

STATE OF NEW YORK
SURROGATE'S COURT : QUEENS COUNTY

Probate Proceeding, Will of

File No. 723/93

ABRAHAM GOLDFEDER,
also known as AL GOLDFEDER,

Deceased.

**MEMORANDUM OF LAW
OF PETITIONER FLORENCE STEIN GOLDFEDER
IN SUPPORT OF MOTION FOR SUMMARY DETERMINATION
OF EFFECT OF ELECTION BY SURVIVING SPOUSE**

Dated: December 14, 1993

HILARY B. MILLER
Attorney for Petitioner
112 Parsonage Road
Greenwich, Connecticut 06830-3942
(203) 861-6262

HILARY B. MILLER, ESQ.
Juris No. 308011
112 Parsonage Road
Greenwich, CT 06830
(203) 861-6262

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTORY STATEMENT..... 1

STATEMENT OF FACTS 3

ARGUMENT..... 5

POINT I

**PETITIONER’S NOTICE OF ELECTION WAS
VALIDLY EXECUTED AS REQUIRED BY LAW**..... 5

Point II

**THE DECEDENT’S UNILATERAL, “MAIL ORDER”
MEXICAN DIVORCE FROM PETITIONER IS UTTERLY VOID**..... 7

Point III

**PETITIONER IS NOT EQUITABLY BARRED
FROM ASSERTING HER RIGHT OF ELECTION** 13

A. Petitioner Did Not Accept Any “Benefits of Divorce.” 14

B. Plaintiff Cannot Be Charged With Laches or Estoppel. 15

Point IV

**MERE INACTION BY PETITIONER CANNOT
CONSTITUTE A DEFENSE UNDER EPTL § 5.1-2(a)(3)**..... 19

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

| | |
|---|------------|
| <i>Alfaro v. Alfaro</i> , 5 A.D.2d 770, 169 N.Y.S.2d 943 (1958), <i>aff'd</i> , 7 N.Y.2d 949, 165 N.E.2d 880, 198 N.Y.S.2d 318 (1960) | 11 |
| <i>Caldwell v. Caldwell</i> , 298 N.Y. 146, 81 N.E.2d 60 (1948)..... | 7, 11 |
| <i>Cammarota v. Sec’y of Health, Education & Welfare</i> , 329 F.Supp. 1087 (N.D.N.Y. 1971)..... | 8, 17 |
| <i>De Pena v. De Pena</i> , 31 A.D.2d 415, 298 N.Y.S.2d 188 (1st Dep’t 1969) | 9, 10 |
| <i>Donohue v. Donohue</i> , 57 A.D.2d 543, N.Y.S.2d 61 (2d Dep’t 1977) | 8 |
| <i>Duffy v. Duffy</i> , 23 Misc.2d 268, 201 N.Y.S.2d 351 (Sup. Ct. Queens County 1960) | 11 |
| <i>Gruttemeyer v. Gruttemeyer</i> , 285 A.D. 1185, 141 N.Y.S.2d 227 (1955)..... | 11 |
| <i>Imbrioscia v. Quayle</i> , 278 A.D. 144, 103 N.Y.S.2d 593 (1st Dep’t 1951) | 8 |
| <i>Lamb v. Lamb</i> , 61 Misc.2d 1032, 307 N.Y.S.2d 318 (Family Ct. N.Y. County 1969)..... | 13 |
| <i>Litvaitis v. Litvaitis</i> , 162 Conn. 540, 295 A.2d 519 (1972) | 12 |
| <i>Matter of Adams</i> , 182 Misc. 937, 45 N.Y.S.2d 494 (Surr. Ct. N.Y. County 1943), <i>aff'd</i> , 267 A.D.2d 985, 48 N.Y.S.2d 801 (1944), <i>cert. denied</i> , 324 U.S. 865, 65 S.Ct. 914, 89 L.Ed. 1421 (1944) | 19, 20, 21 |
| <i>Matter of Banks</i> , 31 N.Y.S.2d 652 (Surr. Ct. Westchester County 1941) | 6 |
| <i>Matter of Bauer</i> , 278 A.D. 658, 102 N.Y.S.2d 577 (2d Dep’t 1951). | 12 |
| <i>Matter of Bock</i> , 70 Misc.2d 470, 333 N.Y.S.2d 801 (Surr. Ct. Erie County 1972) | 19 |
| <i>Matter of Callahan</i> , 142 Misc. 28, 254 N.Y.S. 46 (Surr. Ct. Kings County 1931), <i>aff'd</i> , 236 A.D. 814, 259 N.Y.S. 987 (2d Dep’t 1932), <i>aff'd</i> , 262 N.Y. 524, 188 N.E. 48 (1933)..... | 12 |
| <i>Matter of Carter</i> , 69 Misc.2d 630, 331 N.Y.S.2d 257 (Surr. Ct. N.Y. County 1972), <i>aff'd</i> , 42 A.D.2d 925, 347 N.Y.S.2d 1007 (1st Dep’t 1973) | 17, 18 |
| <i>Matter of Charkowsky</i> , 89 Misc.2d 623, 392 N.Y.S.2d 368 (Surr. Ct. N.Y. County 1977)..... | 6 |

| | |
|---|--------|
| <i>Matter of Deckert</i> , 141 N.Y.S.2d 855 (Surr. Ct. Kings County 1955)..... | 8 |
| <i>Matter of Lamos</i> , 63 Misc.2d 840, 313 N.Y.S.2d 781 (Surr. Ct. Kings County 1970)..... | 12 |
| <i>Matter of Liebman</i> , 44 Misc.2d 191, 253 N.Y.S.2d 461 (Surr. Ct. Westchester County 1963)..... | 10, 15 |
| <i>Matter of Loeb</i> , 77 Misc.2d 814, 354 N.Y.S.2d 864 (Surr. Ct. N.Y. County 1974) | 19 |
| <i>Matter of Maiden</i> , 284 N.Y. 429, 31 N.E.2d 889 (1940)..... | 12 |
| <i>Matter of Rathscheck</i> , 300 N.Y. 346, 90 N.E.2d 887 (1950) | 13, 19 |
| <i>Matter of Rechtschaffen</i> , 278 N.Y. 336, 16 N.E.2d 357 (1938) | 12 |
| <i>Matter of Rose</i> , 15 A.D.2d 983, 225 N.Y.S.2d 775 (3rd Dep't 1962)..... | 12 |
| <i>Matter of Ruff</i> , 91 A.D.2d 814, 458 N.Y.S.2d 38 (3d Dep't 1982)..... | 12 |
| <i>Matter of Stoeger</i> , 17 A.D.2d 986, 234 N.Y.S.2d 537 (2d Dep't 1962) | 12 |
| <i>Matter of Winkler</i> , NYLJ, 8/6/90, p. 43 (Surr. Ct. N.Y. County) | 12 |
| <i>Matter of Wittner</i> , 301 N.Y. 461, 95 N.E.2d 798 (1950)..... | 12 |
| <i>Plancher v. Plancher</i> , 35 A.D.2d 417, N.Y.S.2d 140 (2d Dep't 1970), <i>aff'd</i> , 29 N.Y.2d 880, 278 N.E.2d 650, 328 N.Y.S.2d 444 (1972)..... | 8 |
| <i>Pomerance v. Pomerance</i> , 187 Misc. 20, 61 N.Y.S.2d 227 (Sup. Ct. Kings County 1946)..... | 17 |
| <i>Rosenbaum v. Rosenbaum</i> , 309 N.Y. 371, 130 N.E.2d 902 (1955)..... | 13 |
| <i>Rosenstiel v. Rosenstiel</i> , 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965) , <i>cert. denied</i> , 384 U.S. 971, 86 S.Ct. 1861, 16 L.Ed.2d 682 (1966) | 7 |
| <i>Russell v. Russell</i> , 27 A.D.2d 563, 276 N.Y.S.2d 49 (1966) | 9 |
| <i>Starbuck v. Starbuck</i> , 173 N.Y. 503, 66 N.E. 193 (1903) | 18 |
| <i>Weiner v. Weiner</i> , 27 Misc.2d 647, 211 N.Y.S.2d 125 (Sup. Ct. Bronx County 1961), <i>modified on other grounds</i> , 14 A.D.2d 671, 219 N.Y.S.2d 944 (1st Dep't 1961)..... | 16 |
| <i>Williams v. North Carolina</i> , 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945).. | 9 |

| | |
|--|-------|
| <i>Zeitlan v. Zeitlan</i> , 31 A.D.2d 955, 298 N.Y.S.2d 816 (2d Dep’t 1969), <i>aff’d</i> , 26 N.Y. 835, 258 N.E.2d 84, 309 N.Y.S.2d 585 (1971)..... | 8, 10 |
|--|-------|

STATUTES

| | |
|--------------------------------|-------|
| CPLR § 4519..... | 17 |
| D.R.L. § 170..... | 7 |
| D.R.L. § 32..... | 14 |
| D.R.L. § 6..... | 11 |
| D.R.L. § 70..... | 14 |
| D.R.L. Art. 5-A..... | 15 |
| EPTL § 5.1-2(a)(1)..... | 19 |
| EPTL § 5.1-2(a)(3)..... | 2, 19 |
| EPTL § 5-1.1-A(d)..... | 5 |
| F.C.A § 412..... | 14 |
| F.C.A. § 413..... | 14 |
| F.C.A. § 652..... | 14 |
| U.S. CONST., art. IV, § 1..... | 8 |

OTHER AUTHORITIES

| | |
|---|----|
| Annotation, <i>Election By Spouse To Take Under Or Against Will As Exercisable By Agent Or Personal Representative</i> , 83 A.L.R.2d 1077 (1993)..... | 6 |
| <i>Black’s Law Dictionary</i> | 20 |
| N.Y. Jur.2d Domestic Relations § 1517 (1992)..... | 8 |

INTRODUCTORY STATEMENT

This Memorandum of Law is submitted on behalf of petitioner Florence Stein Goldfeder in support of her application, by Verified Petition dated October 1, 1993, for an order determining, *inter alia*:

A. That petitioner is the surviving spouse of Abraham Goldfeder, deceased, the decedent herein;

B. That petitioner is entitled to elect against the last will of the decedent;

C. That the Notice of Election served and filed on behalf of petitioner has been properly served, filed and recorded as provided by statutes;

D. That the said Notice of Election is valid and effective;

E. That the preliminary executors herein be ordered and directed to make immediate and complete disclosure to petitioner of the nature, location and value of all of the said decedent's assets, whether probate or non-probate in nature; and

F. That the said preliminary executors be ordered and directed to make immediate payment of petitioner's elective share to petitioner.

As more particularly hereinafter set forth, the gravamen of petitioner's position is that a unilateral "mail-order" Mexican divorce procured by the decedent on November 10, 1944 is utterly void and insufficient to defeat her right of election.

In opposition to this application, the respondents Ann Koenig and Seymour Russ, the preliminary executors under the last will of the decedent, have served an Answer dated December 10, 1993. In their Answer, respondents raise four defenses to plaintiff's application: (1) that petitioner's Notice of Election is defectively subscribed and acknowledged; (2) that the decedent procured a

“valid” Mexican divorce from petitioner in 1944, and thereafter the decedent entered into a ceremonial remarriage with another woman that lasted 36 years; (3) that petitioner was aware of and accepted the benefits of the Mexican divorce and is barred by laches from asserting its invalidity; and (4) that petitioner’s purported acquiescence in the Mexican divorce for more than 48 years disqualifies petitioner under EPTL § 5.1-2(a)(3) because she should be deemed to have procured a divorce outside of this state.

Solely for purposes of this motion, petitioner does not dispute the material factual allegations of respondents’ Answer. Because, based on the undisputed facts of this matter, respondents’ defenses are insufficient to bar plaintiff’s election, plaintiff is entitled to judgment in her favor as a matter of law. Accordingly, plaintiff asks that this motion be treated as one for summary judgment and that this Court strike respondents’ defenses and enter judgment forthwith as sought by petitioner.¹

¹Respondents’ cross-motion seeks discovery of petitioner. Petitioner does not oppose this cross-motion and had voluntarily produced all documents sought by respondents prior to the return date hereof. Petitioner will also voluntarily submit to a deposition by respondents at her place of residence. Petitioner is 83 years old, has had a tracheostomy, suffers from respiratory insufficiency and is unable to travel from the residential care facility to which she is confined. Supplemental Affidavit of Florence Stein Goldfeder dated December 13, 1993 (“Goldfeder Aff.”), ¶2. In the event that the Court declines to rule in petitioner’s favor as a matter of law, petitioner respectfully requests that any discovery of her be expedited that and this Court grant petitioner a trial preference in view of her advanced age.

STATEMENT OF FACTS

The following facts are uncontroverted:

Petitioner and decedent were married on or about January 21, 1932 in Kings County.²

On or about November 10, 1944, a judgment of divorce was rendered at the instance of the decedent in his marriage to petitioner by the First Civil Court for the Judicial District of Morelos, State of Chihuahua, Republic of Mexico.³ From the English-language translation of the divorce judgment, the following facts can be gleaned: (1) the decedent appeared in Mexico solely by attorney; (2) there was no judicial finding that the decedent had established a Mexican domicile; (3) petitioner was served with the complaint therein solely by publication in the official newspaper of the State of Chihuahua; (4) petitioner did not appear in person, or by attorney, or otherwise consent to the jurisdiction of the Mexican court; and (5) petitioner was not awarded any property distribution, alimony or child support by the Mexican court.⁴

On or about November 10, 1954, the decedent purported to enter into a ceremonial remarriage to one Frances Feit.^{5,6} The second “wife” died in 1990.⁷

²Answer, ¶11.

³Petition, ¶10; Answer, ¶12; see also Goldfeder Aff., Exhibit “A.”

⁴Petition, ¶10; Goldfeder Aff., ¶3 and Exhibit “A.”

⁵Answer, ¶13.

Following the separation of petitioner and the decedent, their infant child, Elaine, resided with petitioner.⁸ The decedent made voluntary payments for the support of Elaine and/or petitioner for more than 48 years.⁹

Petitioner has never heretofore sought a judicial determination of the invalidity of the 1944 Mexican divorce, nor has petitioner hitherto sought a declaration as to the voidness of the decedent's second marriage.¹⁰

The decedent's last will and testament is offered for probate herein and makes no provision for petitioner.¹¹

The sole operative fact on which the parties' versions diverge is whether *vel non* petitioner was aware of the Mexican divorce decree at any time prior to the decedent's death. While petitioner maintains that she never had any knowledge of the putative divorce and the decedent's remarriage, this fact is not material to the determination of this proceeding, and petitioner is willing to permit it to be established as sought by respondents solely for purposes of this motion.

(...Continued)

⁶While respondents allege, notwithstanding the uphill battle they face under the "Dead Man statute," CPLR § 4519, that commencing in 1944 decedent "lived separate and apart from petitioner continuously until his death," petitioner does not dispute this allegation.

⁷Answer, ¶14.

⁸Answer, ¶18.

⁹*Id.*

¹⁰Answer, ¶¶19-22.

¹¹Answer, ¶6.

Petitioner’s Notice of Election, executed on her behalf by her attorney-in-fact, was served and filed in this action on or about September 9, 1993.¹² At the time of the said service and filing, the attorney-in-fact was authorized so to act on petitioner’s behalf, and petitioner has since ratified the execution of the Notice of Election by her attorney-in-fact.¹³

Because there is no genuine issue of material fact, for the reasons hereinafter set forth, petitioner respectfully requests that this Court strike respondents’ defenses and grant the relief sought by petitioner as a matter of law.

ARGUMENT

POINT I

PETITIONER’S NOTICE OF ELECTION WAS VALIDLY EXECUTED AS REQUIRED BY LAW

Respondents’ first line of defense is that the Notice of Election herein is not “subscribed or acknowledged by petitioner.” This defense must fail for the plain and obvious reason that there is nothing in the statute that requires a notice of election to be subscribed or acknowledged — it merely must be *written, served, filed* and *recorded* in the manner provided by statute. EPTL § 5-1.1-A(d). None of the elements of writing, service, filing or recordation is controverted by respondents.

¹²Petition, ¶7; Answer, ¶¶2, 9.

¹³Goldfeder Aff., ¶¶6-7.

The right of election is personal to the spouse in the sense that it may not after death be exercised by the personal representative, nor by devisees or legatees, or during the spouse's lifetime by creditors. Despite the personal character of this right, the spouse is not precluded from delegating such right to a third person to make an election in a specified manner under the spouse's direction.

The personal right of election does not require that the writing be subscribed by the spouse's own handwriting and *the act described may be performed either by the spouse or by the spouse's duly authorized agent or attorney-in-fact* [citations omitted; emphasis added].

Matter of Charkowsky, 89 Misc.2d 623, 624, 392 N.Y.S.2d 368, 370 (Surr. Ct. N.Y. County 1977); *Matter of Banks*, 31 N.Y.S.2d 652, 655 (Surr. Ct. Westchester County 1941); *Matter of Coffin*, 152 Misc. 619, 273 N.Y.S. 974 (Surr. Ct. Kings County 1934); see, Annotation, *Election By Spouse To Take Under Or Against Will As Exercisable By Agent Or Personal Representative*, 83 A.L.R.2d 1077 (1993), and cases cited therein.

In the instant case, it is not disputed that the Notice of Election was executed by petitioner's duly authorized attorney-in-fact, and such act by petitioner's representative was expressly ratified by petitioner during her lifetime. Accordingly, respondents' first defense should be stricken.

Point II

**THE DECEDENT’S UNILATERAL,
“MAIL ORDER” MEXICAN DIVORCE
FROM PETITIONER IS UTTERLY VOID**

In 1944, when the Mexican divorce judgment between petitioner and the decedent was rendered, New York provided no statutory grounds for parties to an unsuccessful marriage consensually to extricate themselves from the bonds of matrimony. Indeed, since 1800, New York had provided only a single ground for dissolution of marriage: adultery. D.R.L. § 170. It became a frequent practice¹⁴ for parties to seek divorces in less exacting jurisdictions, often Mexico, because of minimal residency requirements. In many cases divorces were improperly sought by mail.

Where *both* parties executed powers of attorney and mailed them to Mexico, such so-called “quickie” divorces were, and remain, void under New York law, even though they may be valid under Mexican law. “[T]he decree of the Mexican court is a nullity from which no rights of any kind may spring....” *Caldwell v. Caldwell*, 298 N.Y. 146, 149-51, 81 N.E.2d 60, 62-63 (1948).¹⁵

¹⁴As noted by Judge Desmond, “tens of thousands” of such divorces were granted. *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 77, 209 N.E.2d 709, 715, 262 N.Y.S.2d 86, 94 (1965) (concurring opinion), *cert. denied*, 384 U.S. 971, 86 S.Ct. 1861, 16 L.Ed.2d 682 (1966).

¹⁵This rule was tempered in *Rosenstiel, supra*, when a sharply divided Court of Appeals determined to permit divorces where at least one of the parties had been physically present as a non-domiciliary in the forum jurisdiction and the other party had later appeared in person or by attorney and consented to the divorce. Obviously the facts of the instant case are distinguishable.

Where only *one* party, without domicile in the foreign jurisdiction, obtains a divorce without the consent or appearance of his spouse, that divorce is similarly void in New York. *Donohue v. Donohue*, 57 A.D.2d 543, 393 N.Y.S.2d 61 (2d Dep’t 1977); *Plancher v. Plancher*, 35 A.D.2d 417, 317 N.Y.S.2d 140 (2d Dep’t 1970), *aff’d*, 29 N.Y.2d 880, 278 N.E.2d 650, 328 N.Y.S.2d 444 (1972); *Zeitlan v. Zeitlan*, 31 A.D.2d 955, 298 N.Y.S.2d 816 (2d Dep’t 1969), *aff’d*, 26 N.Y. 835, 258 N.E.2d 84, 309 N.Y.S.2d 585 (1971); *Imbrioscia v. Quayle*, 278 A.D. 144, 103 N.Y.S.2d 593 (1st Dep’t 1951); *Matter of Deckert*, 141 N.Y.S.2d 855 (Surr. Ct. Kings County 1955) (collecting cases); *Cammarota v. Sec’y of Health, Education & Welfare*, 329 F.Supp. 1087 (N.D.N.Y. 1971); N.Y. Jur.2d Domestic Relations § 1517 (1992).

A fortiori, when, as in the case of bar, a party obtains a divorce that is both “mail-order” *and* unilateral, that divorce is void.

In this context, *Matter of Deckert, supra*, is instructive. Deckert, the decedent, while domiciled in New York, journeyed to Havana, where he obtained a judgment of divorce — without service upon decedent’s wife and without her appearance in Cuba. The foreign decree was held wholly ineffective to dissolve the marriage, and the surviving spouse was permitted to qualify as such in the Surrogate’s Court proceedings. 141 N.Y.S.2d at 855.¹⁶

¹⁶The line of cases traced by *Deckert* involves a common theme of foreign country divorce judgments which are not constitutionally required to be accorded full faith and credit. However, even judgments of a sister state — which are required to be accorded full faith and credit (U.S. CONST., art. IV, § 1) — may be collaterally attacked if the forum state was not the bona fide

(Continued...)

Similarly, in *De Pena v. De Pena*, 31 A.D.2d 415, 298 N.Y.S.2d 188 (1st Dep't 1969), the husband and wife, both citizens of the Dominican Republic, came to New York and established domicile here. The parties separated, and the husband obtained a Dominican divorce without personal service on the wife and without her appearance. Declaring the divorce void, the Appellate Division held:

Under the circumstances and with due regard to the rights of the petitioner and the child as domiciliaries of the State, the courts here "are under no constitutional compulsion to give full faith and credit" to the divorce decree rendered by the court of the Dominican Republic. (*Schoenbrod v. Siegler*, 20 N.Y. 2d 403, 408 [230 N.E.2d 638, 283 N.Y.S.2d 881 (1967)], citing cases.) Frequently, we do give effect to a foreign country judgment "as a matter of comity" (*Schoenbrod v. Siegler, supra; Rosenstiel v. Rosenstiel*, 16 N.Y. 2d 64, 74 [cited *supra* at fn. 1]), but recognition of such a decree will be denied where the decree or the effect thereof contravenes the public policy of this State (*Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 375 [130 N.E.2d 902 (1955)]).

* * * *

The policy to be adopted under the circumstances here is clearly revealed in our laws and decisions. Initially, we note that the decisions of courts of this State, for the benefit and welfare of its domiciliaries, have repeatedly refused to accord validity to an ex parte divorce decree rendered in a foreign country which lacked substantial contacts with the parties and the marital res (*see, for example, Caldwell v. Caldwell*, 298 N.Y. 146; *Rosenbaum v. Rosenbaum, supra; Vose v. Vose*, 280 N.Y. 779 [21

(...Continued)

domicile of the plaintiff. *Williams v. North Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945); *Russell v. Russell*, 27 A.D.2d 563, 276 N.Y.S.2d 49 (1966).

N.E.2d 616 (1939)]; *Querze v. Querze*, 290 N.Y. 13 [47 N.E.2d 423 (1943)].

31 A.D.2d at 417, 298 N.Y.S.2d at 190.

Another example, with facts verging on all fours with the case at bar, is *Matter of Liebman*, 44 Misc.2d 191, 253 N.Y.S.2d 461 (Surr. Ct. Westchester County 1963). In November 1933, Mr. Liebman obtained a divorce in Chihuahua, Mexico — although neither he nor his wife had ever appeared there in person. Liebman had designated a Mexican attorney to appear for him under a power of attorney transmitted by mail. The decree recited that Liebman’s attorney alone appeared before the Mexican court. Liebman then obtained a religious divorce (“*get*”) and purported to remarry in Greenwich, Connecticut. The second “marriage” lasted 29 years. Liebman’s “first” wife had been aware of the purported divorce — she had been served with the complaint in New York — and continued to live alone in property owned by Liebman throughout the second “marriage,” while also accepting support payments from him. The Court found the divorce a “clear legal nullity,” and rejected arguments of estoppel and laches similar to those raised by respondents in the instant case. 44 Misc.2d at 191, 253 N.Y.S.2d at 461; accord, *Zeitlan v. Zeitlan*, *supra*, 31 A.D.2d 955, 298 N.Y.S.2d 816 (2d Dep’t 1969), *aff’d*, 26 N.Y. 835, 258 N.E.2d 84, 309 N.Y.S.2d 585 (1970).

Mrs. Liebman, as appears from the decision, had actual knowledge of her husband’s putative divorce and remarriage; in the instant case, petitioner, with-

out such knowledge, should *a fortiori* be permitted to elect against the decedent's will.

In the case at bar, there is no evidence that the decedent ever established a domicile in Mexico or that he was even physically present there.¹⁷ He was domiciled in New York at the time of his marriage to petitioner in 1932; he was domiciled in New York at the time of his second “marriage” in 1954; and he was still domiciled in New York at his death in 1992. The Mexican divorce judgment recites solely that the decedent appeared in Mexico by attorney.¹⁸ This Court may logically infer that the decedent had thus obtained a divorce that was both “mail-order” *and* unilateral — doubly void, if that is possible.

It is completely irrelevant that the decedent attempted to remarry subsequent to the divorce. If the divorce is invalid, such an attempted remarriage produces a marriage that is absolutely void. D.R.L. § 6; *Gruttemeyer v. Gruttemeyer*, 285 A.D. 1185, 141 N.Y.S.2d 227 (1955); *Duffy v. Duffy*, 23 Misc.2d 268, 269, 201 N.Y.S.2d 351, 353 (Sup. Ct. Queens County 1960). In Connecticut, the jurisdiction in which the decedent purported to remarry, his remarriage would

¹⁷As in *Caldwell, supra*, the decedent “never alleged or claimed domicile in Mexico. *He was never there* [emphasis added]”! 298 N.Y. at 150, 81 N.E.2d at 63.

¹⁸*Cf.*, *Alfaro v. Alfaro*, 5 A.D.2d 770, 169 N.Y.S.2d 943 (1958), *aff'd*, 7 N.Y.2d 949, 165 N.E.2d 880, 198 N.Y.S.2d 318 (1960). The decree express recited that Mr. Alfaro had been present in Mexico and was present when a hearing was had, even though he admitted having arrived solely to pick up a certified copy of the divorce decree. The decree was distinguished from the *Caldwell* paradigm — and the case at bar — wherein “[t]here is not even the slightest semblance or color of justification justifying action by a court.” 5 A.D.2d at 771, 169 N.Y.S.2d at 945.

equally be deemed to be void. *Litvaitis v. Litvaitis*, 162 Conn. 540, 295 A.2d 519 (1972).

While, as respondents urge, a ceremonial marriage is presumed valid,¹⁹ no such presumption attaches to a divorce decree granted by a foreign tribunal where the parties were not domiciled in the foreign jurisdiction. The burden of proof is solely on respondents to demonstrate the validity of the Mexican divorce for two reasons: first, because a party alleging the forfeiture of the valuable statutory right of election carries must overcome a heavy burden to sustain such a forfeiture;²⁰ *Matter of Rechtschaffen*, 278 N.Y. 336, 338, 16 N.E.2d 357 (1938); *Matter of Ruff*, 91 A.D.2d 814, 458 N.Y.S.2d 38 (3d Dep't 1982); *Matter of Lamos*, 63 Misc.2d 840, 313 N.Y.S.2d 781 (Surr. Ct. Kings County 1970); and second, because the burden of establishing that the decedent had changed his domicile to Mexico rests on the party alleging such a change of domicile; *Matter of Winkler*, NYLJ, 8/6/90, p. 23 (Surr. Ct. N.Y. County) (collecting cases).

¹⁹There is a valid policy reason for affording a strong presumption of validity to a second ceremonial marriage: protection of the second spouse. *Matter of Callahan*, 142 Misc. 28, 254 N.Y.S. 46 (Surr. Ct. Kings County 1931), *aff'd*, 236 A.D.2d 814, 259 N.Y.S. 987 (2d Dep't 1932), *aff'd*, 262 N.Y. 524, 188 N.E. 48 (1933). However, in the instant case, the decedent's second "wife" predeceased him and no interested party claims under the second "wife." Accordingly, no public policy interest is served by disallowing petitioner's right of election. This result accords with *Matter of Bauer*, 278 A.D. 658, 102 N.Y.S.2d 577 (2d Dep't 1951) (no presumption of validity of second marriage where no issue of second marriage survives).

²⁰In providing for a surviving spouse's right of election, the Legislature intended to provide financial security for surviving spouses. Accordingly, the statute must be liberally construed in favor of the surviving spouse. *Matter of Wittner*, 301 N.Y. 461, 95 N.E.2d 798 (1950); *Matter of Stoeger*, 17 A.D.2d 986, 234 N.Y.S.2d 537 (2d Dep't 1962). The burden of proving the disqualification of the surviving spouse rests upon the person claiming disqualification. *Matter of Maiden*, 284 N.Y. 429, 31 N.E.2d 889 (1940); *Matter of Rose*, 15 A.D.2d 983, 225 N.Y.S.2d 775 (3rd Dep't 1962).

As the Court of Appeals has held, a spouse “who procures a ‘mail-order’ decree of divorce in Mexico has nothing . . . but a scrap of paper.” *Matter of Rathscheck*, 300 N.Y. 346, 351, 90 N.E.2d 887, 890 (1950) (concurring opinion of Fuld, *J.*). Indeed, “[i]f, in fact, [decedent] obtains a Mexican divorce and thereupon enters into a subsequent marriage, [petitioner] need have no fear for her property rights and marital status under New York law.” *Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 377, 130 N.E.2d 902 (1955); *Lamb v. Lamb*, 61 Misc.2d 1032, 1034-35, 307 N.Y.S.2d 318, 321 (Family Ct. N.Y. County 1969).

Accordingly, because the decedent’s Mexican divorce was void, respondents’ second defense must be stricken.

Point III

PETITIONER IS NOT EQUITABLY BARRED FROM ASSERTING HER RIGHT OF ELECTION

New York courts have had numerous occasions to consider when a defendant in an otherwise void foreign matrimonial judgment action may be equitably barred from asserting the invalidity of the foreign judgment. Essentially, the issue placed before this Court by respondents is whether, with the passage of time, a divorce which is void for want of jurisdiction may ripen into a valid divorce for purposes of determination of spousal rights. The courts have universally answered this question in the negative.

A. Petitioner Did Not Accept Any “Benefits of Divorce.”

As an initial matter, respondents allege that petitioner “accepted the benefits” of the divorce consisting of custody of the parties’ issue, Elaine, and the decedent’s monthly support payments. This specious argument fails for the simple reason that support and custody are not “benefits” of divorce but rather fundamental rights of spouses and children that do not depend on the marital status of the parties. Under New York law, a husband is liable for the support of his *present* wife, as well as for the support of his children. D.R.L. § 32. A married person is chargeable with the support of his *present* spouse, F.C.A § 412, and with support of his children. F.C.A. § 413. Thus the support payments which petitioner received from the decedent are not a “benefit” of the divorce, but rather obligations which were statutorily imposed on the decedent irrespective of his marital status.²¹

Likewise, child custody is not a “benefit of divorce” but rather a right of the *child* to be cared for by the parent who will best promote the child’s welfare and happiness, *irrespective of the marital status of the parties*. D.R.L. § 70. At any time during their marriage, petitioner would have been privileged to apply for and obtain an order granting her custody of the parties’ issue. F.C.A. § 652.²²

²¹The Mexican divorce judgment did not award petitioner alimony or child support; the decedent apparently made the asserted payments purely voluntarily, further undermining respondents’ assertion that support is a “benefit of divorce.”

²²A plain reading of the Mexican divorce judgment reveals that the custody determination stated therein merely recited and maintained the status quo. As petitioner already *had* custody of the parties’ child, the divorce provided her with no “benefit” in this regard. Of course, the
(Continued...)

B. Plaintiff Cannot Be Charged With Laches or Estoppel.

The *Liebman* case, *supra*, makes abundantly clear that petitioner herein cannot be held to have waived her right of election through estoppel or laches:

As Mr. Justice Geller stated in *Christensen v. Christensen* (39 Misc.2d 370, 371-372 [1963]): “The governing rule of law on this question of estoppel was summed up in *Weiner v. Weiner* (13 A.D.2d 937 [1961]): ‘The gist of the decisions is that a spouse who by acts indicates acquiescence in the divorce and so induces the other spouse to act upon the assumed validity of the decree cannot be heard to contest it....’ It is clear that mere inaction or delay after knowledge of one’s rights cannot constitute laches. The doctrine of equitable estoppel may be invoked only where the conduct of a party has induced a change of position or resulted in a substantial prejudice to the adverse party.”

As to the asserted laches of the wife Ida, there is no evidence that her inaction resulted in worsening petitioner’s position; her marriage to decedent was void ab initio (*Cirone v. Cirone*, 82 N.Y.S.2d 780 [1948]).

It is indeed unfortunate that the petitioner Sylvia after 29 years now finds herself in her present predicament, but the cause was neither the respondent son nor his mother Ida.

44 Misc.2d at 194-95, 253 N.Y.S.2d 461 at 464.

This decision echoes the overwhelming of authority in New York to the effect that the defendant in an otherwise void foreign matrimonial action may “rest on her laurels” with complete impunity, and is under no obligation whatsoever

(...Continued)

Mexican court was utterly without jurisdiction to determine the custody of the child. D.R.L. Art. 5-A.

ever to bring any action to contest it. An example of such a finding, squarely apposite to the facts of the instant case, is *Weiner v. Weiner*, 27 Misc.2d 647, 211 N.Y.S.2d 125 (Sup. Ct. Bronx County 1961), *modified on other grounds*, 14 A.D.2d 671, 219 N.Y.S.2d 944 (1st Dep't 1961), wherein a defense identical to respondents' third defense herein was considered:

The second affirmative defense is predicated upon laches and estoppel, since, after realleging the allegations pleaded in the first defense, it adds allegations to the effect that plaintiff retained counsel to represent her interests in Florida, had full knowledge of that divorce action but did not contest same, and that defendant husband, in reliance upon his divorce decree and the factor of "plaintiff's apparent acquiescence therein", married the co-defendant; that by reason thereof, plaintiff is "guilty of such laches and inequitable conduct in allowing defendants to rely on the 1951 divorce decree". To these allegations, it must be observed that there is no claim that plaintiff appeared personally or by attorney in the Florida action. Unfortunate as it may be to defendants, plaintiff was not obligated to do anything about his divorce. She had not participated actively in its procurement, nor was she a party to it. She may not be charged, upon the facts here, with laches or estoppel (*Pomerance v. Pomerance*, 61 N.Y.S.2d 227 [1946]; *Duffy v. Duffy*, 23 Misc.2d 268; *Gruttemeyer v. Gruttemeyer*, 285 App.Div. 1185). In light of the facts herein and applicable law, the second affirmative defense is therefore stricken.

27 Misc.2d at 648-49, 211 N.Y.S.2d at 127.

Petitioner herein is not claimed to have made any statements or representations to the decedent or his second "wife" on which it is asserted that they relied to their detriment. Petitioner is not claimed to have done anything affirmatively to recognize the divorce or her husband's purported remarriage. As in

Pomerance, “[t]he situation in which the defendants find themselves, unfortunate as it is, is the result of their own doing, and the plaintiff’s delay in asserting her rights cannot aid them.” *Pomerance v. Pomerance*, 187 Misc. 20, 22, 61 N.Y.S.2d 227, 229 (Sup. Ct. Kings County 1946).

There is, and cannot be — by virtue of CPLR § 4519 — any competent evidence that the decedent relied on plaintiff’s inaction in contracting his second purported marriage, nor can it be established that petitioner knew of the decedent’s impending remarriage and deliberately remained silent. *Cammarota v. Sec’y of Health, Education & Welfare*, 329 F.Supp. at 1088-89.

Similarly, former Surrogate Midonick has observed:

The time has come for the first, and the only legal wife of the decedent to enter into the enjoyment of the only benefit which she can enforce as his widow.

* * * *

Besides the requirement of delay, such delay must be the cause of prejudice to a party before the doctrine of laches may be invoked. In most cases similar to the one at bar in which laches have been successfully invoked the prejudice shown has been a change of position on the part of the second spouse in reliance on the first spouse’s inaction (*Krieger v. Krieger*, 25 N.Y.2d 364 [254 N.E.2d 750, 306 N.Y.S.2d 441 (1969)]; *Weiner v. Weiner*, 13 A.D.2d 937 [1961]; *Schuman v. Schuman*, 137 N.Y.S.2d 485 [1954]; *Berkley v. Berkley*, 142 N.Y.S. 2d 273 [1955]; *Wynn v. Wynn*, 189 Misc. 96 [1947]) nothing happened between the first wife and decedent which misled the second “wife” to marry decedent and bear him a child. There is thus no evidence that any inaction on the part of petitioner caused objectant’s marriage to the decedent or motivated their having an immediate child.

Matter of Carter, 69 Misc.2d 630, 636-37, 331 N.Y.S.2d 257, 264-65 (Surr. Ct. N.Y. County 1972), *aff'd*, 42 A.D.2d 925, 347 N.Y.S.2d 1007 (1st Dep't 1973).

As noted above, respondents cannot possibly prove — as indeed they must to sustain their defense of laches and/or estoppel — that the decedent relied on petitioner's inaction in contracting second "marriage." Without the decedent's testimony and in the absence of any other competent evidence, it is equally plausible that the decedent knowingly contracted an entirely void and bigamous re-marriage. In other words, such reliance may not be presumed because non-reliance is no less likely.

The contrary cases distinguished by former Surrogate Midonick in *Carter*, *supra*, all involve a living spouse who asserted his reliance on the other party's inaction. Respondents who claim under the decedent herein simply cannot carry their burden of proof on this key issue to establish their equitable defense.²³

Nor do respondents even allege that respondents themselves relied in any way on petitioner's inaction.

Accordingly, respondents' third defense should be stricken. In the alternative, if this Court declines to strike this defense, plaintiff should be afforded the opportunity to prove at trial that she never knew of or knowingly acquiesced in the Mexican divorce.

²³These cases are all readily distinguished from those in which it is the surviving spouse herself who obtained, or actively participated in, the jurisdictionally defective foreign divorce judgment. *Starbuck v. Starbuck*, 173 N.Y. 503, 66 N.E. 193 (1903).

Point IV

**MERE INACTION BY PETITIONER CANNOT
CONSTITUTE A DEFENSE UNDER EPTL § 5.1-2(a)(3)**

Respondents' fourth defense asserts the novel and patently frivolous notion that mere inaction following petitioner's putative knowledge of the Mexican divorce deprives her of the right to elect against the decedent's will because "petitioner is deemed to have procured outside of this state, a final judgment of divorce which disqualifies petitioner under EPTL § 5.1-2(a)(3) from exercising a right of election."

This theory flies in the face of the unequivocal pronouncements of our courts, which have found that a surviving spouse is deemed to have "procured" a foreign divorce only when the surviving spouse is the plaintiff in the foreign action. *Matter of Rathscheck, supra; Matter of Loeb*, 77 Misc.2d 814, 354 N.Y.S.2d 864 (Surr. Ct. N.Y. County 1974); *Matter of Adams*, 182 Misc. 937, 45 N.Y.S.2d 494 (Surr. Ct. N.Y. County 1943), *aff'd*, 267 A.D.2d 985, 48 N.Y.S.2d 801 (1944), *cert. denied*, 324 U.S. 865, 65 S.Ct. 914, 89 L.Ed. 1421 (1944).²⁴

²⁴Respondents base this defense solely on EPTL § 5.1-2(a)(3), and do not assert a defense based on EPTL § 5.1-2(a)(1). A defense of this latter variety was allowed in the apparently anomalous Erie County case of *Matter of Bock*, 70 Misc.2d 470, 333 N.Y.S.2d 801 (Surr. Ct. Erie County 1972). *Bock* is readily distinguished from the case at bar insofar as the divorce decree at question therein had been rendered by a sister state and was required to be accorded full faith and credit, was presumptively valid and appeared jurisdictionally sufficient on its face; no such jurisdictional validity is apparent or can be presumed in the instant case. However, in the event that respondents hereafter allege a defense based on subdivision 2(a)(1), and this Court adopts a view consonant with *Bock*, petitioner will prove at trial that she had no reason to know of, and never knowingly acquiesced in, the Mexican divorce at issue herein.

In this context, Surrogate Foley's discussion in the *Adams* case is enlightening:

The intention of the Legislature in the enactment of [former Decedent Estate Law] Section 18 and in conferring a right of election or providing for its denial as to certain spouses plainly contemplated that the factual situation at the death of the testator or testatrix was to be the test. Where a decree of divorce had been obtained by the surviving former spouse, which stood unaffected at such death, the right to elect had been destroyed. Any subsequent action to vacate it was worthless. It was and is common knowledge that in certain countries and states, divorces are easily procurable. It may be fairly assumed that they were just as easily capable of being set aside after the death of one of the parties. The disturbance of the inheritance of property under the will of the former spouse first dying was intended to be guarded against by our statute, otherwise, a fertile source of litigation and uncertainty and delay in the distribution of an estate would be created. The Legislature, therefore, provided against these unjust contingencies by making the mere affirmative act of the procurement of the divorce a disqualification of the spouse who obtained it from any privilege to attack the will.

The Surrogate holds, therefore, that the respondent, the former wife here, is barred as a matter of law under subdivision 3 of §18, Decedent Estate Law, by her overt act in procuring the decree of divorce which she voluntarily sought in Nevada and whether it is vacated or not.

182 Misc. 937 at 942, 45 N.Y.S.2d at 499-500.

The word "procure" means "to initiate a proceeding; to cause a thing to be done; to instigate; to contrive, bring about, effect or cause." *Black's Law Dictionary*. In the instant case, nothing could be clearer than that the decedent alone, without notice to or cooperation of petitioner, "procured" the Mexican divorce at

issue. Petitioner committed no “overt act” (*Adams, supra*) constituting the procurement of a decree in a foreign jurisdiction. There is no evidence whatsoever that petitioner “voluntarily sought” (*Id.*) such a decree or even had knowledge thereof.

Accordingly, respondents’ fifth defense must be stricken.

CONCLUSION

For all of the reasons hereinabove set forth, petitioner respectfully requests that this Court determine, as a matter of law, that petitioner is the surviving spouse of the decedent and entitled to elect against his will.

In the event that the Court declines to rule in petitioner's favor as a matter of law, petitioner respectfully requests that any discovery of her be expedited that and this Court grant petitioner a trial preference in view of her advanced age, 83.

Dated: December 14, 1993

Respectfully submitted,

HILARY B. MILLER
Attorney for Petitioner
112 Parsonage Road
Greenwich, Connecticut 06830-3942
(203) 861-6262