



Warning

As of: Dec 05, 2012

**In the Matter of the Estate of Seymour Fox, Deceased**

[NO NUMBER IN ORIGINAL]

Surrogate's Court of New York, New York County

*109 Misc. 2d 634; 440 N.Y.S.2d 811; 1981 N.Y. Misc. LEXIS 2444*

**May 21, 1981**

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** The escrow agent initiated a proceeding with the court, seeking direction from the court order directing him to transfer the proceeds from the sale of decedent's property to the former wife for past due alimony payments.

**OVERVIEW:** The court, in a prior order, directed the escrow agent to sell decedent's property. The escrow agent initiated a proceeding and sought permission to transfer to proceeds from the sale to the former wife for the past due alimony payments the decedent failed to make. The widow opposed the distribution and contested the former wife's right to the escrowed property. The court found in favor of the former wife and held that there was no statute of limitations under the judgment of divorce, no intentional waiver of her rights, and no laches. However, the court held that the alimony arrears exceeded the proceeds of the sale so that the bequest to the former wife in the decedent's will failed due to lack of estate funds.

**OUTCOME:** The court held that the alimony arrears exceeded the proceeds of the sale of the escrowed

property, and that the bequest to the former wife failed due to lack of estate funds.

**CORE TERMS:** decedent's, former wife, alimony, widow's, separation agreement, default, escrow, apartment, escrowed, right to proceed, terminated, bequest, notice, laches, wife's claim, decedent's death, decedent died, agreement provided, net estate, co-operative, election, contest, escrowee, annual, decedent's estate, former husband, ownership interest, divorce decree, right of election, written notice

**LexisNexis(R) Headnotes**

*Family Law > Marital Duties & Rights > Property Rights > Postnuptial & Separation Agreements > General Overview*

*Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview*

*Real Property Law > Purchase & Sale > Escrow*

[HN1] It is a well-settled rule with respect to an escrow, that if either of the parties die before the condition is performed, the deed is good, and will take effect from the

first delivery.

***Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview***

[HN2] A waiver is an intentional relinquishment of a right which is known or ought to be known. A waiver does not occur through mere oversight or negligence.

***Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Laches***

[HN3] Laches depends not only on the passage of time, but on the fact that this delay prejudices the other party.

***Estate, Gift & Trust Law > Estate Administration > Claims Against Estates > General Overview***

***Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview***

***Governments > Legislation > Statutes of Limitations > Time Limitations***

[HN4] *N.Y. Est. Powers & Trusts Law § 5-1.1* provides that a widow's election is against the "net estate" of the decedent. The net estate consists of the decedent's gross estate, minus debts. A claim for unpaid installments of alimony is a preferred claim against an estate. Moreover, the accrued alimony is treated as a judgment debt and as such a claim therefor is governed by a 20-year Statute of Limitations.

**HEADNOTES**

**[\*\*\*1] Husband and Wife -- Alimony and Allowances -- Claim against Husband's Estate**

Decedent's agent is directed to transfer to decedent's former wife the proceeds of certain escrowed property originally representing decedent's ownership interest in a co-operative apartment and held by decedent's agent to secure decedent's performance of his obligations under a separation agreement that was incorporated in the parties' valid divorce decree, where the alimony arrears, accumulated over the course of the nine years immediately preceding decedent's death, exceed the proceeds of the sale of the apartment, which is the only significant estate asset; the separation agreement provided that decedent's former wife had the right to proceed against the security upon written notice to her

former husband, at which point he had 30 days to remedy the default and, although his former wife served said required notice upon him 15 days before his death, the default was not cured by decedent or, subsequently, by his representative. The objection of decedent's widow, his second wife, on the ground that the escrow agreement terminated at his death because he did not have the full 30 days in which to remedy [\*\*\*2] the default is dismissed, as are her arguments that the former wife waived the alimony claim by her delay and that the widow's *EPTL 5-1.1* right of election takes priority over the former wife's claim; the accrued alimony is a preferred claim against the estate, treated as a judgment debt and governed by a 20-year Statute of Limitations and, moreover, the former wife's delay cannot be deemed laches inasmuch as the decedent was not prejudiced thereby, nor is there any evidence that the former wife intentionally relinquished her rights to proceed against the security.

**COUNSEL:** *Michael S. Kraft* for petitioner. *McGovern, Connelly & Davidson* (*Frank H. Connelly, Jr.*, and *John A. Vasile* of counsel), for Patricia Fox. *Thomas C. Lambert* for Bernice G. Fox.

**JUDGES:** Millard L. Midonick, J.

**OPINION BY:** MIDONICK

**OPINION**

**[\*634] OPINION OF THE COURT**

[\*\*812] This proceeding was brought by the escrow agent for the property deposited to secure the decedent's performance under a separation agreement with his former wife. The escrowed property originally consisted of the shares of stock and the lease representing the decedent's ownership interest in his co-operative apartment (together [\*\*\*3] with the relevant stock power and assignment executed in blank). Pursuant to an earlier decision of this court, the agent was authorized to sell the apartment and now holds the proceeds of such sale. He seeks a direction from the court permitting him to transfer these proceeds, on account of [\*635] past due alimony payments, to the former wife. The decedent's widow opposes the proposed distribution and contests the former wife's right to the escrowed property. The estate apparently has no significant assets other than any

interest it may have in the apartment proceeds.

The decedent and his former wife, Bernice, were married on January 18, 1941. Thereafter, they separated, and entered into a separation agreement dated January 1, 1970. This agreement provided that the decedent was to pay to Bernice a gross annual figure of \$ 36,000, or \$ 3,000 per month, or such sums as required to provide her an annual income of \$ 20,000 net of taxes, disregarding all her other income for purposes of this computation. The agreement provided that upon the death of either party, or the wife's remarriage, "the Husband's obligations hereunder shall cease and shall not constitute a charge on [\*\*\*4] his estate except as to arrears and except as to moneys owing under subdivisions (b) and (d)" (which provided the mechanics of adjustment to achieve the annual \$ 20,000 net of taxes standard). In addition, the agreement required the decedent to make a will bequeathing to Bernice the greater of \$ 100,000 or one third of his net estate, if she survives him and has not remarried. The terms of the separation agreement were incorporated, but not merged, in a valid divorce decree dated February 28, 1980.

The agreement further provides that "In order to secure to the Wife the due performance by the Husband of all his obligations hereunder," the decedent must deposit the documents referred to above, representing his ownership of the co-operative apartment, with an escrowee. Under the terms of the agreement, the former wife has the right to proceed against the security if the decedent does not perform any of the obligations set forth in the separation agreement. She is required to serve notice in writing by registered mail upon the escrowee and her former husband if she intends to so proceed. Once notice is served, the decedent has 30 days to remedy the default, or, if he does not the [\*\*\*5] escrowee is authorized to sell the security and deliver the proceeds, up to the amount of the default, to the wife. The wife is not required to resort to the security in the [\*636] event of any default, and may pursue other remedies if she desires.

[\*\*813] In conformance with the provisions of the separation agreement, the decedent made the required bequest in his will, and, in 1970, paid alimony of \$ 36,000 to Bernice. Bernice asserts that in 1971, the decedent paid only \$ 12,500 in alimony, that he paid even smaller sums in succeeding years, and that by 1978, he had ceased payments altogether. Nevertheless, Bernice

did not contemporaneously attempt to proceed against the security, or otherwise protest the nonpayment of alimony. The decedent continued to live in the apartment whose ownership was in escrow. The decedent also remarried, and remained married to his second wife, Patricia, until his death.

By letter dated January 2, 1980, Bernice gave notice, in the required form, of her intention to proceed against the security under the agreement. The decedent died on January 17, 1980, before the 30 days allotted to him under the agreement to remedy the default had expired.

[\*\*\*6] The widow argues that any amount of alimony found to be due should be offset by \$ 68,750, the value of several paintings the decedent gave his former wife in 1966. There is no showing that any such offset was contemplated by the parties, especially as the gift occurred four years before the separation agreement was executed. Also, in 1970, the first year the separation agreement was in force, the decedent paid the entire alimony due under the agreement. The argument that the transfer of the paintings was intended to be in lieu of payment of a portion of the alimony claim cannot be maintained in light of the date of the transfer and the fact that this transfer was not reflected in the 1970 payments.

The widow opposes the distribution of the proceeds of the apartment to the former wife on several grounds. She alleges that the escrow agreement terminated at the decedent's death because he was not afforded the full 30 days specified in the separation agreement to respond to Bernice's claim. She also argues that Bernice's failure to proceed against the security at any time during the nine years the decedent was in default constitutes a waiver of [\*637] her right to enforce her [\*\*\*7] claim for alimony. The court finds against the widow on both grounds, there being no laches nor Statute of Limitations obstacles under the judgment of divorce, nor any intentional waiver.

The widow's first argument, that the separation agreement terminated at the decedent's death, is based on two erroneous presumptions. The widow argues that the death of the decedent, per se, terminated the agreement. This is clearly contrary to established law. [HN1] "It is a well-settled rule with respect to an escrow, that if either of the parties die [*sic*] before the condition is performed \* \* the deed is good, and will take effect from the first delivery". ( *Perry v Perry*, 170 App Div 525, 530, quoting *Ruggles v Lawson*, 13 Johns 285, 286; accord *Webster v Kings County Trust Co.*, 145 NY 275.) The

widow also urges that because the decedent died before the expiration of the 30-day period provided in the agreement to permit him to cure or contest the default, he was unable to perform a required condition of the escrow agreement, which consequently must automatically terminate. A careful reading of the separation agreement reveals that the only condition placed on the decedent [\*\*\*8] was the payment of alimony, and the only condition binding the former wife was the requirement she give written notice of her intent to proceed against the security. The 30-day period is clearly a grace period granted the decedent "with which to *remedy* the default." The fact that the decedent died before the 30-day period expired is irrelevant. The escrow agreement did not impose any condition that only the decedent could perform. His estate could have acted in his place to remedy or contest the default with no prejudice to the decedent's interests.

The widow has also failed to prove that the former wife waived her rights. [HN2] A waiver is an intentional relinquishment of a right which is known or ought to be known. (*Byer v City of New York*, 50 AD2d 771; *Matter of Stillman*, 82 Misc 2d 736, 738.) [\*\*\*814] "[A] waiver does not occur through mere oversight or negligence". (*Matter of Rosenbaum*, NYLJ, Oct. 29, 1980, p 10, col 6.) There is no evidence that the former wife intentionally relinquished her rights to proceed against the security herein; there is only evidence that she pursued no affirmative course of action until [\*638] January 2, 1980. Before that [\*\*\*9] date, the decedent was residing in the apartment which forms the basis of the escrow agreement. The former wife may have considered this fact, beneficial to the widow, in determining whether or not to proceed.

Nor can the former wife's delay be deemed laches in this case. [HN3] Laches depends not only on the passage of time, but on the fact that this delay prejudices the other party. (*Marcus v Village of Mamaroneck*, 283 NY 325, 332; see, also, *Prouty v Drake*, 18 Misc 2d 887, 890.) The decedent was in no way prejudiced or harmed by the

delay in this case. It may even be said that he was benefited in that the escrow agent was not obliged to sell the apartment in which the decedent (and his widow) lived until his death.

The widow also argues that her right of election under *EPTL 5-1.1* takes priority over the former wife's claim for alimony. This argument need not be reached here. A finding that the escrow agreement is valid necessarily operates to keep the escrowed assets outside the decedent's estate. Yet even if this court had found otherwise, the former wife would still have a claim which should be superior to a right of election claim. (Cf. *Rubenstein v Mueller*, 19 [\*\*\*10] NY2d 228.)

[HN4] *EPTL 5-1.1* provides that the widow's election is against the "net estate" of the decedent. The net estate consists of the decedent's gross estate, minus, *inter alia*, debts. A claim for unpaid installments of alimony is a preferred claim against an estate. (*Matter of Torr*, 29 Misc 2d 772 [former wife recovered 20 years' worth of alimony arrears]; *Matter of Herbert*, 23 Misc 2d 884.) Moreover, the accrued alimony is treated as a judgment debt (*Matter of Herbert*, *supra*, p 888) and as such a claim therefor is governed by a 20-year Statute of Limitations. (*CPLR 211*; *Matter of Bassford*, 91 NYS2d 105, mod 277 App Div 1128, mot to resettle den 278 App Div 654.) It is evident that whether or not the escrowed assets are considered a part of the decedent's estate, the former wife's claim for alimony arrears must be satisfied.

The question whether the principles of *Matter of Dunham* (63 Misc 2d 1029, affd 36 AD2d 467, mot for lv to app den 29 NY2d 485 [which holds a widow's right of election [\*\*\*639] superior to the right of a former wife to a bequest made by the decedent pursuant to a separation agreement]), would control when a testator secures such [\*\*\*11] bequest by placing assets in escrow, is not directly before the court. The alimony arrears exceed the proceeds of the sale of the escrowed property, so that the bequest to the former wife in the decedent's will necessarily fails due to lack of funds in the estate.