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# NEW YORK ESTATES, POWERS AND TRUSTS LAW § 5-1.4: WHY DIVORCE MAY NOT DO YOU AND YOUR EX-SPOUSE'S RELATIVES PART

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New York Estates, Powers and Trusts Law (hereinafter "EPTL") section 5-1.4 provides that, upon a divorce or the annulment of a marriage, certain provisions in a written instrument concerning powers, dispositions, and appointments of a decedent's former spouse are revoked.[1] While EPTL section 5-1.4 addresses the effect of a divorce or annulment on a decedent's former spouse, it does not extend to the powers, dispositions, and appointments of the former spouse's relatives.[2] As illustrated by the Appellate Division's recent decision in In re *Lewis,* and the application of EPTL section 5-1.4 in practice, the Legislature should amend EPTL section 5-1.4 to correct certain inequities.[3] EPTL section 5-1.4 should extend the revocatory effect of divorce or annulment to powers, dispositions, and appointments of the relatives of a decedent's former spouse.

## I. THE GENESIS OF EPTL § 5-1.4

Prior to EPTL section 5-1.4's enactment in 1966, the Decedent Estate Law provided that a testamentary instrument could only be

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[1] N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 (McKinney 2008).

[2] *Id.*

[3] *Id.*; In re *Lewis*, 978 N.Y.S.2d 527 (App. Div. 2014).

revoked as follows:

> [B]y some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same . . . .[4]

As the statutorily prescribed means by which to validly revoke a testamentary instrument were exclusive, courts rejected the doctrine of implied revocation of a testamentary instrument.[5] Indeed, not even a divorce or the annulment of a decedent's marriage would impliedly revoke a bequest to, or appointment of, the decedent's former spouse contained in the decedent's will.[6]

In 1966, "[a]s part of its sweeping revision of New York estates law, the Bennett Commission [hereinafter "Commission"] recommended a . . . change in the law concerning the effect of divorce on a testamentary provision for a spouse."[7] The Bennett Commission wrote "it would seem strongly presumable, at least in the case of divorce or annulment, that a testator would no longer wish testamentary benefits conferred upon a former spouse prior to the divorce or annulment to remain effective thereafter."[8]

Mindful of that presumption and the "concededly lax tendencies of the public with respect to the making or reviewing of Wills," the Commission recommended that New York adopt a paternalistic approach.[9] In other words, the Commission advocated for the state to "protect its citizens from the consequences of their own inaction . . . ."[10] The Commission explained:

> On balance, it would seem [a] preferable policy to create a conclusive statutory presumption that provisions in a will for a former spouse are deemed revoked by divorce or annulment. In such case, should the testator wish to retain the provisions in his [or her]

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[4] In re *Sussdorff*, 43 N.Y.S.2d 760, 762 (Sur. Ct. 1943) (citing DECEDENT ESTATE LAW § 34).

[5] *See* In re *Knospe*, 626 N.Y.S.2d 701, 703 (Sur. Ct. 1995).

[6] *See Sussdorff*, 43 N.Y.S.2d at 762.

[7] *Knospe*, 626 N.Y.S.2d at 703.

[8] *Id.* (quoting FIFTH REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, 2 NY Legis. Doc. No. 19, 782 (1966)) [hereinafter "FIFTH REPORT"].

[9] *Id.* (citing FIFTH REPORT, *supra* note 8, at 782).

[10] *Id.*

> will for a former spouse, . . . [the testator] would be required to take the affirmative step of republishing . . . [the] will, or executing a new one to evidence that intention.[11]

## II. THE IMPLEMENTATION AND DEVELOPMENT OF EPTL § 5-1.4

Based upon the Commission's groundbreaking work, the Legislature enacted the EPTL, including section 5-1.4.[12] EPTL section 5-1.4 initially provided for the revocation of dispositions to, and appointments of, a testator's former spouse in a testamentary instrument upon the testator's divorce from his or her spouse or the annulment of their marriage.[13] In 2005, the Legislature amended EPTL section 5-1.4 to bring transfer-on-death accounts within the statute's scope.[14]

More recently, in 2008, the Legislature repealed the then-existing version of EPTL section 5-1.4, and enacted a new statute in its place.[15] The new statute extended the revocatory effect that a divorce or annulment of a marriage would have on a former spouse's status as a beneficiary of Totten Trust accounts, life insurance policies, revocable trusts, and joint tenancies with right of survivorship.[16]

Since EPTL section 5-1.4's initial enactment and subsequent amendments, courts have addressed the revocatory effect of a divorce or annulment on certain powers, dispositions, and appointments. Based upon EPTL section 5-1.4, courts have concluded that: (a) notwithstanding the fact that the testator's will bequeathed his entire estate to his spouse and nominated her to serve as the sole executor thereunder, the subsequent annulment of the testator's marriage to the surviving spouse divested the former spouse of standing to file objections in a probate proceeding concerning the testator's estate;[17] and (b) the testator's divorce from his former spouse resulted in the revocation of a bequest to the spouse contained in the testator's will, even though the testator executed the will before he married his former spouse.[18]

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[11] *Id.* at 703-04 (quoting FIFTH REPORT, *supra* note 8, at 782).

[12] *See generally Knospe*, 626 N.Y.S.2d at 704.

[13] *See generally id.* at 702.

[14] *See* Margaret V. Turano, Supplementary Practice Commentaries, N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 (McKinney 2008).

[15] *Id.*

[16] *See id.*

[17] *See* In re *Schmeid*, 930 N.Y.S.2d 666, 667 (App. Div 2011).

[18] *See generally* In re *Knospe*, 626 N.Y.S.2d 701, 705-06 (Sur. Ct. 1995).

While EPTL section 5-1.4 addresses the revocatory effect of a divorce or annulment as it relates to a decedent's former spouse, the statute is devoid of any similar provision concerning powers, dispositions, and appointments of a former spouse's relatives. This discrepancy has given rise to certain inequitable results, and necessitates the amendments to EPTL section 5-1.4 that are proposed herein.

## III. EPTL § 5-1.4 AND A FORMER SPOUSE'S RELATIVES

However inequitable it may be, courts abiding by the statute have held that the divorce or annulment of a marriage does not result in automatic revocation of powers, dispositions, and appointments of a decedent's former spouse's relatives. For example, in In re *Coffed*, the Appellate Division, Fourth Department, addressed whether a decedent's divorce from his second wife resulted in the revocation of a bequest in the testator's will to the second wife's son from a prior marriage.[19] When the decedent married his second wife, the decedent and his second wife entered into a contract, which provided that the spouses would execute reciprocal wills.[20] Under the agreement, the reciprocal wills were to provide that, upon the death of the first spouse, the entire estate would pass to the surviving spouse and, upon the death of the surviving spouse, the remainder would pass, in equal shares, to the decedent's three children from a prior marriage, and the second wife's son from a prior marriage.[21] The decedent and his second wife both executed reciprocal wills, which reflected these terms.[22]

Several years later, the decedent's second wife obtained a divorce from him.[23] As part of the divorce, the decedent and his second wife executed mutual general releases of all claims, including those arising from the aforementioned contract.[24] After the decedent's death, his survivors learned that the decedent did not execute a new will following his divorce from his second wife, which meant that the second wife's son was a beneficiary under his last will.[25]

When the decedent's former stepson offered the will for probate, one of the decedent's sons filed objections thereto, arguing that the stepson's mother's divorce from the decedent resulted in the

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[19] *See* In re *Coffed*, 399 N.Y.S.2d 548 (App. Div. 1977).
[20] *Id.* at 549-50.
[21] *Id.* at 550.
[22] *Id.*
[23] *See id.*
[24] In re *Coffed*, 399 N.Y.S.2d at 550.
[25] *See id.*

revocation of the bequest to the stepson.[26] The Surrogate's Court, Erie County, ruled in the decedent's son's favor, and denied the stepson's probate petition.[27]

On appeal, however, the Fourth Department reversed, finding that the Surrogate's Court "incorrectly reasoned that [the divorce and] the rescission of the agreement between the parties also worked [as] a revocation of their mutual wills."[28] The Appellate Division explained that although the divorce resulted in the revocation of the decedent's bequest to his former spouse, it did not have a similar effect on the bequest to his former stepson.[29] On the contrary, to the extent that the decedent wished to revoke the bequest to his former stepson, the decedent had a right to change his will before his death, which the decedent failed to exercise.[30]

The Fourth Department declined to read into the EPTL an implied revocation of the decedent's bequest to his former stepson, especially in light of the fact that none of the requirements for revocation of a will, as set forth in EPTL section 3-4.1, were met.[31] In reaching its conclusion, the Appellate Division acknowledged that the equities "favor[ed] a different result," but, nonetheless, opined that the "formalities attendant . . . [to] the revocation of a will are necessary to prevent mistake, misapprehension and fraud."[32]

In In re *Cullen*, the Surrogate's Court, Cattaraugus County, addressed a similar issue.[33] There, the decedent executed a will in which he named his then-wife (the third of his six wives) and her mother as executor and successor executor, respectively.[34] After the decedent died, his widow petitioned for Letters of Administration *cum testamento annexo* ("c.t.a"), while his former mother-in-law filed a probate petition seeking Letters Testamentary.[35]

While recognizing that the decedent's divorce from his third wife resulted in the revocation of her nomination as executor under EPTL section 5-1.4, the Surrogate's Court found that the decedent's former mother-in-law was entitled to the Letters Testamentary she requested, subject to the mother-in-law proving at a hearing that she

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[26] *See id.*
[27] *Id.*
[28] *Id.* at 551.
[29] In re *Coffed*, 399 N.Y.S.2d at 551.
[30] *Id.*
[31] *Id.*
[32] *Id.* (citing In re *McGill*, 128 N.E. 194, 196 (N.Y. 1920)).
[33] In re *Cullen*, 663 N.Y.S.2d 508 (Sur. Ct. 1997).
[34] *Id.* at 508.
[35] *Id.* at 509.

was otherwise eligible to serve as a fiduciary.[36] In doing so, the court expressed that this was not "the 'best' [result] . . . under the circumstances," but it was the result that EPTL section 5-1.4 required.[37] Nonetheless, the court also issued Limited Letters of Administration to the decedent's surviving spouse to prosecute litigation arising from the decedent's death.[38]

Most recently, in In re *Lewis*, the decedent executed a will in Texas that designated her then-husband as the sole executor and sole beneficiary of her estate, and her father-in-law at the time as the successor thereof.[39] Thereafter, the decedent divorced her husband and moved to New York.[40] Following the decedent's death, the decedent's parents applied for and obtained Letters of Administration.[41] In opposition to the decedent's parents, the decedent's ex-father-in-law (the "petitioner") filed a petition to have the decedent's will admitted to probate.[42]

Pursuant to EPTL section 5-1.4, the petitioner alleged that, as a result of the decedent's divorce from his son, the petitioner's son's interest in the decedent's estate was revoked.[43] However, as sole successor executor and sole successor beneficiary under the decedent's will, the petitioner requested that Letters Testamentary issue to him, and argued the Letters of Administration that issued to the decedent's parents should be revoked.[44] The decedent's parents, brother, and half-brother (collectively the "objectants") objected to probate, and contended that the petitioner's nomination as sole successor executor and sole successor beneficiary failed under Texas law.[45]

The objectants based their argument on Texas Probate Code section 69(b), which states:

> [I]f, after making a will, the testator's marriage is dissolved . . . by divorce . . . , all provisions in the will, including all fiduciary appointments, shall be read as if the former spouse and *each relative of the former spouse who is not a relative of the testator* failed to survive the testator, unless the will expressly provides

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[36] *Id.*
[37] *Id.*
[38] *Cullen*, 174 Misc.2d at 509.
[39] *See* In re *Lewis*, 978 N.Y.S.2d 527, 528 (App. Div. 2014).
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Lewis*, 978 N.Y.S.2d at 528-29.
[45] *Id.* at 529.

otherwise.[46]

Based on EPTL section 5-1.4 and In re *Coffed*, the Surrogate's Court dismissed the probate objections, revoked the Letters of Administration previously issued to the decedent's family, issued a decree admitting the will to probate, and granted Letters Testamentary to the petitioner – a decision that the Appellate Division affirmed.[47]

In addressing the objectants' equitable argument, the majority explained that, even if the equities favored a different result, it was not for the courts to circumvent the statutory formalities for the revocation of a will set forth in the EPTL.[48] The majority opined that such formalities "are necessary to prevent mistake, misapprehension and fraud," and from a public policy perspective, the concerns attendant thereto outweighed the reasonable conclusion that the decedent "intended to change [her] will in accord with a natural desire to benefit [her relatives] exclusively" rather than her ex-husband's relatives.[49]

In a well-reasoned dissent, Justice Erin Peradotto wrote that she would reverse the Surrogate's Court's Decree because "the equities overwhelmingly favor denying probate . . . [to the will] and permitting [the] decedent's estate to pass through intestacy," among other grounds.[50] Justice Peradotto explained that: (a) the person who apparently had the most to gain was not the petitioner, but rather the decedent's ex-husband, whose legal interests were revoked by EPTL section 5-1.4, but were being furthered by the petitioner; and (b) the petitioner and his family kept the fact that they had the will a secret from the decedent and her family until they were sure the decedent had died, at which time the petitioner first revealed that he had the instrument and offered it for probate.[51] Accordingly, Justice Peradotto explained that the decedent's estate should pass to the decedent's natural family, not her former in-laws.[52]

Justice Peradotto's dissent is in line with statutes enacted in other states, including New Jersey, Massachusetts, and Texas, as well as the jurisprudence of California courts.[53] As explained more fully

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[46] *Id.* (emphasis added) (citing TEX. EST. CODE ANN. § 123.001 (West 2014) (formerly cited as TEX. PROB. CODE ANN. § 69(b))).
[47] *Id.*
[48] *Id.* at 534-535.
[49] *Lewis*, 978 N.Y.S.2d at 534 (citing In re *Coffed*, 99 N.Y.S.2d 548, 551 (App. Div. 1977)).
[50] *Id.* at 544-45 (Peradotto, J., dissenting).
[51] *Id.* at 545 (Peradotto, J., dissenting).
[52] *Id.* at 546 (Peradotto, J., dissenting).
[53] *See generally* N.J. STAT. ANN. § 3B:3-14 (West 2005); MASS. GEN. LAWS ch. 190B, § 2-

below, EPTL section 5-1.4 should be amended to extend its revocatory effect to powers, dispositions, and appointments of a decedent's former spouse's relatives.

## IV. POLICY-BASED REASONS TO AMEND EPTL § 5-1.4

The very same policy-based reasons that initially gave rise to EPTL section 5-1.4 warrant its amendment as proposed herein. To protect decedents' general intentions and to safeguard against the "lax tendencies of the public with respect to making and reviewing Wills,"[54] EPTL section 5-1.4 should be amended to provide that provisions for the relatives of a decedent's former spouse are deemed revoked upon divorce or annulment.

In most circumstances, a decedent who named a spouse's relatives as beneficiaries, fiduciaries, or holders of certain powers in a written instrument does not wish for the spouse's relatives to benefit under the instrument if the decedent's marriage to the spouse ends in divorce or annulment. The proposed amendment presumes this intention and would prevent the inequity that results when the former spouse's relatives are permitted to take under the governing instrument to the detriment of the decedent's own relatives.

The California Court of Appeal's decision in *Estate of Hermon* is highly illustrative.[55] There, the decedent executed a will leaving his entire estate to his wife or, if she predeceased him, to his issue and his "spouse's issue."[56] The decedent specifically identified his spouse's issue by name in the instrument's preamble.[57] The decedent and his spouse later divorced, and then the decedent died.[58] However, the decedent did not change his will.[59] After the decedent died, his former stepchildren claimed that they were entitled to a share of the estate.[60]

Although the trial court initially ruled in favor of the ex-wife's children, the Court of Appeal reversed.[61] In doing so, the court explained: "We think it is a more logical construction to hold that when a testator provides for his spouse's children, he normally intends to exclude children of an ex-spouse after dissolution, unless a

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804(b) (2012); Estate of Hermon, 46 Cal.Rptr.2d 577 (Ct. App. 1995); TEX. EST. CODE ANN. § 123.001 (West 2014).

[54] *See* In re *Knospe*, 626 N.Y.S.2d 701, 704 (Sur. Ct. 1995).

[55] *Estate of Hermon*, 46 Cal.Rptr.2d at 577.

[56] *Id.* at 578.

[57] *See id.* at 578-79.

[58] *Id.* at 578.

[59] *Id.*

[60] *Estate of Hermon*, 46 Cal.Rptr.2d at 578-79.

[61] *Id.* at 579-81.

contrary intention is indicated elsewhere in his will."[62]

As further support for its conclusion, the court also noted that the "new Uniform Probate Code section 2-804 . . . revokes not only testamentary bequests to the former spouse but it also revokes bequests to the former spouse's relatives as well."[63] According to the court:

> The general predicate of this provision is that, during the dissolution process or in the aftermath of the dissolution, 'the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives . . . .'[64]

Finally, to the extent that a decedent wishes to provide for his or her former spouse's relatives, the decedent will have the opportunity to do so by: (1) simply republishing the prior governing instruments; (2) executing a new document to effectuate that intent after the end of the decedent's marriage by divorce or annulment; or (3) expressing a contrary intention in the governing instrument. This is not a particularly high burden to meet, and does not implicate any of the fraud, mistake, or misapprehension concerns that EPTL section 3-4.1 intends to address.

Accordingly, EPTL section 5-1.4 should be amended as proposed in this Article.

## V. CONCLUSION

In order to ensure that the EPTL is as equitable as possible, and to avoid unnecessary disputes, EPTL section 5-1.4 should be amended to revoke the powers, dispositions, and appointments of a former spouse's relatives who, after the divorce or annulment, are not related to the divorced individual. Doing so will further the intentions of most decedents, which is one of the hallmarks of the EPTL.

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[62] *Id.* at 581.
[63] *Id.*
[64] *Id.* (citing UNIF. PROBATE CODE § 2-804 cmt. (1969) (amended 2010)).