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One Act of Adultery Doesn't Defeat Claim to Deceased Spouse's Estate



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Wills & Estates

One Act of Adultery Doesn't Defeat Claim to Deceased Spouse's Estate

A probate code provision under which a person who "lives in adultery" forfeits their to his or her spouse's estate and property requires more than one act of adultery by offending spouse, the Kentucky Supreme Court decided Sept. 20. Addressing the is for the first time, the court further said that while the adulterous activity need not with the same person, it must be "periodic or recurring, a sustained or notorious activity" (*Griffin v. Rice*, Ky., No. 2011-SC-000250-DG, 9/20/12).

The case before the court involved a couple who married in February 2004 and separated about four months later. The wife obtained a domestic violence order ag the husband and filed for divorce in August 2004. The husband died in a work-relat accident the following month, and his mother was appointed administratrix of his e She asked the court to declare that the wife had forfeited her right to and interest husband's estate under Ky. Rev. Stat. 392.090(2), which provides that when a spo voluntarily leaves the other and "lives in adultery," he or she forfeits their right to : interests in the other's property and estate.

The mother alleged that while separated from the husband, the wife had gone out another man and that they had sexual intercourse on Sept. 11, the night before th husband's death. She presented an affidavit from the man that acknowledged such conduct and also stated that he and the wife had lived together for eight or nine m after the husband's death. The court held that the wife had forfeited her interest in husband's estate pursuant to § 392.090(2). (The main component of the estate wa \$60,000 workers' compensation death benefit.)

The appeals court reversed, holding that the wife's single act of adultery did not constitute "liv[ing] in adultery" under the statute. The state supreme court granted estate's motion for discretionary review.

More Than Once

Writing for the supreme court, Justice Lisabeth Hughes Abramson found that cases indicate "that one instance of adultery is insufficient under the statute. Rather, the periodic or recurring, a sustained or notorious activity. The adultery need not be wi there must be more than one instance of adultery for a husband or wife to 'live[] i

Abramson went on to find that the "General Assembly's intention that more than o indicated by its intentional use of the word 'lives' Had the General Assembly con sufficient to bar a husband or wife from his or her interest in the other spouse's est reasoned, "it would have made this clear by employing different wording in the sta or 'engages in adultery'."

Pointing out that the adultery ground of Kentucky's former fault-based divorce stat § 392.090(2)) showed that the legislature "was aware of its phrasing and knew ex: one adulterous act and multiple acts of adultery," Abramson also said that the inte in *Baker v. Baker*, 124 S.W. 866 (Ky. 1910), "reinforces the conclusion that 'lives i one instance of adultery."

Other Jurisdictions

Abramson further noted that courts in other jurisdictions interpreting similar statut more than one act of adultery is needed for a finding that a spouse lives in adulter *Montgomery*, 528 S.E.2d 618, [26 FLR 1315](#) (N.C. Ct. App. 2000). "By holding that requires more than just one act of adultery, this Court acts in accordance not only the intention of the General Assembly, but also in accordance with other states tha issue," she declared.

issue, she declared.

Abramson was not swayed by the estate's claim that while the wife may have only occasion prior to the husband's death, her conduct subsequent to his death established "living in adultery" and but for the husband's untimely death would have been in his estate.

Widow's Conduct

"This novel argument," Abramson explained, depends in part on the contention that the days and months following the husband's death is relevant. "As a matter of law, it is simple when the husband died the wife "became a widow and no longer had a 'lawful spouse' to commit adultery. Stated simply, a surviving wife or husband cannot commit adultery because the marriage ends with the death of either party."

Adding that while "the conduct of a widow or widower in the days, weeks, or months following the husband's death may seem unseemly [] it cannot be adultery," Abramson said that to forfeit an interest in the estate, a surviving wife or husband must have lived in adultery prior to that spouse's death. Construing § 392.090(2), "we do not require trial courts to tally acts of infidelity to direct courts to look for a course of notorious or sustained unfaithful conduct or perjury by the errant spouse, which indicates he or she is *living* in adultery."

Because the wife engaged in adultery only once before her husband's death, the statute, Justice Abramson concluded.

Once Is Enough

Justice Bill Cunningham dissented. Asserting that the court placed "more emphasis on the wife's conduct," he argued that "[t]his Court should not have to continually review the sex lives of widows to determine how many acts of infidelity constitute a death sentence to the marriage."

Contending that § 392.090(2) "was enacted for cases like this one," Cunningham argued that the determination of whether a person is 'living in adultery' must be left to the trial court to consider the circumstances." He also noted that the court "conveniently overlooked" the fact that after her husband's death, the wife gave birth to a child that was not his.

Cunningham added that the "seamless continuation" of the wife's relationship with her husband's death constituted "probative evidence as to the state of her mind" and that the "sacred bond of marriage between the two which would entitle her to the benefits of the estate."

Justice Mary C. Noble also dissented, joined by Cunningham and Justice Will T. Scott. "Adultery, *plus other relevant facts*, can constitute living in adultery," she explained. "The circumstances approach "seems more reasonable to me than counting acts of adultery under the statute such as this serves a sound public policy in today's world," she asserted that the statute "as having some fault base to the extent of at least examining the adulterous party' to still have it on the books."

Otis Doan, Jr., appeared for the estate. The wife was represented by Karen Sue Davidson, Louisville, Ky.

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