

<b>Matter of Jongebloed</b>
2010 NY Slip Op 33603(U)
December 21, 2010
Surrogate's Court, Nassau County
Docket Number: 343245
Judge: John B. Riordan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----x  
Proceeding to Determine the Validity or Effect of Election  
by Lillian Osterberg-Jongebloed, Surviving Spouse, to  
Take a Share Against the Provisions of the Last Will of

File No. 343245

Dec. No. 26810

GEORGE JONGBLOED,

Deceased.  
-----x

This is a miscellaneous proceeding (SCPA 1421) commenced by the decedent's spouse, Lillian Osterberg-Jongebloed, to determine the validity of her right of election. A hearing was held on the issue of whether Lillian abandoned the decedent and is, therefore, disqualified from taking her elective share. The parties submitted post-trial memoranda of law.

**Procedural Background**

The decedent, George Jongebloed, died on February 14, 2006. He was survived his wife, Lillian, and four children, his sons, Roy, Tom and Bruce, and his daughter, Jodi. After the decedent's death, Lillian filed a petition for letters of administration. Roy objected to Lillian's petition on the grounds that the decedent had not died intestate and that Lillian was disqualified by reason of having abandoned the decedent. Roy offered a purported will dated November 17, 2000 for probate. The purported will nominated Roy as executor and made no provision for Lillian. The will was admitted to probate by decree dated May 21, 2007, and letters testamentary issued to Roy on the same date. On July 9, 2007, Lillian served a Notice of Election on Roy and filed it in the court. On February 24, 2009, Roy filed a written rejection of Lillian's elective share on the grounds of abandonment.

### **Factual Background**

The decedent and Lillian were married on January 14, 2002 and remained married until the decedent's death on February 14, 2006.

Lillian and George met on January 19, 2001 on a cruise. At that time, Lillian was living in Poland, Maine, and George was living in East Meadow, New York. Two weeks after the cruise, Lillian visited George at his East Meadow home where she stayed for three weeks. Thereafter, George visited Lillian at her home in Maine and remained there from the middle of April 2001 until September 2001. They returned to George's East Meadow home from September 2001 until April 2002 when they returned to Maine. Essentially, George and Lillian developed a routine whereby they would live in Lillian's Maine home from April 15<sup>th</sup> to October 15<sup>th</sup> at which time they would return to George's East Meadow home and stay there from October 15<sup>th</sup> to April 15<sup>th</sup> the following year. This routine was followed by George and Lillian in the years 2002, 2003 and 2004.

### **Testimony**

At the trial, Lillian did not testify because she was hospitalized and unable to attend. Portions of her deposition testimony of July 9, 2009 were read into the record. In addition, Roy and his wife, Erika Jongbloed, testified. Lillian's son, Glenn Osterberg, and daughter-in-law, Michelle Osterberg, were called as witnesses by Lillian's attorney.

Lillian testified as follows. George suffered what appeared to be a stroke in the spring of 2005 when the couple was living in Maine. George's speech was slurred, he was unable to hold things and was unsteady on his feet. According to Lillian, on either October 11th or 12th, 2005, George drove to the post office in Maine to arrange for their mail to be forwarded in anticipation

of the move to New York. George never came back from the post office. Lillian testified that she made calls to their New York home, to George's children and to George's sister trying to find him. On October 13th, George called Lillian and asked where she was. Lillian told him that she was in Maine where he had left her. According to Lillian, she was angry at George because he left her with no food in the house, no oil in the tank, no money and no car. George told Lillian to buy a car and come to New York. Lillian was delayed in doing so because she had to find someone to complete the winterizing process on the Maine house. On October 17th, Lillian purchased a new Saturn automobile using funds from the parties' joint checking account at Biddeford Bank in Waterboro, Maine. On October 31, 2005, George suffered another stroke and was hospitalized at the Nassau County Medical Center. George's sister phoned Lillian to let her know George was in the hospital. Lillian drove down to Long Island on November 1, 2005.

Lillian testified that she visited George on November 1, 2005 with her daughter-in-law, Michelle. She further testified that she stayed at the East Meadow home for about a week to ten days. During that time, she visited George once or twice a day. According to Lillian, she had to return to Maine because she could not stay at the East Meadow home since the house was full of mold and she had allergies. Lillian testified that she asked Roy to fix the mold problem, but despite what he did, the problem persisted and she could not stay in the home. She did not recall a mold problem in the East Meadow home in 2003 or 2004. The decedent's son, Tom, also came to the house to look into the mold problem, but said it would take time. Lillian returned to Maine and closed up the Maine house. In January she drove to Florida to stay with her son.

Prior to Thanksgiving, Lillian commenced a divorce action against George in Maine. The complaint was filed on November 21, 2005. Lillian did not call or talk to George after she

returned to Maine. To her knowledge, he was not able to speak. Lillian advised her attorney of George's hospital room number to serve him with the complaint. According to Lillian, she filed for divorce because she was afraid George's children would take her property in Maine. She saw an attorney to protect her assets. Lillian testified that in 2003 George and his daughter, Jodi, had a telephone conversation and Jodi said that when something happened to George, they would have a summer home in Maine.

Lillian learned of George's death from a friend of George. She went to the funeral parlor with her son and daughter-in-law, Michelle.

Roy also testified at the hearing. According to Roy, he met Lillian at the hospital on November 1, 2005 and at the East Meadow home on the night of November 1st. On November 2, 2005, he met with Lillian at the ICU of the hospital. He wanted Lillian's input on a procedure to put a filter in his father's leg. Lillian told him he should talk to his aunt. On November 4, 2005, Roy met with Lillian again to tell her that he authorized the procedure and it was successful. According to Roy, Lillian told him that he was going to put his father in a wheelchair and she was not going to be his nursemaid. Lillian said Roy's father was Roy's problem.

Concerning the mold condition, Roy and his son, Luke, went to the East Meadow home basement and emptied the dehumidifier. Roy saw a light white powder because the dehumidifier was full and was not running since it needed to be emptied. Roy told Lillian that he would ask his brother, Tom, to wipe down the surfaces and keep the dehumidifier running.

On November 8, 2005, Roy and his wife, Erika, went to the East Meadow home and asked Lillian for the checkbook to pay his father's bills. Lillian repeated to him that she was not going to be his father's nursemaid. She stated that she had her own life to live and George was

Roy's problem.

On November 9, 2005, Roy went to the East Meadow home and found that Lillian had left. Her key was on the table. He also found a note and a receipt for a lawyer with his father's credit card. In addition, drawers were open and Lillian's clothes were gone. Her pictures and personal effects were also gone.

Roy found a letter dated December 2005 from Lillian to George which he put in a file. The letter was sent to George at the hospital. Roy did not give the letter to his father. Roy had opened a file on Lillian at the end of 2002. In December 2002, he found a letter in his father's house to his father from Lillian. He took the letter and made a copy for his file. Roy testified that he kept a file on Lillian because his father was distraught after his mother's death. His father would tell women that he had \$2 million. Roy needed to protect his dad because he anticipated certain things would happen.

Roy further testified on cross-examination that his father and Lillian were secretly married. He also did not approve of his father marrying Lillian without a prenuptial agreement. In fact, Roy prepared a prenuptial agreement for his father to review.

Roy also testified that he never told his father about Lillian having filed for a divorce. He obtained a lawyer to represent his father with respect to the divorce.

Roy also testified that he told Lillian she could stay at the East Meadow home and he would pay the expenses. Roy acknowledged that Lillian said the mold was a problem, but testified that she never said it was a problem which prevented her from staying there. Roy also testified that he canceled his father's credit card after a \$5,000.00 bill came in.

Roy's wife, Erika, also testified at the trial. According to Erika, she was present during

two conversations between Roy and Lillian. On November 4, 2005, Roy and Erika went to see Lillian to discuss the procedure for George's blood clot. Roy told Lillian that it went well. Lillian yelled at Roy and said she did not want George to have the procedure. She did not want George in a wheelchair and she was not going to be his nursemaid. According to Lillian, it was all "Roy's fault." Erika testified that Roy said if Lillian would just stay by George's bedside, he would take care of all the expenses. Lillian wanted \$1,000 per month. Roy refused and Lillian said she would not stay.

On November 8, 2005, Erika and Roy met with Lillian again at the East Meadow home. Roy asked Lillian for the checkbook because he wanted to pay his father's expenses. She became irrate and told Roy that she was not George's nursemaid. Lillian again told Roy that Roy put George in a wheelchair.

Glenn and Michelle Osterberg also testified at the trial. Michelle testified that when she was at the East Meadow home with Lillian it smelled musty and Lillian was coughing. Michelle stayed in the East Meadow home for a week and the smell never got better. When George was in the hospital, Lillian visited him two to three times a day during the week Michelle was there, except for one day when Lillian took Michelle to the wineries. Michelle drove back to Maine with Lillian. Lillian took her personal items, her sewing machine, snow blower, arts and crafts, dog, and mainly her winter clothing.

Both Glenn and Michelle testified that they went to the funeral home with Lillian after George died, but were not permitted in until after George's family left.

### Analysis

Abandonment of the decedent by the surviving spouse disqualifies the surviving spouse

from his/her elective share, provided the abandonment continued until the decedent's death (EPTI 5-3.1). To constitute abandonment, something more is necessary than just a departure from the marital residence or living apart. The departure must be without the consent of the other spouse and must be unjustified (*Matter of Maiden*, 284 NY 429 [1940]). The essence of abandonment is a refusal by one spouse to fulfill "basic obligations springing from the marriage contract" (*Schine v Schine*, 31 NY2d 1133 [1972]). The burden of proof of establishing an abandonment is on the party who alleges it (*Matter of Reifberg*, 58 NY2d 134 [1983]), and the mere showing that the petitioner and decedent lived separate and apart does not prove abandonment (*Matter of Perst*, 135 NYS2d 686 [Sur Ct, New York County 1954]). "To amount to an abandonment the departure must be unjustified without the consent of the other spouse and evidence an obstinate and hardened refusal to return" (*Matter of Zilite*, NYLJ, Aug. 21, 1996, at 24, col 2 [Sur Ct, Nassau County][internal citations omitted]). "Such a determination almost always involves a question of fact" (*Matter of Arrathoon*, NYLJ, Aug 30, 2006, at 29, col 3 [Sur Ct, New York County]).

In the instant case, the evidence shows that Lillian vacated the East Meadow home in November 2005. The evidence also shows that she took with her personal items. Lillian returned to Maine and commenced a divorce action against George. The complaint was filed on November 21, 2005. Lillian did not call or talk to George after she returned to Maine. Lillian did write a letter to George in December 2005. In January 2006, Lillian drove to Florida to stay with her son.

Here, it is undisputed that Lillian left the marital residence. The departure was clearly without George's consent as George was unable to give consent due to his medical condition as



shown by the fact that Roy had to give authorization for the medical procedure George underwent. As far as whether the departure was justified, Lillian claims that she was unable to stay in the home due to the mold condition. Nevertheless, the testimony showed that Lillian had use of the checkbook and the decedent's credit card, which she could have used to repair the problem. Moreover, her actions after she left the East Meadow home evidence an obstinate and hardened refusal to return. She took her possessions with her as her daughter-in-law testified. Lillian returned to Maine and filed for divorce. The court finds her testimony that she filed for divorce in 2005 based upon a telephone conversation George had with his daughter, Jodi, in 2003 incredulous. Moreover, Lillian drove to Florida from Maine, but made no attempt to visit George in Long Island on the way.

Under the circumstances, the court finds that respondent has proved his claim of abandonment. Accordingly, it has been established that the petitioner is disqualified as the decedent's surviving spouse (EPTL 5-1.2 [a] [5]).

Settle decree.

Dated: December 21, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court