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**New York Law Journal**  
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November 1, 2011 Tuesday

**SECTION:** DECISION OF INTEREST; Pg. 26 Vol. 246 No. 85

**LENGTH:** 2305 words

**HEADLINE:** Probate Proceeding, Will of Doris Ackerly Newman, Deceased, 883P2007/A;  
Surrogate's Court, Suffolk County

**BYLINE:** Surrogate John M. Czygier

**BODY:**

Cite as: Will of Newman, 883P2007/A, NYLJ 1202520804987, at \*1 (Surr., SUF, Decided September 26, 2011)

Decided: September 26, 2011

ATTORNEYS

Attorneys for Petitioner: Steinberg & Boyle, LLP, East Islip, NY.

Attorneys for Michelle Newman: Cherny & McGrory, LLC, Garden City, NY.

Attorneys for Lillian Meurer and Delmas Morrison: Phillips, Weiner, Artura, Cox & McDonough, Esqs., Lindenhurst, NY.

DECISION

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In this contested proceeding to determination the validity of a right of election, petitioner has moved for summary judgment pursuant to CPLR 3212. Respondents oppose the application. For the reasons set forth below, petitioner's motion is granted in part.

Background

Decedent died on March 2, 2007. Her will was admitted to probate on November 9, 2010. In January of 2011, petitioner, the executor and beneficiary, commenced the underlying proceeding to determine the validity or effect of the election pursuant to EPTL 5-1.1-A filed by Kenneth Newman, decedent's purported spouse, prior to his death on Janu-

ary 3, 2011. As no fiduciary had been appointed to administer Kenneth's estate, petitioner obtained jurisdiction over all of his presumptive distributees, his spouse and children. Two pleadings opposing the relief requested by petitioner were filed, one by his spouse and the other collectively by his children. The parties entered into a pretrial disclosure schedule on March 29, 2011, which was "so ordered" by the court. On June 15, petitioner filed the instant motion seeking a determination that Kenneth Newman's right to take an elective share of this estate is invalid and of no effect. Respondents oppose the instant application.

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#### Applicable Law

Summary judgment is designed to eliminate from the trial calendar litigation that can be resolved as a matter of law (see *Andre v. Pomeroy*, 35 NY2d 361). The court's burden is not to resolve issues of fact, but merely to determine if such issues exist (see *Dyckman v. Barrett*, 187 AD 2d 533). It is a drastic remedy that will only be awarded where there is no triable issue of fact (see *Barclay v. Denckla*, 182 AD2d 658). The court, therefore, must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person of her day in court (see *Russell v. A. Barton Hepburn Hospital*, 154 AD2d 796).

The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Zarr v. Riccio*, 180 AD2d 734). Failure to make out a prima facie case requires a denial of the motion regardless of the sufficiency of opposing papers (see *Winegrad v. New York University Medical Center*, 64 NY2d 851). If, however, this burden is satisfied, the burden of going forward shifts to the opposing party to establish the existence of material issues of fact requiring a trial (see *Romano v. St. Vincent's Medical Center*, 8 AD2d 467), by the tender of evidentiary proof in admissible form (see *Friends of Animals, Inc. v. Associated Fur Manufactures Inc.*, 46 NY2d 1065). In seeking to meet this shifting burden, a party may introduce evidence that may be otherwise barred by CPLR 4519 (see *Phillips v. Joseph Kantor & Company*, 31 NY2d 307).

Pursuant to EPTL 5-1.1-A (a), where a decedent dies on or after September first, nineteen hundred ninety-two and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate. EPTL 5-1.2 provides in pertinent part that [a] husband or wife is a surviving spouse within the meaning, and for the purposes of 4-1.1, 5-1.1, 5-1.1-A, 5-1.3, 5-3.1 and 5-4.4, unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that...[t]he marriage was void as incestuous under section five of the domestic relations law, bigamous under section six thereof, or a prohibited remarriage under section eight thereof (EPTL 5-1.2(2)). Domestic Relations Law 6 provides, in pertinent part, that a marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either

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...such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person....

The record before the court consists of the following: the petition and supporting documents, answers, the instant motion and supporting papers, the opposition and supporting papers, and petitioner's reply. It should be noted that although depositions were scheduled to take place on June 8, 2011, no examinations were conducted, nor was a request made to adjourn same to a new date.

#### Arguments

Petitioner asserts that Kenneth Newman was not legally divorced from his prior spouse when he married decedent; therefore his marriage to her was void. As a result, he has no legal basis to claim an elective share of this estate. More specifically, petitioner asserts that decedent's first spouse died in April of 1993. Subsequently, she became involved in a relationship with Kenneth Newman. Prior to January 12, 1996, decedent and Kenneth Newman applied for a marriage license in the state of Florida, where they had been residing. That application required each of the applicants to certify that the information contained therein is true and accurate. According to the information contained on that application, Newman indicated that his previous marriage ended in divorce in October of 1993. After obtaining a marriage license, decedent and Kenneth Newman were married on January 12, 1996 in Cape Coral, Florida, which is located in Lee County. In March of 1996, however, Kenneth Newman was still married to Dianne Newman, the two having been married in November of 1992. This fact is evidenced by the matrimonial record on file with the Clerk of Suffolk County, which reveals that the two entered into a stipulation settling their contested matrimonial action on or about March 14, 1996. The "Judgment of Divorce" dissolving their marriage was granted on or about June 6, 1996. Further, decedent and

Kenneth Newman filed federal income tax returns from 2000 to 2006 indicating their filing status as "single." Thus, petitioner concludes that because Kenneth Newman was still married to Diane Newman on January 12, 1996, his marriage to decedent was a nullity.

Respondents argue in opposition that there are issues of fact that preclude the granting of summary judgment and that discovery is incomplete thereby rendering this application premature.

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Although they concede that the "Judgment of Divorce" between Kenneth Newman and Diane Newman was granted June 6, 1996 and the ceremony between decedent and Kenneth Newman occurred prior to that date, respondents suggest that there may have been a marriage between decedent and Kenneth Newman after the June 6th date. With respect to the income tax returns, respondents argue that same are unsigned copies with no probative value. As this application was made shortly after the proceeding was commenced, respondents have not had the opportunity to investigate the possibility that decedent and Kenneth Newman may have married elsewhere. Further to this point, they have yet to depose petitioner who may have been a witness to any subsequent marriage ceremony of the two, especially since he indicated in his response to interrogatories that decedent and Kenneth Newman were married in February of 1998.

Respondents also assert that there is compelling evidence establishing this marriage. During the contested probate proceeding, both Kenneth Newman and Linda Levaillant, decedent's daughter and the objectant in the contested probate proceeding, testified that he married decedent in the latter part of June, 1996. Decedent's death certificate indicates that Kenneth Newman was decedent's surviving spouse. Correspondent from the Veterans Administration and Social Security Administration have recognized Kenneth Newman to be the surviving spouse of decedent.

Lastly, respondents assert several affirmative defenses in support of this application, including statute of limitations, standing and laches. Respondents assert that this proceeding is actually analogous to an action under Domestic Relations Law 140, which must be commenced during the lifetime of the parties. As for laches, petitioner has been aware of these facts for several years and his delay in prosecuting this claim has prejudiced them.

#### Discussion

The burden of proving the invalidity of a spousal right of election is upon the party asserting it (see Application of Carr, 134 NYS2d 513). Pursuant to EPTL 5-1.2, a husband is the surviving spouse unless and until it is proven otherwise. Further, there is a strong presumption that where a marriage has been established by the facts of record, such marriage is valid and continuing (see Gomez v. Windows on World, 23 AD3d 967). Where there are

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essentially two competing claims that a marriage was valid at a given time, each supported by proof of their respective marriages, there is a presumption that the second marriage is valid and that the prior marriage was dissolved by death, divorce, or annulment (see Mack v. Brown, 82 AD3d 133). This presumption is rebuttable upon a proper showing (see Seidel v. Crown Industries, 132 AD2d 730).

Here, there is a marriage certificate signed by decedent and Kenneth Newman, that certifies that they were married in Lee County Florida on June 12, 1996. That the parties, their children or friends, some of whom are not disinterested, may recall a different anniversary date or a general time frame when this marriage may have occurred is of little import, as the only proof of record, documentary or otherwise, as to the date when the parties entered into this marriage is contained on that certificate.

Thus, the sole remaining issue to be determined in connection with this application is whether at the time decedent and Kenneth Newman entered into their union as husband and wife there was a legal proscription barring it. It is uncontroverted that decedent's prior spouse, Kenneth Ackerly, predeceased her in 1993 and that she was free to remarry in 1996. With respect to Kenneth Newman, the record establishes otherwise. As conceded by respondents, Kenneth Newman and his former spouse Diane Newman were embroiled in a contested matrimonial proceeding until March of 1996 when they settled their dispute. Pursuant to the terms of their settlement, Kenneth Newman, the plaintiff, was to "proceed by uncontested divorce action," with Diane Newman consenting to the submission of the case for purposes of obtaining a judgment of divorce. That "Judgment of Divorce" was granted on June 6, 1996 and entered on June 10, 1996. Even if entry of the judgment is considered a "ministerial act," of which there is no proof in the record, the stipulation settling the contested divorce proceeding occurred three months after decedent and Kenneth Newman exchanged vows, as generally matrimonial judgments are not entered "nunc pro tunc" (see Cornell v. Cornell, 7 NY2d 164). Further, the affidavit of Daniel Garcia, an accountant who prepared income tax returns for decedent and Kenneth Newman, states that he prepared returns for both individuals listing their filing status as "single," as they did not qualify for filing in any other

manner. According to this affidavit, both decedent and Kenneth Newman told him on numerous occasions that the two were not legally married.

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Based upon the foregoing, petitioner has rebutted the presumption afforded respondents that a valid marriage between decedent and Kenneth Newman existed at the time of her death (Domestic Relations Law § 6). Having established that the marriage between Kenneth and Diane Newman had not been dissolved at the time of his union with decedent, their marriage is absolutely void and may not be validated or ratified by the subsequent divorce (see Mack V. Brown, supra).

The burden of going forward now shifts to respondents to lay bear their proof creating a genuine issue of material fact. This they have not done. The mere assertion that evidence may exist in some jurisdiction is insufficient. Similarly, conclusions, speculation and supposition are insufficient to raise a triable issue of fact. As far as this application being premature, the "so ordered" pretrial disclosure stipulation scheduled the deposition of party and nonparty witnesses on June 8, 2011. Pursuant thereto, the failure to conduct discovery in accordance with the order shall constitute a waiver thereof. Here, no application was made to amend the order; nor a request for such purposes. Moreover, respondents had ample time to obtain affidavits from those persons they believed may have knowledge or information on this issue.

As for the possibility that decedent and Kenneth Newman may have married "remarried" subsequent to the dissolution of Kenneth Newman's marriage to Diane Newman, respondents concede that, although the possibility exists, to the best of their knowledge no marriage took place after June 10, 1996.

Faulty or vague recollections and self-serving statements are insufficient to create a genuine issue of material fact in light of the uncontroverted documentary evidence of record.

Lastly, with respect to estoppel, the marriage between decedent and Kenneth Newman was void ab initio and cannot be rendered valid by estoppel (see Frelingstad v. Frelingstad, 134 NYS2d 63).

Conclusion

Accordingly, petitioner's motion is granted to the extent that the court finds that decedent was not legally married to Kenneth Newman at the time of her death and that, as such, he has no legal

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right to an elective share of this decedent's estate. The notice of election filed by Kenneth Newman is invalid and his claim to share in connection therewith dismissed.

This decision constitutes the order of the court.

**LOAD-DATE:** November 1, 2011

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