county of Poland and thereafter never contributed to her support); High v. Bailey, 107 N.C. 70, 12 S.E. 45 (1890) (constructive abandonment on the part of the husband barring him from his distributive share where he refused to give his wife anything to eat and and she was forced to leave in order to provide for herself and his family). *See also* Alexander v. Alexander, 107 Conn. 101, 139 A. 685 (1927); Hinton v. Whitaker, 101 Ind. 344 (1885); Plummer v. Metropolitan Life Insurance Company, 229 Mo. App. 368, 81 S.W.2d 453 (1935). Many cases have found the evidence to be insufficient: Collier v. Porter, 322 Mo. 697, 16 S.W.2d 49 (1929) (evidence that the husband and wife lived apart at times during the marriage is insufficient); *In re* Stolz' Estate, 145 Misc. 799, 260 N.Y.S. 906 (1932) (must be desertion without consent); *In re* Rudolph's Estate, 128 Pa. Super. 459, 194 A. 311 (1937) (proof that the husband did not work and was intemperate was not sufficient).

66. *In re* Zanfino's Estate, 375 Pa. 501, 503, 100 A.2d 60, 61 (1953).

67. *In re* Bowman's Estate, 301 Pa. 337, 340, 152 A. 38, 39 (1930). See also *In re* Boesenberg's Estate 265 A.D. 484, 485, 39 N.Y.S. 2d 418, 419 (1943) where the court assumed that if the husband made an attempt at reconciliation which was rejected by his wife, it is evidence of an abandonment by her.

68. Hill v. Taylor, 186 Ind. 680, 684, 117 N.E. 930, 931 (1917); *In re* Armond's Estate, 22 N.Y.S.2d 18, 22 (1940); *In re* Arnout's Estate, 283, Pa. 49, 53, 128 A. 661, 662 (1925).

69. Alexander v. Alexander, 107 Conn. 101, 139 A. 685 (1927) (after separation, the wife moved to another city and dropped all communication with her husband); Kanton v. Bloom, 90 Conn. 210, 96 A. 974 (1916) (wife entered marriage with another man); *In re* Bowman's Estate, 301 Pa. 337, 152 A. 38 (1930) (adultery); *In re* Arnout's Estate, 283 Pa. 49, 128 A. 661 (1925) (wife's refusal to return home at her husband's request).

70. *In re* Green's Estate, 155 Misc. 641, 280 N.Y.S. 692, *Aff'd*, 246 A.D. 583, 284 N.Y.S. 370 (1935); *In re* Crater's Estate, 372 Pa. 458, 93 A. 2d 475 (1953).

71. Kantor v. Bloom, 90 Conn. 210, 96 A. 974 (1916); Hill v. Taylor, 186 Ind. 680, 117 N.E. 930 (1917); Parson v. Butler, 230 Miss. 830, 94 So.2d 320 (1957); *In re* Maiden's Estate, 284 N.Y. 429, 31 N.E. 2d 889 (1940); *In re* Celenza's Estate, 308 Pa. 186, 162 A. 456 (1932).

72. High v. Bailey, 107 N.C. 70, 12 S.E. 45 (1890); Jac's Estate, 355 Pa. 137, 49 A.2d 360 (1946). But see Stoltz' Estate, 145 Misc. 799, 260 N.Y.S. 906 (1932), where the court said that where a decedent wife left her husband, it could not be said that he had abandoned her even if she was justified in leaving by his cruel treatment.

Mississippi has no statute barring a surviving spouse from claiming his distributive share on acount of abandonment, desertion,[73] non-support or adultery.[74] The courts have noted that under the statutes regulating descent and distribution, the surviving spouse is made an heir to the deceased. Thus there is no authority on the part of the court to engraft exceptions to the statutes.[75] Nonetheless, there are instances in which the surviving spouse may be estopped from asserting his heirship.[76]

The Mississippi Supreme Court has held that estoppel did not result in cases where the surviving spouse was justified in leaving the deceased,[77] where the surviving spouse was merely silent as to an illegitimate marriage of the deceased subsequent to the separation,[78]or where there was adultery on the part of either spouse.[79] The court has found estoppel based on the wife's conduct of living with another man before obtaining a divorce,[80] and

---

73. Legislation has been enacted on the question of desertion as a ground for divorce. MISS. CODE ANN. § 93-5-1 (1972) provides: "Divorces from the bonds of matrimony may be decreed to the injured party for any one or more of the following twelve causes, viz:

First . . .

Fourth. Willful, continued and obstinate desertion for the space of one year."

The courts have held that there must be a complete abandonment of the marital relationship, but it is not always necessary for the deserting spouse to physically abandon the marital domicile. Graves v. Graves, 88 Miss. 677, 680, 41 So. 384 (1906). The abandonment must be willful, Walker v. Walker, 140 Miss. 340, 354, 105 So. 753, 756 (1925), and be continuous for the statutory period. Gaillard v. Gaillard, 23 Miss. 152, 153 (1851). There must be no intent to return on the part of the deserting spouse, but his intent must be to permanently end the marital relationship. Walton v. Walton, 76 Miss. 662, 666, 25 So. 166, 168 (1899). The separation must be without consent, Fulton v. Fulton, 36 Miss. 517, 525 (1858), and there must be no just cause for the spouse's leaving. Wilson v. Wilson, 198 Miss. 334, 341, 22 So.2d 161, 163 (1945). In addition, the party seeking the divorce on the grounds of desertion must show that he was ready and willing to renew the marital relationship during the statutory period. Unwillingness to renew the marital relationship amounts to consent or acquiescence. Lynch v. Lynch, 217 Miss. 69, 84, 63 So.2d 657, 663 (1953). For discussion on desertion as a ground for divorce, see N.S. HAND, MISSISSIPPI DIVORCE, ALIMONY, AND CHILD CUSTODY § 4-9 (1981).

74. Rowell v. Rowell, 251 Miss. 472, 170 So.2d 267 (1964).

75. Stanley v. Stanley, 201 Miss. 545, 554-55, 29 So.2d 641, 645 (1947); Williams v. Lee, 130 Miss. 481, 491, 94 So. 454, 455 (1923).

76. Williams v. Lee, 130 Miss. 481, 94 So. 454 (1923).

77. Parsons v. Butler, 230 Miss. 830, 94 So.2d 320 (1975); Stringer v. Arrington, 202 Miss. 798, 32 So.2d 879 (1947).

78. Walker v. Matthews, 191 Miss. 489, 3 So.2d 820 (1941); Williams v. Lee, 130 Miss. 481. *But see* Woodson v. Colored Grand Lodge, 97 Miss. 210, 52 So. 457 (1910), where the wife who had acquiesced in the separation and remarriage of her husband and who had herself remarried was estopped.

79. *In re* Marshall's Will, 243 Miss. 472, 138 So.2d 482 (1962).

80. Gaston v. Gaston, 358 So.2d 376 (Miss. 1978). Although the husband in this case had entered a second marriage after the separation, the court based its finding of estoppel on the fact that the wife, before living with another man, had not received a divorce or ascertained whether her husband had.

in cases of a bigamous marriage after the separation.[81]

When estoppel is pled in a proceeding, the burden of proving the estoppel is upon the party pleading it.[82] Every fact essential to an estoppel must be clearly proven by a preponderance of the evidence. Where the evidence is evenly balanced, this burden has not been sustained.[83] If there has been a marriage subsequent to the separation, this raises the presumption that the former marriage was dissolved. The burden of overcoming this presumption is placed upon those asserting the invalidity of the subsequent marriage.[84]

THE COURT'S DECISION

The court first noted that where no provisions were made for the surviving spouse in the will of the deceased, he is entitled to either a child's share or one-half of the deceased spouse's estate under Mississippi statute.[85] As stated in the earlier case of *Bullock v. Harper,*[86] and again in *McBride v. Haynes,*[87] this section provides that the surviving spouse need not take any affirmative action since the law automatically renounces the will.[88] Next, the court addressed the lower court's holding that since Mr. Tillman had deserted his wife he was estopped from claiming his share of her estate. Noting that the lower court had been misled by earlier statements of the supreme court, the court went on to clarify its earlier holdings in regard to estoppel.[89]

Turning first to the case of *Walker v. Matthews,* the court discussed legislation on the abandonment and desertion theory.[90] Only seven states follow this theory, all of which have legislation dealing with abandonment as a basis for barring a surviving spouse's right to an interest in the estate of his deceased spouse;

---

81. Baugh v. Brimage, 242 Miss. 459, 135 So.2d 701 (1961); Harrison v. G. & K. Investment Co., 238 Miss. 760, 115 So.2d 918 (1959), *cert. denied,* 363 U.S. 844 (1960); Minor v. Higdon, 215 Miss. 513, 61 So.2d 350 (1952); Walker v. Matthews, 191 Miss. 489, 3 So.2d 820 (1941); Williams v. Johnson, 148 Miss. 634, 114 So. 733 (1927).

82. Harkins v. Cole, 200 Miss. 698, 28 So.2d 839 (1947); *In re* Marshall's Will, 243 Miss. 472, 138 So.2d 482 (1962).

83. *In re* Marshall's Will, 243 Miss. 472, 138 So.2d 482 (1962).

84. Vaughn v. Vaughn, 195 Miss. 463, 16 So.2d 23 (1943); Wallace v. Herring, 207 Miss. 658, 43 So.2d 100 (1949).

85. MISS. CODE ANN. § 91-5-7 (1972).

86. 239 So.2d 925 (Miss. 1970).

87. 247 So.2d 129 (Miss. 1971).

88. Tillman v. Williams, 403 So.2d 880, 881 (Miss. 1981).

89. Both the case of Walker v. Matthews, 191 Miss. 489, 3 So.2d 820 (1941), and *In re* Marshall's Will, 243 Miss. 472, 138 So.2d 482 (1962) had contained statements indicating that desertion or abandonment is held to estop a spouse from inheriting from the other.

90. Tillman v. Williams, 403 So.2d 880, 881 (Miss. 1981).

the statute granting such right must be strictly construed unless a clear desertion or abandonment exists that sets up the estoppel.[91]

The prior holdings discussed in the court's opinion revealed that a mere separation is not sufficient to set up an estoppel. There must be further evidence, such as a bigamous marriage, which shows a clear abandonment of the marital relationship.[92]

In the court's opinion, the necessary evidence to show a desertion or abandonment was not present in this case. There were no marriage or divorce proceedings by either party, and at most only a separation was proven. In the words of the court, "the statute in question cannot have any meaning if the surviving spouse is disinherited under the clear language of the statute solely because of a long separation."[93]

The court held that Tillman was entitled to a one-half interest in his wife's real and personal property which she owned at the time of her death. He holds this interest as a tenant in common with the beneficiaries of the will.[94]

ANALYSIS-CONCLUSION

On first review of the principal case, it appears to set out a clear case of abandonment. Not only had Narvel Tillman left his wife and moved to another county fifteen to twenty years prior to her death, there was also no clear evidence that he had, in fact, contributed to her support during the separation. There was no evidence to show that Mr. Tillman was justified in leaving or that the separation was based on a consensual agreement with his wife.

However, as the court noted, the abandonment or desertion theory is not generally applied except in jurisdictions which have enacted legislation on the issue.[95] The lack of legislation in Mississippi on the question of abandonment and the resultant effect on the surviving spouse's right to a distributive share of the deceased's estate, appears to have had an impact on earlier cases

---

91. *Id.*, clarifying the statement in Walker v. Matthews, 191 Miss. 489, 3 So.2d 920 (1941), that the "desertion of abandonment theory" was a majority rule.

92. Baugh v. Brimage, 242 Miss. 459, 135 So.2d 701 (1961) (surviving husband estopped as he had entered a bigamous marriage and was living with still another woman); *In re* Marshall's Will, 243 Miss. 472, 138 So.2d, 482 (1962) (estoppel found where the surviving wife had lived with various men after leaving her husband and her husband had entered a bigamous marriage); Rowell v. Rowell, 251 Miss. 472, 170 So.2d 267 (1964) (adulterous affair does not amount to desertion in the absence of statute or bigamous marriage); Walker v. Matthews, 191 Miss. 489, 2 So.2d 820 (1941) (both spouses had entered a bigamous marriage after separation, therefore estoppel was found).

93. Tillman v. Williams, 403 So.2d 880 (Miss. 1981).

94. *Id.*

95. *Id.* at 881.

dealing with this issue. In the absence of such legislation, the court has consistently construed the descent and distribution statutes in a strict manner, refusing to find judicial exception to them.[96]

At the same time however, estoppel, based on the conduct of the surviving spouse, has been held to be a bar to the right to a distributive share. A finding of estoppel has been deemed proper only where a clear abandonment of the marital relationship has been shown.[97] The court has had numerous occasions on which to consider this issue, and in case after case has consistently held that there must be a bigamous marriage on the part of the surviving spouse. This strict rule has very rarely been departed from, and where estoppel has been based on other conduct of the surviving spouse, the courts have noted that the deceased had himself entered a bigamous marriage before his death.[98]

Equitable estoppel has previously been said by the court to be established where there is a change in a party's position in reliance upon the conduct of another and detriment is suffered as a result.[99] It seems that a spouse who has been left by his or her partner for the period of time involved in the principal case could conceivabley fall within this definition. Even if facts were not sufficiently established in this case, the court's holding appears to rule out the possibility of a separation alone, under any circumstances, ever resulting in estoppel.

No consideration is given to the fact that the deceased, during the separation, may have devoted considerable efforts and resources to acquire additional property. The surviving spouse may not even be aware of the extent of the estate of the deceased in which he is claiming an interest. Since the survivor played no part in the acquiring of this property, it seems inequitable to allow him a right to an interest in it, in spite of a long separation, merely because there was no bigamous marriage.

Abandonment as a ground for divorce has not, on the other hand, been held to such a stringent test by the court. As long as there has been willful, intentional and complete separation with an intent of ending the marital relationship, the court has found

---

96. Harrison v. G. & K. Investment Co., 238 Miss. 760, 771-72, 115 So.2d 918, 921 (1959), *cert. denied*, 363 U.S. 844 (1960); Rowell v. Rowell, 251 Miss. 472, 484, 170 So.2d 267, 272 (1964); Williams v. Lee, 130 Miss. 481, 491, 94 So. 454, 455 (1923).

97. *In re* Marshall's Will, 243 Miss. 472, 138 So.2d 482 (1962); Walker v. Matthews 191 Miss. 489, 3 So.2d 820 (1941).

98. Gaston v. Gaston, 358 So.2d 376, 379 (Miss. 1978); *In re* Marshall's Will, 243 Miss. 472, 478, 138 So.2d 482, 483 (1962).

99.Thomas v. Bailey, 375 So.2d 1049, 1053 (Miss. 1979).

abandonment to exist based on numerous sets of facts.[100] Although desertion as a grounds for divorce is sanctioned by statute,[101] it is still left to the court to determine whether a clear abandonment is shown. It is not clear why the court has chosen to apply a different test in determining whether abandonment exists as a ground for estopping a surviving spouse from claiming his right to a distrubutive share of his deceased spouse's estate. Both instances call for determination of whether or not there has been an abandonment of the marital relationship, yet in one instance numerous facts can lead to a finding of such abandonment, while in the other there can be no such finding in the absence of a bigamous marriage. Using this rationale, the very same set of facts could lead to a finding of abandonment as grounds for divorce but not as grounds for estopping the right to a distributive share. It seems logical that the same test should apply in both instances since the same question is present and the same factual circumstances raise the question.

The court in the principal case has restated and reinforced the law that has resulted from its prior decisions in this area. The burden of approving the estoppel was placed upon the executrix.[102] Since none of the requirements as established by earlier cases was shown by the evidence presented, this burden was not met. The court properly found under statute[103] that the husband was entitled to a one-half interest in the estate of this deceased wife. No matter how inequitable this may appear, it was proper application of the law as it now exists in this state.

Linda D. Bounds

100. Graves v. Graves, 88 Miss. 677, 41 So. 384 (1906); Griffin v. Griffin, 207 Miss. 500, 42 So.2d 720 (1949); Lynch v. Lynch, 217 Miss. 69, 63 So.2d 657 (1953).

101. MISS CODE ANN., *supra* note 65 at § 93-5-1.

102. Tillman v. Williams, 403 So.2d 880, 882 (Miss. 1981).

103. *Id.*