

## Equity Prevails And Voids Marriage Between Aides And Aged Patients

By Gary E. Bashian\*

As ever growing segments of the American population transition into senior citizenship, there has been an alarming rise in what is broadly known as Elderly abuse. Neglect, financial exploitation, physical and or mental abuse, are all forms of elder mistreatment that are adversely effecting increasing numbers of people in our community, and people throughout the country.

This unfortunate occurrence is exacerbated by tough economic times, an increasingly strained healthcare system, and a lack of awareness about the nature and depth of this problem on behalf of families, and the professional communities that offer services to them.

As illustrated in a recent series of decisions, the Courts have been actively taking steps to protect older generations from new forms of elder abuse by using traditional legal tools to address this growing social problem.

In the recently decided *Campbell v. Thomas*<sup>i</sup>, *In the Matter of I. Berk*<sup>ii</sup>, and the *Estate of R. Kaminester*<sup>iii</sup>, the Courts were confronted with examples of elder abuse where young caretakers providing healthcare and daily support for elderly patients, secretly marry the much older and mentally incapacitated individuals, and later attempt to claim the statutory right of election as provided under the Estates, Powers and Trusts Law ("EPTL"), Section 5-1.1-A. This tactic evades the safeguard provisions of EPTL 5-1.2, which ordinarily prompts disqualification of such a "spouse" in the event of wrongdoing. As the black letter of the law stands now, the abusing "spouse" remains a legal "surviving spouse" once the "sham" marriage has been entered into. Subsequently, they are later entitled to one-third of the decedent's estate despite this entitled share being the product of abuse.

*Campbell v. Thomas* involved a 72 year old decedent who was diagnosed with terminal prostate cancer and severe dementia in 2000. He required 24 hour supervision which was undertaken by his daughter. In February, 2001, his daughter took a one week vacation and entrusted her father's care to the petitioner, a 58 year woman who had full knowledge of her patient's incapacity and many health issues. During the daughter's one-week absence, the petitioner married the decedent and transferred approximately \$150,000.00 of the decedent's assets into joint accounts and changed the decedent's \$147,000 retirement plan, naming herself as the sole beneficiary. The decedent died six months after the marriage in August, 2001. The Appellate Division,

Second Department, ruled that although the petitioner did have a right to claim her elective share of the decedent's Estate, they would invoke their equitable powers to refuse to enforcement of that right.

*In the Matter of Irving Berk* involved a successful businessman whose health began to fail as he aged. Mr. Berk suffered from memory loss and his physical condition had deteriorated to the point that he required a wheelchair and caretaker at all times. His family obtained the services of the petitioner, a then 40 year old woman, who was hired as the decedent's live-in caretaker. After seven years of caring for Mr. Berk, petitioner, then 47 years old, took the 99 year old decedent to the New York City Clerk's Office where they were married. Approximately one year after the marriage, the decedent died. Neither the petitioner nor the decedent told anyone of their marriage during his lifetime. While traveling to the funeral home, petitioner finally advised the decedent's two children of her marriage to the decedent. Upon the offering of the decedent's Last Will and Testament for probate with the Kings County Surrogate's Court, the petitioner filed her petition to have the Court determine the validity of her right of election against the decedent's estate, which was in excess of five million dollars. Again, the Appellate Division, Second Department, refused to enforce the right of election on equitable grounds.

In the *Estate of Richard Kaminester*, the decedent's daughter sought a determination as to the validity of the petitioner's right of election against her father's estate. The petitioner, who was the decedent's caretaker, married the physically and mentally ailing decedent in March, 2006, shortly after both a Texas and New York Court found the decedent to be incapacitated. The caretaker, who was aware of the New York Court's ruling that the decedent was found to be incapacitated, concealed the marriage from the decedent's family as well as from the Court. The caretaker had transferred the beneficiary designation of the decedent's \$1.6 million dollar life insurance policy into her name, and shortly after their marriage the caretaker transferred the ownership of the decedent's \$2 million dollar house into both his and her name. In May, 2006 the decedent died, his marriage to the caretaker remaining a secret. The Surrogate Court of New York County, relying on a prior determination of the Supreme Court in an Article 81 proceeding which declared that Mr. Kaminester lacked the capacity to enter into contracts, including marriage contracts, refused to enforce the petitioner's right of election as a surviving spouse.

In each of these examples, the surviving spouse's attempt to exercise their statutory right of election against the decedent's estate was denied. These cases highlight a developing jurisprudence the Courts have adopted in response to the effort by surviving spouses to take refuge behind a statutory loophole to obtain unjust gains at

an elderly, and infirm, person's expense. The Courts will not permit such unjust acts, even where the statutory law might appear to compel such a result.

Exercising the ancient judicial power of equity, these Courts have invoked the principle that “no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong.” In conjunction with this equitable principle, the Courts have applied traditional concepts of contract to situations such as these. Where it has been determined that the Decedent was in fact incompetent at the time of entering the marriage contract, it follows that they could not have offered consent due to their disability. As such, the marriage contract was deemed void *ab initio*, thereby disqualifying the abuser of the status of “surviving spouse.” With no marriage contract, there can be no marriage, and therefore no spouse to claim an elective share. As the *Campbell* Court noted “this...does not reflect an effort to avoid a result intended by the Legislature. Rather ... it is clear...that the Legislature did not contemplate the circumstances presented ... when it enacted EPTL 5-1.2... The Legislature did not intend the statute to provide refuge for a person seeking to profit by means of a nonconsensual marriage.”<sup>iv</sup> With these decisions, the Courts have effectively prevented the misuse of the EPTL that can occur due to an unforeseen weakness in the statute as it is currently enacted.

With this succinct and traditional reasoning, the Court has foreclosed a potentially disastrous avenue of elder abuse in lieu of legislative action. These cases once again underscore our legal system's ability to adapt to the changing needs of society, and provide relief for those who find themselves outside the protections of statutory law. Moreover, the Court's mandate to use their discretion in situations such as these represents the essence of our common law, and is a confirmation that the Court's powers of equity are necessary, alive, and well.

\* Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP in White Plains, New York. Mr. Bashian is a past President of the Westchester County Bar Association, and presently on the Executive Committee of the New York State Bar Association's Trust and Estates Law Section. He can be reached at [garybashian@aol.com](mailto:garybashian@aol.com). Mr. Bashian gratefully acknowledges the contributions of Andrew Frisenda for his assistance in the composition of this article.

Please note that an article on the same topic has been submitted by this author to the Trusts & Estates Section of the New York State Bar Association Quarterly Newsletter for publication in their Summer 2010 issue.

---

<sup>i</sup> 73 A.D.3d 103, 897 N.Y.S.2d 460, 2010 N.Y. Slip Op. 02082 (App Div 2<sup>nd</sup> Dept. 2010)

<sup>ii</sup> 71 A.D.3d 883, 897 N.Y.S.2d 475, 2010 N.Y. Slip Op. 02139 (App. Div. 2<sup>nd</sup> Dept. 2010)

<sup>iii</sup> 26 Misc.3d 227, 888 N.Y.S.2d 385, 2009 N.Y. Slip Op. 29429 (Surr. Ct. N.Y. 2009)

<sup>iv</sup> *Campbell* Ibid. p 121