NYSBA SUMMER 2018 | VOL. 51 | NO. 2

Trusts and Estates Law Section Newsletter

A publication of the Trusts and Estates Law Section
of the New York State Bar Association

In This Issue

"Till Death [and Divorce] Do Us Part":

The Surviving Spouse's Right of Election vs. A Former Spouse's Rights in the Decedent's Estate under a Separation Agreement

By Brian P. Corrigan

Spousal separation agreements sometimes provide for one party to make a provision in his or her will for the benefit of a soon-to-be former spouse and/or children of their marriage. What if that party dies without fulfilling that contractual commitment? It is well-settled that a valid contract between spouses that provides for the distribution of one's estate to the other, or their children, may be enforced against the deceased spouse's estate.[1]

Assume that same party not only failed to fulfill the contractual commitment but remarried and died survived by that later spouse. The former spouse, and perhaps the children of that marriage (as third-party beneficiaries), will enforce their contractual claim against the estate. What if decedent's later/surviving spouse files a right of election under EPTL 5-1.1-A? Which claim against the decedent's estate has priority?

The surviving spouse will argue the provisions of EPTL 5-1.1-A and the related public policies against disinheriting a spouse and in favor of providing financial support to a spouse afford priority. The surviving spouse will further contend that provisions of a contract to which he or she was not a party cannot possibly impinge on his or her statutory rights.

In response, the former spouse will refer to the written and duly executed/acknowledged separation agreement and the statutory provisions of EPTL 13-2.1(a)(2) and DRL 236(B)(3), which expressly permit such a contractual commitment by the decedent.[2] The former spouse will further argue that the elective share is based upon the "net estate," an amount computed *after* deducting all debts and claims which take priority over gratuitous transfers, including the right of election. Thus, as the claim under the separation agreement was extant not only when the decedent died but also at the time of the decedent's marriage to the surviving spouse, the decedent's assets were effectively encumbered before any elective share rights were created.

To provide further context for this estate administration issue, we roll the clock back to the creation of the settlement agreement. In their settlement negotiations, Spouse A and Spouse B recognize that Spouse B would be entitled to no less than $5,000/month in maintenance from Spouse A, but Spouse A's sole source of income, and only asset of significant value, is A's interests in a business. Instead of selling the business and losing the steady income stream, the parties agree that A will pay B only $2,000 month for the rest of B's life and, further, A must make a will bequeathing the business interests to B.

If Spouse A remarried and died survived by a spouse who asserts an elective share against A's estate, is Spouse B, as a matter of law, any more or less a creditor/claimant as to the $2,000/month than the agreement to receive the business interests in A's Will?

In construing such a separation agreement, Spouse B will likely be found to be a "contract creditor" as to the monthly payment, but a "contract legatee" as to the business interests. This article examines the case law drawing the distinction between a "contract creditor" and a "contract legatee" and how the former has a claim superior to the surviving spouse's elective share, whereas the latter does not. Spouse B will surely regard such a result as unjust, having agreed to a lower monthly payment in turn for the provision to receive the business interests on Spouse A's death.

The Distinction Between a Contract Creditor and a Contract Legatee

In *In re Dunham*,[3] the decedent's surviving spouse's election was found to be superior to the interests of a prior spouse as a legatee under his will, even though the legacy was made pursuant to the terms of the decedent's separation agreement with his prior spouse.

The separation agreement provided that the "husband also agrees to make and execute a will, simultaneous with the execution of this agreement, under which he shall devise and bequeath all of the stock which he may own in [the corporations] at this time to the wife, to be hers absolutely."[4] The separation agreement further provided that decedent would pay his ex-wife $200 per week until her death or remarriage. The decedent remarried and his will stated:

> Third: In compliance with a certain separation agreement dated August 9, 1967 between myself and my former wife, Mary J. Dunham, * * * I hereby give, devise and bequeath to said Mary J. Dunham, all of the stock which I might own at the time of my

death, in [the corporations], to be hers absolutely.[5]

Thus, the terms of the decedent's will were consistent with the contractual obligations he undertook in divorcing his prior spouse. However, the principal asset of the decedent's estate was the stock in one of the corporations that was subject to the foregoing bequest required by the separation agreement. This fact led the decedent's surviving wife to file for her elective share.

The Surrogate found the decedent, by his will, clearly satisfied his contractual obligations under the separation agreement, but noted New York public policy that a person who is obligated to support his spouse during his lifetime should not, by his will, be permitted to disinherit her is expressed in the right of election statute. The Surrogate held:

> A contract to make a will and a will, when made, is encumbered by this policy of the State and the right of an individual to either contract to make a will or to make a will is thereby limited and restricted. The decedent did not make a present conveyance or transfer of the shares of stock. He made an agreement to make a will and consequently it is the finding of this Court that the Court reads the words "at this time" in paragraph 6 of the separation agreement as necessarily referring back to the words "stock which he may own." No intention to make a present transfer may be found in that document.
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> *The distinction between an agreement to make a will and contracting a debt is obvious. In this case the [first wife] with respect to the shares is a contract legatee. With respect to the weekly payment of $200 she is a creditor of the estate.* This court adheres to the stricter view that EPTL 5-1.1 limits the power of a married person to bind himself by contract to devise or bequeath property by will in a manner that would deprive the surviving spouse of her statutory rights. (*Matter of Erstein's Estate*, 205 Misc. 924, 129 N.Y.S.2d 316; *Matter of Hoyt's Estate*, 174 Misc. 512, 21 N.Y.S.2d 107; *Matter of Lewis*, 4 Misc.2d 937, 123 N.Y.S.2d 859) The rights of the legatee are consequently subordinate to the election filed by the widow of the decedent herein.[6]

Based upon her life expectancy, the first wife's claim (arising from the $200/week provision) was valued at $138,894. The court noted that some amount of the shares of the corporations would have to be sold by the executor to satisfy decedent's substantial debts, including the $138,894 due to his first wife.

Thus, although the specific legacy of the shares to the first wife, as provided by the separation agreement, was frustrated by the surviving wife's elective share, the alimony owing to the first wife was regarded as a valid debt which took priority over the surviving spouse's elective share. The Surrogate reached this decision by drawing a distinction between a "contract creditor" and a "contract legatee."

In *Hoyt's Estate*[7] the separation agreement provided, *inter alia*, that (a) the husband would pay his wife $200,000 annually which would terminate upon the death of either party and (b) that the husband would create a trust in his will of at least $1.5 million with income to wife, and on her death or remarriage, principal to their children in equal shares. The husband remarried and executed a will containing such a provision. At his death, however, his net estate amounted to about $490,000. His surviving spouse filed an election against the will.

"If Spouse A remarried and died survived by a spouse who asserts an elective share against A's estate, is Spouse B, as a matter of law, any more or less a creditor/claimant as to the $2,000/month than the agreement to receive the business interests in A's Will?"

The estate of decedent's first wife and his children from that marriage filed a creditor's claim based upon the separation agreement which they claimed had priority over the surviving spouse's election. The surviving spouse alleged her elective share had priority over that claim.

Citing *In re Tanenbaum*,[8] the court found the prior spouse and children of that marriage did not become creditors of the estate under the provisions of the separation agreement and that their rights are accordingly not superior to those of the surviving spouse. Quoting *Tanenbaum*, and referring to the separation agreement, the Surrogate wrote:

> The engagement was not a contract to convey property. It was a promise to make a testamentary disposition. The difference has significance. [cite omitted] *The breach of this obligation to make a testamentary provision would not constitute the wife a true creditor*; it would merely give rise to a right in equity to enforce the obligation of the husband.[9]

The Surrogate noted in *Tanenbaum*, as in the case at bar, the payments of fixed annual amounts provided under the separation agreement to the ex-spouse did not continue for her lifetime, but, instead, terminated on the decedent's death. This led the court to hold that:

> ... the claimants are not creditors under paragraph seventh of the separation agreement, but that the agreement merely created an enforcible [sic] obligation to make a testamentary provision for the benefit of the first wife of the testator and his children after her death. The testator performed that agreement. He undertook to do no more. The status of the claimants is therefore that of legatees or beneficiaries under the will. As such legatees or beneficiaries they take subject to the operation of the statutes relating to testamentary dispositions, including the right of the surviving widow to take her intestate share under Section 18 of the Decedent Estate Law. Their rights are also subordinate to all *true creditors* of the estate. The widow of the testator is therefore entitled to a one-third share of the net estate. The respective interests of the claimants as legatees or beneficiaries must be satisfied out of the balance.[10]

The court drew a distinction between that part of the separation agreement as provided for a present and continuing payment of fixed sums and that part of the agreement which was a promise to make a testamentary disposition. The latter provision did not make the claimants "true creditors" of the estate such that it created a debt reducing the amount of the elective share. However, as to that amount of the annual payments that the testator was obligated to make up until his death, the court held: "As to this amount, when established, [such claimant] is a *true creditor* of the estate."[11]

In re Lewis' Will[12] involved a separation agreement in which the decedent agreed to provide his wife (a) $6,000 annually and (b) maintain certain provisions in his will for the benefit of his wife and children. Decedent remarried and, after he died, his surviving wife contended that her right of election interest was superior to the claims of the decedent's wife and/or the children of that marriage arising under the separation agreement.

In analyzing who had the superior claim, the Surrogate drew the following distinction between the $6,000 payment, on the one hand, and the provision to make a bequest on the other:

> Clearly the right of election is subject and subordinate to any claim of the former wife as a creditor of decedent. It follows, therefore, that as to the amounts required to satisfy the payments of $6,000 annually to be made to the former wife of decedent, she is a creditor of decedent, and the rights of the surviving spouse to elect to take against the will are subordinate to this indebtedness. ... Since the right of election of the surviving spouse under § 18 of the Decedent Estate Law extends to a share of only the *net estate* such right of election would embrace only the balance of assets remaining after deducting the amount required to satisfy the indebtedness due the former wife under the separation agreement.
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> However, by the provisions of the settlement agreement to the effect that the will was to remain unchanged, the former wife of decedent and his children are legatees and not creditors of testator, and the rights of the surviving spouse are paramount to the rights of the widow and children of the former marriage, under the 1927 will. The dis-

"The Surrogate noted in Tanenbaum, *as in the case at bar, the payments of fixed annual amounts provided under the separation agreement to the ex-spouse did not continue for her lifetime, but, instead, terminated on the decedent's death."*

> tinction is one between a direction to make a gift or conveyance and a promise to make a testamentary provision. The breach of an agreement to make a testamentary provision would not constitute the wife a creditor but would create an equitable right to enforce the obligation of the deceased husband. In this respect the former wife and the children of said marriage are regarded as legatees and not as creditors, and their rights are subordinate to the right of election of the surviving spouse.[13]

The court identified the manner to compute the present value of the former spouse's interest in receiving the annual $6,000 payment. The value of that claim would constitute a valid debt of the estate which would receive priority and, thereby, allow for the net estate to be computed for purposes of identifying the surviving spouse's elective share.

In re Erstein's Estate[14] also placed the contractual interests of decedent's prior spouse and children from that marriage arising from a separation agreement against the right of election claim made by decedent's surviving wife. The separation agreement at issue noted the husband's financial situation did not allow him to contribute any fixed sum to his wife. The agreement provided that he would contribute reasonably towards her support and maintenance when his financial condition improved and, further, that he would make a Will establishing a trust for the benefit of his wife and children of that marriage.

The husband later remarried and died leaving a will satisfying the provisions of the separation agreement. His surviving spouse elected against the will and argued that her claim is not impaired or defeated by the separation agreement between the decedent and his former spouse. The guardian for the infant remaindermen of the testamentary trust argued that the right of election could attach only to property which the testator could dispose of freely. Given that his entire estate was subject to disposition under a prior contract, his surviving spouse had no rights superior to those of his first wife or the issue of that marriage.

The court dismissed the guardian's argument and held that the rights of the decedent's first wife and children were subordinate to the rights of his surviving wife to elect against the will. The court stated:

> The distinction between a contract legatee and a creditor or a lienor may be sometimes difficult to bring into sharp focus. However, the difference between a covenant to bequeath and an actual conveyance or perfected lien is too clear to be misunderstood. A creditor may make such agreement with his debtor as he chooses but whenever the settlement agreement touches upon a bequest or devise by either of them, both parties must recognize that, just as the power to make a will is subject to conditions and restrictions, so, too, is a contract to make a will.... The widow may waive her rights in the manner prescribed by the statute, but the husband is powerless to lift the restriction without her concurrence. No third-party agreement can bestow upon him authority which the State withheld from him.[15]

Thus, had the prior spouse in *Erstein* agreed, instead of the testamentary provision, to a present and continuing payment by the decedent, even if he lacked the ability to pay, she would have been a "true creditor" of the estate as to the arrears and future payments and, therefore, entitled to priority over the surviving spouse's election.

Conclusion

As the foregoing cases establish, the threshold inquiry in determining priority between a separation agreement claim and the elective share is whether the separation agreement created a certain debt for the decedent to meet from the time of the parties' divorce or, instead, involved an agreement to make a will to meet maintenance obligations or otherwise.[16]

The risk presented in having one party's contractual expectations frustrated by the other party's subsequent remarriage may be reduced by imposing, if not a present transfer of assets in the separation agreement, a present indebtedness on the part of the obligated spouse. Further, if the negotiations involve some benefit to a party (or the parties' children) upon the death of the other party, having the obligated party obtain life insurance to satisfy that benefit will provide more protection against an elective share claim than an agreement to make a testamentary disposition. Life insurance is not a testamentary substitute that is included in computing a surviving spouse's elective share interest.[17]

Fell v. Fell[18] reveals an interesting attempt to avoid having the elective share upset the provisions of the separation agreement. The parties agreed that each had the right to use certain specified property during his or her lifetime which would ultimately be bequeathed to their children. To safeguard the children's interest, the parties further agreed to obtain the waiver of the right of election from any subsequent spouse. The husband remarried without obtaining the waiver from his new wife, which led his ex-wife to move to compel compliance. The trial court directed the husband to obtain the

waiver. On appeal the husband argued that provision of the separation agreement should not have been enforced because it violated public policy. The Appellate Division rejected the argument and affirmed.

The *Fell* decision presents more questions than answers. What if the husband's new wife refused to sign waiver of the right of election? She was not a party to the separation agreement and already married to the husband at the time of the court's decision. *Erstein, supra*, supports the new wife's rights in this regard ("The widow may waive her rights in the manner prescribed by the statute, *but the husband is powerless to lift the restriction without her concurrence*. No third-party agreement can bestow upon him authority which the State withheld from him."[19]) If the children sued for breach of contract, could they establish damages during their father's lifetime? His new wife may predecease him or that marriage may end in divorce rendering the right of election issue moot.

Endnotes

1. *In re Bruan*, 35 Misc. 3d 345, 938 N.Y.S.2d 762 (Sur. Ct., Westchester Co. 2012). Insofar as it affects a decedent's estate, any question as to the interpretation and enforcement of an agreement settling a matrimonial action in Supreme Court is clearly within the subject matter jurisdiction of the Surrogate's Court. *In re Garofalo*, 141 A.D.2d 899, 528 N.Y.S.2d 939 (3d Dep't 1988).
2. EPTL 13-2.1(a)(2) recognizes the validity of "a contract to make a testamentary provision of any kind" and DRL § 236(B)(3) recognizes the validity of "a contract to make a testamentary provision of any kind" as between parties before or during their marriage.
3. 63 Misc. 2d 1029, 314 N.Y.S.2d 29 (Sur. Ct., Greene Co. 1970), *aff'd*, 36 A.D.2d 467, 320 N.Y.S.2d 951 (3d Dep't 1971).
4. *Id.* at 1030.
5. *Id.*
6. 63 Misc. 2d at 1034 to 1035 (emphasis added).
7. 174 Misc. 512, 21 N.Y.S.2d 107 (Sur. Ct., N.Y. Co. 1940).
8. 258 A.D. 285, 16 N.Y.S.2d 207 (2d Dep't 1939), *appeal and reargument denied*, 258 A.D. 1054, 17 N.Y.S.2d 1021 (2d Dep't 1940).
9. 174 Misc. at 515 (emphasis added).
10. *Id.* at 516 (emphasis added).
11. *Id.* (emphasis added).
12. 4 Misc. 2d 937, 123 N.Y.S.2d 859 (Sur. Ct., Westchester Co. 1953).
13. 4 Misc. 2 at 939-940 (emphasis in original; all internal citations removed).
14. 205 Misc. 924, 129 N.Y.S.2d 316 (Sur. Ct., N.Y. Co. 1954).
15. *Id.* at 931-932.
16. *See also Estate of Raninga*, NYLJ, Jan. 18, 2008, p. 38, col. 6 (Sur. Ct., Kings Co.) ("In this case, the decedent and his former spouse contracted to create certain alimony and child support rights which became the decedent's debts to meet from the time of the parties' divorce. ... Clearly, the decedent did not contract to make a will giving the spouse a legacy to meet alimony obligations, the core fact that under the case law defeats the surviving spouse's arguments [that she has priority over the former spouse's separation agreement claims].")
17. *Estate of Boyd*, 161 Misc. 2d 191, 196, 613 N.Y.S.2d 330 (Sur. Ct., Nassau Co. 1994); *Estate of Green*, 18 Misc. 3d 1116(A), 2008 N.Y. Slip Op. 50100(U) (Sur. Ct., Bronx Co. 2008). Annuities, however, are not insurance and are testamentary substitutes against which the surviving spouse may elect. *See In re Zupa*, 48 A.D.3d 1036, 850 N.Y.S.2d 311 (4th Dep't 2008).
18. 213 A.D.2d 374, 623 N.Y.S.2d 315 (2d Dep't 1995).
19. 205 Misc. 924 at 932 (emphasis added).