

## Outside Counsel

# Boomers, Beware: Predatory Marriage and New York's Elective Share Law

BY YOLANDA KANES,  
MARYANN STALLONE  
AND AMANDA LEONE

Unless you are a trusts and estates attorney or family law practitioner, odds are that the last time you encountered the term “elective share” was in law school or while studying for the bar exam. The purpose of statutory elective share law is to preclude one spouse from surreptitiously disinheriting the other. While not all states have a statutory elective share, those that do typically allow the spouse of a decedent to elect to recover anywhere between 30% and 50% of the decedent's estate. In New York, that share is the greater of \$50,000 or one-third of the estate, regardless of the length of the marriage, and a surviving spouse has a statutory right to claim his/her elective share unless one of the enumerated grounds of disqualification (annulment, divorce, incest, bigamy, abandonment of spouse and failure

YOLANDA KANES is chair of the trusts and estates practice at Tannenbaum Helpert Syracuse & Hirschtritt. MARYANN STALLONE is a partner and AMANDA LEONE is an associate in the firm's litigation and dispute resolution practice.



By  
**Yolanda  
Kanés**

And  
**Maryann  
Stallone**

**Amanda  
Leone**

to support) set forth in New York's Estates, Powers & Trusts Law (EPTL) is established.

While the New York legislature may have had the best of intentions when it drafted and enacted the elective share statute, over the last decade, opportunistic individuals have increasingly abused the statute to take advantage of our most vulnerable citizens: the elderly. In a disturbing trend now more commonly labeled “predatory marriage,” such individuals—often caregivers or those in positions of control—target the elderly and covertly marry them in order to take advantage of New York's elective share statute. Unfortunately, while most people would agree that predatory marriage is decidedly unethical and immoral, the plain language of Section 5-1.1-A of the EPTL leaves courts and practitioners with very little wiggle room to argue against its

strict application. However, in 2010, the Appellate Division of the State of New York, Second Department, rendered two decisions that circumvented the strict application of the elective share statute and brought justice to two families victimized by predatory marriage. In the seminal cases, *Camp-*

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*bell v. Thomas* and *Matter of Berk*, the Second Department determined that, notwithstanding the confines of New York's elective share statute, courts are empowered to exercise their powers of equity to prevent predators from deliberately taking advantage of mentally incapacitated individuals by marrying those individuals for the purpose of securing an elective share.

In *Campbell v. Thomas*, 73 A.D.3d 103 (2d Dept. 2010), a 58-year-old caretaker

surreptitiously married a 72-year-old man with dementia while his daughter—who normally cared for him—was away on vacation. *Id.* at 105-06. Without telling the family, the caretaker transferred the man's assets into her name and caused herself to be named as the sole beneficiary of his pension. *Id.* at 106. The man passed away several months later. *Id.* The decedent's will left his entire estate to be divided equally among his adult children and made no bequest to his "new" spouse. *Id.* When the caretaker attempted to claim her right of election, the decedent's adult children challenged the election in Surrogate's Court and simultaneously pursued an action in Supreme Court to declare the marriage and asset transfers null and void. *Id.* The children ultimately prevailed in nullifying the marriage in 2007 before the Supreme Court. The Appellate Division affirmed and directed the Supreme Court to enter a judgment declaring that the caretaker should "have no legal rights and can claim no legal interest as a spouse of [the decedent]." *Id.* at 110 (referencing *Campbell v. Thomas*, 36 A.D.3d 576 (2d Dept. 2007)). The caretaker later moved to modify the judgment on the grounds that, regardless of whether the marriage was later declared null and void, she was nevertheless entitled to the elective share as a surviving spouse under the EPTL. *Id.* at 110. The Supreme Court denied the caretaker's motion to modify the judgment, and the caretaker appealed. *Id.* Although the Appellate Division agreed that the caretaker was technically a "surviving spouse" within the plain meaning of EPTL 5-1.1-A and thus had a statutory right to the elective share, it held that the caretaker

had forfeited that right by "wrongfully alter[ing] [the decedent's] testamentary plan in her favor, just as surely as if she had exploited his incapacity to induce him to add her to his will and bequeath her one-third of his estate." *Id.* at 118-19. The court reasoned that "[u]nder such circumstances, equity will intervene to prevent the unjust enrichment of the wrongdoer." *Id.* at 119.

Critical to the *Campbell* decision was the Court's acknowledgement that "[m]echanically applying [the statute] to honor the right of election of a surviving spouse whose very status as a spouse was procured through overreaching or undue influence would 'seemingly invite [ ] a plethora of surreptitious 'deathbed marriages' as a means of obtaining one-third of a decedent's estate immune from challenge.'" *Id.* at 116 (quoting *In re Hua Wang*, 20 Misc.3d 691, 697 (Kings County Sur. Ct. 2008)).

While clarifying that the caretaker's conduct in *Campbell* was not criminal, the Appellate Division nevertheless recognized *Campbell's* parallels to *Riggs v. Palmer* and the "slayer statute" principle that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." *Campbell*, 73 A.D.3d at 116 (citing *Riggs v. Palmer*, 115 N.Y. 506, 511 (1889)). The Court also reasoned that, "[i]t is 'an old, old principle' that a court, 'even in the absence of express statutory warrant,' must not 'allow itself to be made the instrument of wrong, no less on account of its detestation of everything conducive to wrong than on account of

that regard which it should entertain for its own character and dignity.'" *Id.* at 119 (quoting *Matter of Hogan*, 295 N.Y. 92, 96 (1946)).

Similarly, in *Matter of Berk*, 71 A.D.3d 883 (2d Dept. 2010) (*Berk I*), the caregiver of a 91-year-old widower took the widower to City Hall and married him without telling any family or friends until the day before the decedent's funeral. *Id.* at 884-85. The decedent's will left his multi-million dollar estate to his two sons and four grandchildren. *Id.* at 885. The caregiver (and now wife) filed an application in Surrogate's Court seeking her elective share under the EPTL. *Id.* The decedent's two sons challenged the application and filed a counterclaim seeking a declaration that the marriage was a sham and that the wife was not entitled to her elective share. *Id.* The Surrogate's Court granted summary judgment in favor of the wife and declared that the election was valid. *Id.* In *Berk I*, the Appellate Division reversed, finding that a triable issue of fact existed as to whether the wife forfeited her statutory right of election by taking unfair advantage of the decedent and obtaining benefits that only became available by virtue of being that person's spouse. *Id.* The Appellate Division observed that decedent's sons had tendered evidence from which a trier of fact could determine that the caregiver "knowing that a mentally incapacitated person [was] incapable of consenting to a marriage, deliberately [took] advantage of the incapacity by marrying that person for the purpose of obtaining pecuniary benefits that become available by virtue of being that person's spouse." *Id.* If the trier of fact were to find this

to be the case, the Court stated that equity would intervene to prevent the wife from “becoming unjustly enriched from her wrongdoing, as a court cannot ‘allow itself to be made the instrument of wrong.’” *Id.* at 885-86. The Appellate Division remanded the case for a determination of these discrete issues.

On remittitur to the Surrogate’s Court, when another dispute arose as to which party shouldered the burden of proof, the case returned to the Appellate Division, Second Department, in 2015. See *Matter of Berk*, 133 A.D.3d 850, 851 (2d Dept. 2015) (*Berk II*). Expanding upon its forfeiture analysis from 2010, the Appellate Division stated:

An alternative ground for forfeiture of the right of election is whether [the surviving spouse], as the [decedent’s] caretaker, exercised undue influence upon the decedent to induce him to marry her for the purpose of obtaining pecuniary benefits that become available by virtue of being that person’s spouse, at the expense of the intended beneficiaries ... [T]he burden of proof on this issue should be placed upon the appellants [the decedent’s sons] by a preponderance of the credible evidence.

*Id.* at 852.

Applying the Appellate Division’s analysis on remand, the Surrogate’s Court ultimately held that the decedent’s sons satisfied their burden of proof and that the elective share should not be funded: “The evidence presented shows consistent, insidious and duplicitous conduct that led to petitioner’s clandestine marriage to decedent. As decedent’s live-in caretaker, petitioner had ample motive

and opportunity to influence decedent’s actions.” *Matter of Hua Wang*, 60 Misc.3d 1207(A), 2018 WL 3194100 at \*4 (Kings County Sur. Ct. 2018).

*Campbell* and *Berk* were truly landmark decisions. For the first time, New York courts went beyond the bounds of statutory disqualification, and used their equitable powers to correct the injustice that would result from the strict application of the elective share statute. In doing so, they laid a framework to enable other courts to combat the growing problem of elder abuse and exploitation.

Perhaps the most interesting and potentially consequential part of the

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*Berk* trial decision was the Surrogate’s Court’s candid discussion of the caretaker’s “insidious and duplicitous” conduct. While the earlier Appellate Division decisions in *Campbell*, *Berk I*, and *Berk II* placed somewhat greater emphasis on the undue influence that the surviving spouse exerted over the decedent in order to secure an entitlement to the elective share, by acknowledging that a decedent could essentially be “scammed” into marriage merely by dishonest motives or conduct, the Surrogate’s Court’s decision following the *Berk* trial seemingly broadened the scope of future predatory marriage challenges.

We have an entire generation—the Baby Boomers—entering retirement.

As they get older, they are increasingly vulnerable and susceptible to exploitation. Predatory marriage is not a fiction; it is a real threat to our most vulnerable citizens and their families. Whether the powers of equity employed by the *Berk* and *Campbell* courts are sufficient to tackle predatory marriage in the long term remains to be seen. On the other hand, as the population ages and predatory marriages proliferate, it may finally come to pass that the legislature will step forward and address the confines of elective share laws that do not adequately address the emerging problem of predatory marriage.