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

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Administration Proceeding, Estate of

File No. 352535

KENNETH HENDRICKSON,
a/k/a KENNETH L. HENDRICKSON,

Dec. No. 27133

Deceased.

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Before the court in this administration proceeding is the motion for summary judgment made by the Nassau County Public Administrator, as temporary administrator of the estate of Kenneth Hendrickson, deceased. The Public Administrator is seeking an order granting summary judgment to him and dismissing the cross-petition for administration filed by Kathleen Powles, who purports to be the decedent's common-law wife. Willetta Green, a distributee, has filed a cross notice for summary judgment and, by her attorney's affidavit, joins in the relief requested by the Public Administrator. The guardian ad litem for the decedent's unknown distributees has filed an affirmation in which he also joins in the relief requested by the Public Administrator. Kathleen opposes the motion.

The decedent died on May 13, 2007. Kathleen attempted to file a verified petition for letters of administration dated February 7, 2008 in which she described her interest as an "eligible person who is not a distributee under SCPA ... 1001 (6)." In the petition, Kathleen indicated that the decedent died without a spouse who would inherit the decedent's estate pursuant to EPTL 4-1.1 and 4-1.2. She listed four individuals as the decedent's distributees (cousins). The court did not accept the petition for filing because Kathleen did not obtain consent to her appointment from the individuals she listed as distributees.

Thereafter, the Public Administrator filed a petition for letters of administration dated

August 13, 2008 in which he alleges that Kenneth L. Hendrickson died leaving as his closest relatives four alleged maternal cousins. The Public Administrator subsequently filed an affidavit amending the petition to ask that letters of temporary administration issue to him for the purpose of securing the decedent's property and to ask for a hearing to determine Kathleen's relationship to the decedent. Kathleen did not object to having the Public Administrator appointed as temporary administrator. The court issued a decision and order dated November 26, 2008 (Dec. No. 609) issuing letters of temporary administration to the Public Administrator. Kathleen filed objections dated December 1, 2008 to the Public Administrator's petition for letters of administration in which Kathleen asserted as an affirmative defense that she and the decedent entered into a common-law marriage in Pennsylvania in 1993 and were living together as husband and wife at the time of the decedent's death.

Kathleen filed a cross petition for letters of administration dated November 13, 2008 in which she described her relationship to the decedent as a surviving spouse and sole distributee. In addition to requesting that the court issue letters of administration to her, Kathleen also asked that the court dismiss the Public Administrator's petition and recognize Kathleen as the decedent's surviving spouse. Along with the cross petition, Kathleen submitted affidavits from five individuals who aver that during a one-week visit in 1993 each of them heard the decedent repeatedly refer to Kathleen as his wife and Kathleen refer to the decedent as her husband. The Public Administrator filed a verified answer and objections to the cross petition in which he requested that the cross petition be dismissed and letters of administration issue to the Public Administrator.

By order dated December 11, 2009, the court appointed a guardian ad litem to represent

the decedent's unknown distributees.

On September 9, 2010, counsel for the parties and the guardian ad litem had a conference with a member of the court's law department in which they represented that discovery was complete. At the conference, the attorney for the Public Administrator stated that the Public Administrator was planning to move for summary judgment on the issue of whether Kathleen is the decedent's surviving common-law spouse.

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of

fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge. Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

The Public Administrator asserts that the decedent was an openly homosexual man, who was survived by four maternal first cousins as his sole distributees, and that, as a matter of law, Kathleen was not his common-law spouse. In support of his motion for summary judgment, the Public Administrator relies on Kathleen's first petition in which she alleged that the decedent died without a spouse and did not list herself as a distributee. The Public Administrator also relies on Kathleen's deposition testimony in which Kathleen responded to the question, "How many times have you been married?" by stating, "The 'I do" marriage, [to someone other than decedent], one." Additionally, Kathleen testified that she and the decedent "didn't, per se, get married." Kathleen stated that she married the decedent in "I would go with '92" at a dinner, but that they did not exchange wedding vows on that day.

Additionally, the Public Administrator relies upon various documents, such as: (1) a disability benefit form, which the decedent signed on December 24, 1998, on which he checked the "no" box on the question of whether he was married; (2) a patient form from St. Francis Hospital in Roslyn, New York, for the decedent bearing an admission date of December 23, 1998, on which Kathleen's relationship to the decedent is typed as "other"; (3) a handwritten letter from Kathleen to the New York State Department of Taxation and Finance dated August

15, 2007 in which Kathleen states that she had "been living and taking care of Kenneth L. Hendrickson for these past 19 years" but does not state that she was his spouse; (4) a beneficiary change form for an IRA at Washington Mutual Bank, FA, signed by the decedent in August 2004 in which he states that his marital status is single; (5) the decedent's federal and New York State income tax returns for the tax years 1996, 1998, 1999 and 2002 on which the decedent is listed as single or head of household (with the decedent's mother being listed as a dependent); (6) Kathleen's federal and New York State income tax returns for the tax years 2000 through 2007 on which Kathleen is listed as single or head of household (with Kenneth being listed as a dependent); and (7) an heirship affidavit by Lois Markland, a neighbor of one of the decedent's alleged first cousins in which Ms. Markland states that based upon her own knowledge and conversations with the decedent, he was never married.

The Public Administrator also relies on an affidavit, sworn to on July 28, 2008 by Kathleen, which was prepared by the Public Administrator's counsel to correct the decedent's death certificate on which Kathleen is listed as the decedent's surviving spouse. In the affidavit, Kathleen states, among other things, that: (1) she is a "friend of the decedent"; (2) she is familiar with his family and next-of-kin; (3) the decedent "was never married"; (4) although the death certificate describes Kathleen as the decedent's surviving spouse, "in fact, I was never married to the Decedent, and was solely the informant of the Decedent's death"; and (5) she requests that the death certificate be amended to reflect that the "Decedent was never married and that I, Kathleen H. Powles, was not the surviving spouse."

The court finds that the Public Administrator, as the moving party, has made a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b];

Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The burden now shifts to Kathleen to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Kathleen has submitted her own affidavit in opposition to the motion. In it, Kathleen claims that, until her lawyer's colleague explained it to her in connection with the July 28, 2008 affidavit, she was unaware that "it was possible to be deemed married in New York by virtue of a Pennsylvania common law marriage; and I did not know until later that my trip to Pennsylvania with the decedent and the events that transpired there would form the basis of a common law marriage." Kathleen claims that she declined to sign the affidavit correcting the death certificate, but a signed copy is annexed as an exhibit to the Public Administrator's moving papers and her signature was notarized by the very attorney Kathleen claims to have made her aware that New York State would recognize a Pennsylvania common-law marriage.

In her affidavit in opposition to the motion, Kathleen states that her mother was living in Pennsylvania when Kathleen and the decedent had "really become a couple." She and the decedent drove to Pennsylvania in 1993 to visit her mother and spent about a week there. They referred to themselves freely in front of Kathleen's family and friends as being spouses. They went to dinner one evening during the visit at a restaurant where one of the guests arranged for a congratulatory cake on which was frosted "Mr. & Mrs. Hendrickson" and they had a "little celebration." Kathleen and the decedent stayed in the same room at a hotel every night of the visit.

Kathleen also relies on the affidavits of the five individuals who aver that during a one-week visit in 1993 each of them heard the decedent repeatedly refer to Kathleen as his wife and Kathleen refer to the decedent as her husband. She states that these individuals are prepared to come to New York to testify at a trial. Kathleen asserts that there is a question of fact about whether she and the decedent were common-law spouses. She states that "whether or not the actions and words of the decedent and I in the Commonwealth of Pennsylvania are sufficient to form the basis of a valid common law marriage in that state is an issue of fact and for that reason, if for no other, this court should deny the motion."

There is no question that although New York State does not recognize common-law marriage, "a common-law marriage contracted in a sister state will be recognized as valid [in New York] if it is valid where contracted" (*Matter of Mott v Duncan Petroleum Trans.*, 51 NY2d 289, 292 [1980]). Pennsylvania recognizes common-law marriages entered into prior to January 1, 2005 (*see* 23 Pa. C.S.A. 1103).

> "Under Pennsylvania law, a common-law marriage may be created by uttering words in the present tense with the intent to establish a marital relationship. Because of the difficulty of assembling proof of such a marriage, constant cohabitation together with a general reputation as husband and wife in the community raise a rebuttable presumption that the parties have contracted marriage. Even with this presumption, a common-law marriage is not easily established since the proponent must meet a heavy burden of proof especially when one of the parties is dead and the proponent is seeking to share in his or her estate (*see, In re Estate of Stauffer v Stauffer,* 504 Pa 626, 630, 476 A2d 354, 356)" (*Matter of Yao You-Xin*, 246 AD2d 721, 721 [3d Dept 1998]) [internal citations omitted]).

The Supreme Court of Pennsylvania, in *Staudenmayer v Staudenmayer* (552 Pa 253 [1998]), stated:

> "Generally, words in the present tense are required to prove common law marriage. Because common law marriage cases arose most frequently because of claims for a putative surviving spouse's share of an estate, however, we developed a rebuttable presumption in favor of a common law marriage where there is an absence of testimony regarding the exchange of *verba in praesenti.* When applicable, the party claiming a common law marriage who proves: (1) constant cohabitation; and, (2) a reputation of marriage which is not partial or divided but is broad and general, raises the rebuttable presumption of marriage. Constant cohabitation, however, even when conjoined with general reputation are not marriage, they are merely circumstances which give rise to a rebuttable presumption of marriage" (*id.* at 262-263 [internal citations and quotation marks omitted]).

Kathleen admitted at her deposition that she and the decedent did not exchange wedding vows on the day of the alleged celebratory dinner in Pennsylvania. In her affidavit in opposition to the motion for summary judgment Kathleen states that "I did not know until later that my trip to Pennsylvania with the decedent and the events that transpired there would form the basis of a common law marriage" (emphasis added). These words evidence the lack of a present intent to marry in Pennsylvania in 1993. Further, there is no evidence in the record that she and the decedent enjoyed a "broad and general" reputation of marriage (*id.*). Indeed, the record is replete with overwhelming documentary evidence to the contrary. These documents show that Kathleen and the decedent held out to the world at large that they were single. Aside from Kathleen's assertion that the "world called us Hendrickson," there is no evidence that she was addressed that way or that she and the decedent were common-law spouses. Most damaging to Kathleen's position are her sworn statements in July 2008 in the affidavit requesting that the decedent's death certificate be amended wherein Kathleen swore that "in fact, I was never married to the Decedent . . ." , and was solely the informant of the Decedent's death" and that the "Decedent

was never married and that I, Kathleen H. Powles, was not the surviving spouse."

For these reasons, the court grants the motion for summary judgment, grants the Public Administrator's petition for letters of administration and dismisses Kathleen's cross-petition.

This is the decision and order of the court.

Settle decree.

Dated: May 6, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court