



**In the
Missouri Court of Appeals
Western District**

IN THE ESTATE OF)	
JOHN DAVID HEIL,)	
Respondent,)	WD80748
v.)	OPINION FILED: February 6, 2018
)	
MARILYN HEIL,)	
Appellant.)	

Appeal from the Circuit Court of Carroll County, Missouri
The Honorable Kevin L. Walden, Judge

Before Special Division: Zel M. Fischer, Special Judge, Presiding, Cynthia L. Martin,
Judge and Gary D. Witt, Judge

Marilyn M. Heil ("Ms. Heil") appeals from the trial court's June 30, 2015 judgment denying her election to take a spousal share of decedent John David Heil's ("Decedent") estate as against the provisions of Decedent's will. Ms. Heil claims that the trial court erred because there was no evidence of marital misconduct to support the denial of her claim.

Because Ms. Heil abandoned Decedent without reasonable cause as anticipated by section 474.140,¹ we find no error and affirm.

Factual and Procedural Background²

Decedent died on May 14, 2014. Decedent's will was admitted to probate by Donald Heil ("Son"), the personal representative named in the will. Decedent's will expressed Decedent's intent to leave the entirety of his estate to Son. After Decedent's will was admitted to probate, Ms. Heil filed notice of election to take a spousal share of Decedent's estate pursuant to section 474.160. Son raised the affirmative defense of abandonment pursuant to section 474.140. The trial court considered the pleadings and evidence submitted by the parties, and entered its Findings of Fact, Conclusions of Law and Judgment on June 30, 2015 ("Judgment"). Ms. Heil concedes that the findings of fact set forth in the Judgment are supported by the evidence, and adopts the findings as her own. [Appellant's Brief, p. 2]

Ms. Heil and Decedent were married on June 21, 1968. They lived together in their marital home in Norborne, Missouri for many years. In the 1990's, Decedent spent more and more time at the residence of his parents on a farm outside of Norborne, until he suffered a heart attack in 1997, after which he returned to the marital home to rehabilitate.

Sometime prior to 1999, Decedent moved from the marital home back to his parents' farm. After Decedent's mother's death in 1999, Decedent became the owner of his parents' farm, and refused to move back to the marital home.

¹All statutory references are to RSMo 2016, except as otherwise specified.

²The factual discussion is drawn primarily from findings of fact included in the trial court's June 30, 2015 judgment.

In an effort to salvage their marriage, Ms. Heil moved from the marital home to the farm in the summer of 1999. Decedent and Ms. Heil did not enjoy a warm, loving, affectionate, or supportive relationship. However, the trial court found that Decedent's treatment of Ms. Heil did not rise to a level that Ms. Heil could no longer reasonably be expected to live with Decedent.

In the fall of 2000, Ms. Heil voluntarily moved from the farm back to the marital home. Ms. Heil's move was not requested by Decedent, but Decedent acquiesced in the move.

From and after the fall of 2000, Ms. Heil visited Decedent very infrequently and primarily for business reasons or to bring grandchildren to see Decedent. From and after the fall of 2000, neither Ms. Heil nor Decedent provided the other with domestic, financial or emotional support. Ms. Heil did not support or care for Decedent during his several illnesses, which included a subsequent heart attack, Alzheimer's disease, and prostate cancer. Eventually, Decedent fell and broke his hip, requiring his admission into a nursing home. Ms. Heil visited Decedent one or two times while he was in the nursing home, and spent only a few minutes with him when he was near death. When Son sought Ms. Heil's assistance in caring for Decedent, Ms. Heil responded by giving Son a phone number for a potential caregiver.

Neither Decedent nor Ms. Heil took steps to terminate their marriage or to legally separate. The trial court found that neither Decedent nor Ms. Heil committed adultery or marital misconduct. However, they lived separately and apart for several years preceding Decedent's death. The trial court found that for all intents and purposes, the marriage

between Decedent and Ms. Heil did not exist from and after the fall of 2000, and that Ms. Heil made no attempts to pursue or cultivate a marital relationship with Decedent. Based on these facts, the trial court found that Ms. Heil intended to abandon Decedent and the marital relationship. The Judgment thus concluded that Ms. Heil was disqualified pursuant to section 474.140 from electing to take her spousal share against Decedent's will.

Ms. Heil appealed the June 30, 2015 Judgment to this court on July 29, 2015. By Order dated December 15, 2015, we dismissed Ms. Heil's appeal as untimely. We observed that the Judgment, an interlocutory probate court order, was final immediately upon its entry, and that Ms. Heil's permissive right of appeal pursuant to section 472.160 required a notice of appeal to be filed within ten (10) days of the Judgment's entry. However, though Ms. Heil's permissive appeal was not timely filed, she remained entitled to appeal the interlocutory Judgment following final settlement of Decedent's estate. *See In re Kraus*, 318 S.W.3d 274, 277 (Mo. App. W.D. 2010). The trial court entered its order approving a final settlement of Decedent's estate on May 9, 2017. Ms. Heil filed this timely appeal from the Judgment on May 11, 2017.

Standard of Review

The judgment of a circuit court entered in a probate proceeding "will be upheld on appeal unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law." *In re Estate of Hayden*, 258 S.W.3d 505, 508 (Mo. App. E.D. 2008) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). "However, the construction of a statute is a question of law, which is reviewed *de novo*." *Id.* (citing *Delta Air Lines, Inc. v. Dir. of Revenue, State of Mo.*, 908 S.W.2d 353,

355 (Mo. banc 1995); *Wood ex rel. Estate of Lisher v. Lisher*, 187 S.W.3d 913, 915 (Mo. App. W.D. 2006)).

Analysis

Though Ms. Heil asserts two points on appeal, they claim the same error. Each point alleges legal error in denying Ms. Heil's section 474.160 election to take her spousal share against Decedent's will because section 474.140 requires martial misconduct in order to disqualify a spouse from taking the election, and the trial court found no misconduct.³ Ms. Heil's points relied on, which will be addressed collectively, require us to construe section 474.140.

"The primary rule of statutory construction is to determine the intent of the legislature from the plain and ordinary meaning of the words used in the statute." *In re Estate of Hayden*, 258 S.W.3d at 508 (citation omitted). "Courts may look outside the plain meaning of the statute only when the language is ambiguous or would lead to an illogical result." *Id.* (quoting *State ex rel. Broadway-Washington Associates, Ltd. v. Manners*, 186 S.W.3d 272, 275 (Mo. banc 2006)). "To give effect to the legislature's intent, the words should be construed within the context of the legislature's purpose in enacting the law." *Id.* (citing *State v. Schleiermacher*, 924 S.W.2d 269, 276 (Mo. banc 1996)). "In an endeavor to determine the legislative intent, it is appropriate to consider [the] history

³Although Ms. Heil's Brief asserts two points on appeal, the argument portion of her Brief is not assigned to either point relied on. Rule 84.04(e) provides that "[t]he argument [in the appellant's brief] shall substantially follow the order of 'Points Relied On.' The point relied on shall be restated at the beginning of the section of the argument discussing that point. The argument shall be limited to those errors included in the 'Points Relied On.'" Ms. Heil's Brief is thus defective. We exercise our discretion to consider Ms. Heil's points relied on, *ex gratia*, because we discern no material difference between them, and the argument portion can thus be fairly attributed to both points.

[of the statute], the presumption that the legislature had knowledge of the law, the surrounding circumstances, and the purpose and object to be accomplished.'" *Callahan v. Cardinal Glennon Children's Hosp.*, 901 S.W.2d 270, 273 (Mo. App. E.D. 1995) (citing *Person v. Scullin Steel Co.*, 523 S.W.2d 801, 803 (Mo. banc 1975)).

Section 474.160.1 permits a surviving spouse to take against the will of a deceased spouse. However, section 474.140 provides a defense to such a claim:

If any married person voluntarily leaves his or her spouse and goes away and continues with an adulterer or abandons his or her spouse without reasonable cause and continues to live separate and apart from his or her spouse for one whole year next preceding his or her death, or dwells with another in a state of adultery continuously, such spouse is forever barred from his or her inheritance rights, homestead allowance, exempt property or any statutory allowances from the estate of his or her spouse unless such spouse voluntarily reconciled to him or her and resumes cohabitation with him or her.

Ms. Heil argues that section 474.140 requires "marital misconduct" as a condition of disqualifying her from the right to take her spousal share pursuant to section 474.160.1. However, the phrase "marital misconduct" does not appear in section 474.140.⁴ Instead, section 474.140 identifies scenarios which disqualify a spouse from enforcing various

⁴Though not argued by Ms. Heil, we are aware that the title of section 474.140 is "Inheritance and statutory rights barred on misconduct of spouse." "[T]he *title* of a statute is necessarily a part thereof and is to be considered in construction, if, '[b]y title to the act, [one] mean[s] the title as enacted by the legislature.'" *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406, 413 (Mo. banc 2012) (quoting *Bullington v. State*, 459 S.W.2d 334, 341 (Mo. 1970) (emphasis in original)). However, "[t]he bold-faced headings (or 'catch words') assigned to each title, chapter and individual section throughout the Revised Statutes are the work solely of [the] codification process and, therefore, shed no light whatsoever on the General Assembly's purposes or intent.'" *Farmer's Alliance Mutual Insurance Company v. Daniels Plumbing*, 496 S.W.3d 644, 650 (Mo. App. W.D. 2016) (quoting *State v. Wade*, 421 S.W.3d 429, 441 (Mo. banc 2013) (Wilson, J., concurring)). "These headings 'are not to be considered in construing our statutes; these indicia are mere arbitrary designations inserted for convenience of reference by clerks or revisors, who have no legislative authority and are therefore powerless to lessen or expand the letter or meaning of the law.'" *Id.* (quoting *State ex rel. Agard v. Riederer*, 448 S.W.2d 577, 581 (Mo. banc 1969)). Thus, the heading assigned to section 474.140 is neither controlling nor relevant to our construction of the statute.

inheritance rights, including the right to elect to take a spousal share against a decedent's estate pursuant to section 474.160.1.

One such scenario is abandonment. Relevant to this case, section 474.140 provides that "[i]f any married person voluntarily leaves . . . her spouse and . . . abandons . . . her spouse without reasonable cause and continues to live separate and apart from . . . her spouse for one whole year next preceding his . . . death, . . . such spouse is forever barred from . . . her . . . statutory allowances from the estate of . . . her spouse. . . ." Here, the trial court found that: (i) Ms. Heil and Decedent were married; (ii) Ms. Heil voluntarily left the Decedent; (iii) Ms. Heil did so without reasonable cause; (iv) Ms. Heil continued to live separate and apart from Decedent for one whole year next preceding Decedent's death; and (v) Ms. Heil abandoned the Decedent. Ms. Heil has adopted these findings as her own. [Appellant's Brief, p. 2] The trial court's unchallenged findings, which track the plain language of section 474.140, support the conclusion that Ms. Heil is disqualified from recovering her spousal share from Decedent's estate.

Ms. Heil nonetheless argues that the trial court committed legal error because the trial court also found she did not commit marital misconduct,⁵ and section 474.140 requires marital misconduct as a condition of disqualification. Ms. Heil relies on cases which have held, generally, that section 474.140 is intended to declare and protect principles of public policy and morality. *See, e.g., Lane v. St. Louis Union Trust Co.*, 201 S.W.2d 288, 290-91

⁵In finding as it did in the Judgment that Ms. Heil did not commit adultery or "marital misconduct," the trial court apparently ascribed the same traditional meaning to the phrase as is endorsed by Ms. Heil in this appeal. However, because section 474.140, by its plain terms, does not require a finding of "marital misconduct," the trial court's finding that Ms. Heil did not commit marital misconduct is largely irrelevant.

(Mo. 1947); *Wilson v. Craig*, 75 S.W. 419, 431 (Mo. 1903). Indeed, this is the accepted purpose of section 474.140. *Matter of Jellech*, 854 S.W.2d 828, 830 (Mo. App. E.D. 1993) (holding that "[s]ection 474.140 'was intended to announce a principle of sound morality and public policy'" (quoting *Heil*⁶*v. Shriners' Hospital for Crippled Children*, 365 S.W.2d 736, 742 (Mo. App. K.C. Dist. 1963))). Specifically, "[a] spouse cannot repudiate, while his [or her] [spouse] lives, all his [or her] marital obligations, and then take all the benefits which remain after [he or] she dies." *Id.* (citing *Heil*, 365 S.W.2d at 742). The trial court's finding that Ms. Heil abandoned Decedent based on the circumstances in this case is consistent with this recognized public policy. The trial court essentially found that Ms. Heil essentially repudiated all of her marital obligations while her spouse was living, foreclosing her from taking the benefits thereof after her spouse died.

Next, Ms. Heil argues that separation alone does not constitute abandonment. We agree. Our cases have consistently concluded that "[m]erely living apart for one year or more is not sufficient to show abandonment." *Id.* (citing *In re Clark's Estate*, 213 S.W.2d 645, 650 (Mo. App. St. L. Dist. 1948)). Rather, "[a]bandonment requires 'a showing of an intention on the part of the one charged with it to give up completely the relation of husband or wife with no intention to resume it.'" *Id.* (quoting *In re Clark's Estate*, 213 S.W.2d at 650). The trial court found that Ms. Heil and Decedent were living separately and had for more than a year, and also found that Ms. Heil's conduct after and during the separation

⁶The common case name is purely coincidental.

reflected her intent to give up completely the relation of husband and wife with no intention to resume it.

Finally, Ms. Heil argues that abandonment cannot be found in the presence of consensual separation. She cites *Reeve v. Reeve*, 160 S.W.2d 804, 807 (Mo. App. K.C. Dist. 1942), to argue that abandonment requires: (i) cessation from cohabitation, (ii) an intention on the deserter's part not to resume the same, and (iii) an absence of consent to the separation by the other spouse. *Reeve* addressed a statute which permitted an award of temporary maintenance when one spouse "abandons" the other without good cause. *Id.* at 807 (referring to sec. 3376, RSMo. 1939, amended and now codified at section 452.130). Ms. Heil argues that the definition ascribed to the term "abandon" in the context of temporary maintenance awards must also be ascribed to the term "abandon" as used in section 474.140. We disagree. The policies which underlie an award of *pendent lite* maintenance pending the final resolution of dissolution proceedings are not aligned with the policies intended to be fostered by section 474.140. In the context of section 474.140, abandonment is an inherently factual inquiry that turns on a "showing of an intention on the part of the one charged with it to give up completely the relation of husband or wife with no intention to resume it." *In re Clark's Estate*, 213 S.W.2d at 650. Consensual separation is not prohibitive of such a finding.

In *In re Clark's Estate*, the court addressed the definition of "abandonment" relied on by Ms. Heil, and observed it to be applicable to a different context--a wife's statutory right to file a separate suit for maintenance based on a husband's abandonment. *Id.* (citing *Reeve*, 160 S.W.2d at 807). *In re Clark's Estate* did *not* conclude that consensual separation

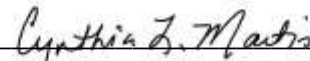
precludes a finding of abandonment pursuant to section 474.140. Instead, *In re Clark's Estate* viewed consensual separation as a fact to be weighed in determining whether the evidence supports an inference that a spouse voluntarily, and without reasonable cause, abandoned the deceased spouse by giving up completely the relation of husband and wife with no intent to resume same. 213 S.W.2d at 646-651.

We similarly conclude that consensual separation is a relevant fact, but not a dispositive one, in determining whether a spouse has "abandoned" his or her spouse for purposes of section 474.140. Our conclusion fosters the public policy underlying section 474.140 that "[a] spouse cannot repudiate, while his [or her] [spouse] lives, all his [or her] marital obligations, and then take all the benefits which remain after [he or] she dies." *Matter of Jellech*, 854 S.W.2d at 830 (citing *Heil*, 365 S.W.2d at 742).⁷ Though consensual separation may weigh against an inference that a spouse intended to give up completely on the relation of husband and wife without reasonable cause, it does not summarily foreclose the inference. It is thus possible, as was the case here, for a trial court to find that pursuant to section 474.140, each spouse has abandoned the other, rendering each disqualified from enforcing inheritance rights against the other's estate. *Accord In re Williamson's Estate*, 196 A. 770, 771-72 (Conn. 1937) (finding spouse disqualified under statute prohibiting recovery of statutory share if spouse abandoned the other without sufficient cause and continued the abandonment to the time of the other's death, because "even though a

⁷In *Heil*, a spouse defended against the application of section 474.140 to disqualify her right to take a statutory allowance following her husband's death, arguing that before his death, husband had filed a petition for dissolution, demonstrating his consent to their separation. 365 S.W.2d at 740-41. Wife's argument was rejected. The *Heil* court concluded that despite evidence that husband counter-sued for dissolution of their marriage, the factual record as a whole supported the finding that wife abandoned husband. *Id.* at 741-42.

husband and wife separate by mutual consent, an abandonment may take place within the meaning of the statute if thereafter the surviving spouse evinced an intent not to resume [the] marital relationship").⁸

The trial court did not err in applying section 474.140 to disqualify Ms. Heil from electing to take her spousal share against Decedent's estate, having found that Ms. Heil abandoned Decedent voluntarily and without reasonable cause.


Cynthia L. Martin, Judge

All concur

⁸We recognize that as a general principle, consensual separation is often characterized as preventing a finding of abandonment. *See, generally*, E.L. Stobin, Annotation, Abandonment, Desertion, or Refusal to Support on Part of Surviving Spouse as Affecting Marital Rights in Deceased Spouse's Estate, 13 A.L.R. 446, sections 5, 9 and 10(b) (1967). However, this result is not a function of application of a disqualifying principle of law, but instead reflects the inherently factual nature of determining whether abandonment has occurred. "Insofar as issues of fact are involved, there seems to be little doubt that a surviving spouse who has for some time been separated from the decedent is in an unsympathetic position in claiming an interest in the estate." *Id.* at section 2. Separation, even if consensual, can nonetheless support a finding of abandonment if the totality of the facts support the reasonable inference that a spouse intended to completely give up the relation of husband and wife with no intention of resuming same. This inference is particularly likely where, as in this case, substantial time transpires after separation over which a spouse is demonstrated to have abdicated the natural indicia of commitment to a marriage, whether financially, emotionally or otherwise.