

IN RE ESTATE OF JOHN K. BENCHOFF, LATE OF
CHAMBERSBURG, FRANKLIN COUNTY, PENNSYLVANIA,
Court of Common Pleas, 39th Judicial District, Franklin County Branch,
Orphans Court Division, No. 117-1999

Motion for summary judgment to dismiss petition to disqualify surviving spouse from inheriting on grounds of desertion under section 2106(a) of Probate, Estates and Fiduciaries Code, 20 Pa.C.S.A. section 101 et seq.

- 1) A surviving spouse is not entitled to inherit property from the decedent spouse's estate if the surviving spouse willfully and maliciously deserted the decedent spouse for a period of one year or more before the decedent spouse's death.
- 2) "Desertion" means actual abandonment of marital cohabitation with the intent to desert which persists without cause or consent of the other spouse.
- 3) The term "malicious" refers to legal, not actual malice, and consists of a perverse refusal to perform marital obligations.
- 4) A petition to disqualify on grounds of desertion cannot be dismissed on a motion for summary judgment where the record shows a factual dispute exists as to the true nature of the marital relationship in the year before the decedent spouse's death.

Appearances:

E. Franklin Martin, Esq., Counsel for Harriet Ritchie
Randy R. Moyer, Esq., Counsel for Suzanne Benchoff

OPINION

Herman, J., April 25, 2001

Introduction

Before the court is a motion for summary judgment filed by Suzanne Benchoff to a petition to disqualify her from inheriting property of her husband John Benchoff who died intestate on June 8, 1999. The petition to disqualify was filed by Harriet Ritchie, John Benchoff's aunt.¹ After considering argument, briefs of counsel, the record and the relevant authority, the court denies the motion for summary judgment.

Background

John and Suzanne Benchoff were married on August 31, 1977. John filed a divorce action under section 3301(d) of the Divorce Code, 23 Pa.C.S.A. 101 et seq, on May 20, 1998. The complaint alleged the parties separated in July of 1988, had lived separate and apart for more than two

¹ John's estate does not have separate counsel.

years and that the marriage was irretrievably broken. He did not allege desertion as a ground for divorce pursuant to section 3301(a)(1).² Suzanne filed an answer and counter-affidavit alleging that the parties had not lived separate and apart for two years. She also made economic claims.

A master's hearing was held on February 19 and 22, 1999. Suzanne consented to entry of the decree at the hearing. Much of the testimony focused on determining the date of separation for the purpose of resolving the economic claims. John alleged the parties separated in the fall of 1989, whereas Suzanne maintained the separation occurred in May of 1998 upon John's filing of the complaint. Before the master had the opportunity to issue a report and recommendation and before the court entered the decree, John died intestate on June 8, 1999.

Letters of administration were issued to Suzanne as John's wife on June 15, 1999. On August 19, 1999, John's aunt Harriet Ritchie filed a petition to disqualify Suzanne as beneficiary of John's estate, alleging she willfully and maliciously deserted John on or about September 1989 and is therefore not entitled to inherit his property under section 2106(a) of the Probate, Estates and Fiduciaries Code, 20 Pa.C.S.A. section 101 et seq.³ On October 26, 2000, Suzanne filed this motion for summary judgment and Ritchie filed an answer. Counsel submitted briefs and the court held oral argument on the motion.⁴

Discussion of the Law

Summary judgment is governed by Pennsylvania Rule of Civil Procedure 1035.2 which provides:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

² (a) Fault. — The court may grant a divorce to the innocent and injured spouse whenever it is judged that the other spouse has:

(1) committed willful and malicious desertion and absence from the habitation of the injured and innocent spouse, without reasonable cause, for the period of one or more years.

³ A hearing date was set, but the hearing was continued generally by stipulation of counsel.

⁴ Counsel agreed that the court could consider both the exhibits offered as evidence at the master's hearing and the transcript of that hearing as well in disposing of this motion for summary judgment. We have also reviewed the April 13, 2000, deposition of Harriet Ritchie.

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

“The mission of the summary judgment procedure is to pierce the pleadings and assess the proof in order to see whether there is a genuine need for a trial...We have a summary judgment rule in this Commonwealth in order to dispense with a trial of a case...where a party lacks the beginnings of evidence to establish...a material issue.” *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1041 (Pa. 1996) [citations omitted]. At the same time, the court in reviewing the motion must view the record in the light most favorable to the nonmoving party and all doubts as to the existence of whether there is a genuine issue of material fact must be resolved against the moving party. *Pennsylvania State University v. County of Centre*, 615 A.2d 303 (Pa.1992).

Ritchie’s petition to disqualify is based on the assertion that Suzanne Benchoff willfully and maliciously deserted John in 1989, which is clearly at least one year before his death in June of 1999. Section 2106(a) provides as follows:

Forfeiture: Spouse’s share. — A spouse who, for a period of one year or upwards previous to the death of the other spouse, has willfully neglected or refused to perform the duty to support the other spouse, or who **for one year or upwards has willfully or maliciously deserted the other spouse**, shall have no right or interest under this chapter in the real or personal estate of the other spouse.

[Emphasis supplied.] Desertion requires an actual abandonment of marital cohabitation with the intent to desert which persists without cause or the consent of the other spouse. *In re Estate of Kostick*, 526 A.2d 746 (Pa. 1987); *Re Lodge’s Estate*, 134 A.2d 472 (Pa. 1926). Desertion is both a specific act and a continuing course of conduct. *Id.* A withdrawal from cohabitation is not a willful and malicious desertion where the withdrawing spouse intends the separation to be temporary. *Davis v. Davis*, 40 A.2d 144 (Pa.Super. 1944). Physical separation such as living in separate residences does not create a presumption that one spouse has willfully and maliciously deserted the other, though it is a factor to be weighed in the inquiry.

The separation must be against the innocent spouse’s will. If there is an indication the separation is mutual, then a spouse cannot claim the

separation was without his consent. *Mullen v. Mullen*, 214 A.2d 292 (Pa.Super. 1965). What constitutes consent to a separation is determined on a case-by-case basis. *Urbanski v. Urbanski*, 213 A.2d 219 (Pa.Super. 1965). A wife’s withdrawal from the shared residence and her refusal to allow her husband to live at her residence without cause constitutes desertion. *Pochiba v. Pochiba*, 385 A.2d 562 (Pa.Super. 1978). Desertion can also be shown where the withdrawing spouse refuses a good faith offer of reconciliation. *Procopio v. Procopio*, 100 A.2d 115 (Pa.Super. 1953); *Zimmerman v. Zimmerman*, 236 A.2d 785 (Pa. 1968). The spouse who has been abandoned need not actively seek reconciliation but can acquiesce in the separation and still be considered a deserted spouse. *Valerio v. Valerio*, 444 A.2d 1166 (Pa.Super. 1982). The separation must also be without reasonable cause. Such cause must be based on more than an argument, incompatibility of temperament or financial difficulties. *Wagner v. Wagner*, 299 A.2d 45 (Pa.Super. 1972).

The term “malicious” refers to legal, not actual, malice. *Rebar v. Rebar*, 67 A.2d 598 (Pa.Super. 1949). It means a perverse refusal to perform marital obligations. *Grace v. Grace*, 68 A.2d 197 (Pa.Super. 1949). Willful and malicious desertion will not be found where there is a forced separation, a separation encouraged by the other spouse, sickness or necessity. *Id.* In addition, even after physical separation, instances of sexual contact, sporadic visits together and trips together are insufficient to counteract the desertion because permanency is central to the marital relationship. *Thomas v. Thomas*, 483 A.2d 945 (Pa.Super. 1984).

The petitioner in an action for forfeiture of inheritance, in this case Harriet Ritchie, bears the burden of proving that the heirs, whether they take by Will or by statute, are legally undeserving. *In re Estate of Fonos*, 698 A.2d 74 (Pa.Super. 1997). A prima facie case of desertion is made through proof of a spouse’s continuous absence from the shared home for the statutory period of one year or more, coupled with the intent to desert. Once the petitioner proves there was a desertion without cause or consent, the burden shifts to the deserting spouse to prove the desertion was not willful or malicious in order for that spouse to receive her share of the estate. *In re Estate of Fisher*, 276 A.2d 516 (Pa. 1971); *In the Matter of the Estate of Cochran*, 738 A.2d 1029 (Pa.Super. 1999).

Suzanne contends that the facts show that, as a matter of law, she did not willfully and maliciously desert or abandon her husband one year before his death. Ritchie responds by pointing to evidence in the record which indicates that at the very least, there is a dispute about the nature of the marital relationship between John and Suzanne beginning in the fall of

1989. Having reviewed the entire record of the master's hearings, we find that Suzanne's motion for summary judgment must be denied because there remain factual disputes about whether Suzanne deserted John for a period of at least one year before his death which Ritchie is entitled to pursue through a full evidentiary hearing before a trier of fact.

Discussion of the Record

The parties married on August 31, 1977. John became stepfather to Suzanne's 11 year old son Darin from a prior marriage. The parties rented an apartment in Waynesboro but also spent much of their time in the early years of their marriage at the large house in Chambersburg belonging to John's mother which had been in the Benchoff family for many years. Some of the house's furnishings formed the basis for an antique business which John operated beginning in the early 1980's.

The parties bought into a restaurant business in Lewisburg, 120 miles from Waynesboro, in 1986 as owner-operators. They began commuting several times a week to Lewisburg to manage the restaurant, staying first in motels and then in a rented apartment, all while maintaining the Waynesboro apartment. Despite investing substantial money and time in the restaurant between 1986 and 1991, the business struggled. During this period, other activities made demands upon the parties' energies and resources, including Suzanne's caring for her elderly mother in Chambersburg and John's pursuit of his antique business and Civil War memorabilia hobby.

By 1989, Suzanne had wearied of the constant traveling between Chambersburg and Lewisburg and was becoming disenchanted with the marriage. In the fall of that year, she rented a residence on a horse farm in Lewisburg where she could settle down and keep her horses. Interpersonal problems also began to surface between the parties at that time. Suzanne opposed having John bring his own horses to the farm, though the reason for her refusal is a matter of dispute. John divided his time between the Waynesboro residence, his mother's home and Lewisburg thereafter. Suzanne wrote John a letter in March of 1991 in which she expressed dissatisfaction with certain aspects of their marriage and indicated a desire to be alone to work out personal issues. It was sometime in that year that she confirmed John's suspicions that she was having an affair with a man who used to patronize the restaurant. There was no dispute that the parties had no sexual relations beginning in 1991.

The restaurant declared bankruptcy in November of 1991, resulting in a large tax liability for the parties. The parties filed separate income tax

returns beginning in either 1991 or 1992, though the reason for filing in that manner was a matter of dispute at the master's hearing. Their relationship remained civil, with John maintaining a close relationship with Suzanne's son Darin. The parties also had fairly regular contact throughout the bankruptcy proceedings which were not completely resolved for several years. Suzanne was unemployed until 1994 when she began working as an office manager at a realty office in Lewisburg. The fallout from the restaurant's failure continued to affect her finances, however. She took out a personal loan, but had trouble with payments, which prompted her to request a payment extension from the bank in August of 1994. In that letter she told the bank she had limited resources because she was separated from her husband who was not providing her with income.⁵

The parties agreed at the master's hearing that their personal relationship as husband and wife was troubled between 1989 and 1995 and that financial problems during those years further strained the marriage. However, they continued to have contact during those years in relation to the bankruptcy and tax problems, as well as mutual family and social connections, including Darin who had by then married and had a child of his own. John attended Suzanne's family reunions because he was on good terms with her family. He continued to travel regularly between Lewisburg and Franklin County several times a year during this period, but stayed at motels because Suzanne would not allow him to stay at her farm in Lewisburg, even during a nighttime snowstorm in 1992. The parties made one brief attempt at reconciliation through a marriage counselor, though it was unclear who initiated that attempt and when it occurred.

Suzanne moved back to Chambersburg in the summer of 1995. John's mother was in ailing health and Suzanne stayed at the Benchoff home to care for her. Returning to Chambersburg also allowed her to see her sister, Darin and grandchild. John's mother died in September of that year. Suzanne helped John clear out the house and the two were seen doing yard work together twice thereafter and having meals at local restaurants. Although they exchanged gifts and maintained a civil relationship, John continued to live at the Waynesboro apartment and they had no sexual relations. Suzanne was eventually paid for her work on behalf of the estate of John's mother and she continued to live at the Benchoff family house until 1998.

Neither party engaged the services of a marriage counselor after 1995, nor was there evidence of specific discussions between the parties about reconciliation. They did not sleep under the same roof since at least 1995.

⁵ The tax authorities eventually marked her portion of the bankruptcy debt satisfied upon her payment of \$500.00.

Although John paid some of her bills and kept her on his credit card, he was not fully supporting her. They attended dinners with social acquaintances and their extended families in 1996 and 1997, but disagreed about whether they went to those dinners as a couple. John was involved with another woman in 1997 and filed for divorce in May of 1998.

The parties sharply disagreed about the nature and evolution of their relationship beginning with the year 1989. John's position was that he and Suzanne separated in the fall of that year after she rebuffed him sexually and told him she did not love him and may never have. This was when she discouraged him from bringing his horses to the Lewisburg farm. John believed that the marriage suffered another tear in 1991 when Suzanne's extramarital affair was confirmed, after which the parties' connection was not the emotional and physical one normally associated with marriage, but was based merely on familial, social and financial circumstances. He testified to his belief that the failed attempt at reconciliation took place in either 1991 or 1992. John also testified that the only outward show of physical affection Suzanne displayed toward him occurred right after his mother's death in September of 1995 when she kissed him on the cheek and told him that she was sorry for his loss.

By contrast, Suzanne testified that she and John continued to work on their marriage between 1991 and 1995. Although she did not contradict John's testimony about the lack of sexual relations between them after 1991, she pointed to their exchange of cards and gifts during that period and the fact that they always seemed to end up back in each other's company through social and family connections and other circumstances, such as the death of John's mother and the winding up of her estate. Suzanne described her attitude toward the marriage in 1995 as "neutral," and dated the attempted reconciliation to that year when she returned to Chambersburg. She testified to being surprised when she was served with a copy of the 1998 complaint because it was her belief that she and John had continued to view themselves as a married couple up through May of 1998 even though they did not cohabit, an arrangement she alleged was familiar to John insofar as his own parents lived in separate residences later in their marriage while continuing to spend family occasions together.

The parties had a wholly different perception of a 1997 Christmas party at the Benchoff family house. Suzanne asserted the party was a joint undertaking, whereas John recalled that although he paid the bills, it was Suzanne's project. He denied they hosted the party as a married couple. As mentioned above, the undisputed evidence at the master's hearing showed John was having an affair in 1997.

Based on the foregoing outline of the evidence of record, we strongly disagree with Suzanne's assertion in her motion for summary judgment that "the record is devoid of any evidence, and no disputed material facts exist, indicating that Suzanne Benchoff willfully or maliciously deserted the Decedent one year prior to his death." Clearly there is conflicting evidence about the true nature of the parties' relationship in the year before John's death and even in the year before he filed for divorce. Although it is true that John did not allege desertion as a ground for divorce in the complaint, it would be inappropriate for the court to dismiss Ritchie's petition to disqualify Suzanne from inheriting from John's estate as a matter of law at this stage of the proceedings.

Suzanne has not cited any cases, nor are we unaware of any, in which the court dismissed a forfeiture petition at the summary judgment stage despite factual disputes about whether and when one spouse deserted the marriage one year or more before the other spouse's death. In this case, such disputes must be resolved by a trier of fact at a hearing or trial. Such a proceeding will have a different focus than the master's hearing, where the inquiry was confined to determining date of separation for the sole purpose of resolving the parties' economic claims, and was not open to evidence about desertion from a third party such as petitioner Ritchie.

For the foregoing reasons, the motion for summary judgment filed by Suzanne Benchoff to Harriet Ritchie's petition to disqualify under section 2106(a) of the Probate Code will be denied.

ORDER OF COURT

Now this 25th day of April, 2001, the court hereby denies the motion for summary judgment filed by Suzanne Benchoff to the petition to disqualify.