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Expert Analysis

Estate Pitfalls in Divorce And Separation Agreements

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Coming to terms regarding inheritance concerns is a natural part of the process when divorcing spouses sit down to settle their legal and financial affairs in a written agreement. The interest in settling inheritance issues becomes particularly important to couples where there are children of the marriage and couples are confronted with the possibility that a subsequent remarriage will jeopardize the children's or their own inheritance rights.

In a perfect world, attorneys that draft agreements that contemplate inheritance issues are best suited if they have some level of expertise in estate planning and estate matters, in addition to being experienced matrimonial lawyers. This is underscored by the fact that, time and again, we see disputes that arise after one spouse dies over the meaning and intent of marital agreements concerning inheritance rights that could have been avoided had an experienced estate practitioner laid eyes on the agreements. This article is intended only to highlight some common issues and case-fact patterns to provide examples that shine a light on this overarching problem.

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At the outset, it is important to be familiar with certain default statutory provisions that, absent agreement otherwise, are automatically triggered in cases of divorce, annulment or, in some cases, the entry of a judgment of separation. Most notably, EPTL 5-1.4 provides for the revocatory effect of divorce, annulment, declaration of nullity or dissolution of marriage on certain dispositions made by a deceased spouse, appointments, provisions or nominations regarding a former spouse. Included among these are dispositions or appointments by will, by security registration in beneficiary form, by beneficiary designation in life insurance policies or (to the extent permitted by law), in pension or retirement benefits or revocable trusts, including trusts in bank form commonly known as Totten Trusts. See EPTL 5-1.4(a). Note that this automatic revocation does not apply in cases of separation.

Additionally, EPTL 5-1.2 provides for the disqualification of a spouse from receiving certain statutory

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inheritance rights, including, the right of election (EPTL 5-1.1 and 5-1.1A), the intestate share (EPTL 4-1.1), exemptions for the benefit of the family (EPTL 5-3.1) and rights in wrongful death recoveries (EPTL 5-4.1), but only where there is a final judgment of divorce, annulment or separation in place at the time of death.

While it is imperative to understand these statutory default provisions, case law provides us with real life context in which disputes arise and provides guidance to avoid potential disputes.

For example, a ripe area for dispute is the waiver language of testamentary or testamentary-like dispositions in separation agreements. It is the law in New York that waivers of an interest in a spouse's estate by separation agreement are to be strictly construed, requiring explicit language of renunciation of the particular asset. See *Matter of Maruccia*, 54 N.Y.2d 196 (1981); see also, *Matter of LeRoy*, 118 Misc.2d 381 (Surr. Ct., Onondaga County 1983) and *Blackmon v. Estate of Battcock*, 78 N.Y.2d 735 (1991).

In *Matter of Maruccia*, the Court of Appeals considered whether a release clause in a separation agreement revoked a prior testamentary disposition in favor of the testator's former spouse in light of the burden placed upon the testator to revoke a testamentary provision in compliance with the statutory formalities set forth in EPTL 3-4.1. The court held that:

... in order for a separation agreement to have the effect of revoking a prior devise or bequest ..., the agreement must either contain a provision whereby the spouse explicitly renounces any testamentary disposition in his or her favor made prior to the date of the separation agreement or employ language which clearly and unequivocally manifests an intent on the part of the spouses that they are no longer beneficiaries under each other's wills.

This rule has been logically extended to apply to waivers of interest in nonprobate property as well. In *Winkler v. Bauman, et al.*, 89 A.D.2d 529 (1st Dept. 1982), the First Department considered whether a beneficiary designation in a decedent's profit sharing plan, which was in existence at the time of the separation agreement in that case, was nullified by waivers of interests to each other's estate by the parties thereto. Citing the rule in *Maruccia*, the First Department held that the general language of the separation agreement as to waivers in each other's estate must be strictly construed and cannot be expanded to include the profit sharing plan which was not specifically mentioned in the agreement.

In another Court of Appeals case, *Blackmon v. Estate of Battcock*, 78 N.Y.2d 735 (1991), there was an stipulation between the decedent and the executor of her deceased husband's estate whereby the parties agreed that the decedent would not alter the beneficiaries under her then existing will. The decedent thereafter opened Totten Trust bank accounts in which she designated different beneficiaries. The Appellate Division held that pursuant to EPTL § 7-5.2, title vested in the Totten Trust beneficiaries unless a promise barring her from creating the Totten Trusts is implied and is found to violate the agreement.

The Court of Appeals reversed the Appellate Division and held:

We disagree that the promise must be implied into decedent's 1971 agreement not to change her will (internal citation omitted). To do so constitutes a significant judicial alteration and addition to the settlement agreement of the parties. The agreement itself is silent as to Totten Trusts or any other testamentary-like forms of disposition of property. Only the change of the will is forbidden. Moreover, the significant infringement of decedent's rights during her lifetime to do whatever she wished with her property is not fairly inferrable by reasonable construction and necessary implication. ... the application and expansion of the proposition of the law flowing from this case would be most unsettling, troubling and unwise development in

this area of law. In the absence of an express provision in the agreement or factors far more substantial within the four corners of the settlement agreement itself from which judicial inference could comfortably and properly be drawn, courts should not innovate for the parties after the fact.

Similarly, in *Eredics v. Chase Manhattan Bank,* 100 N.Y.2d 106 (2003), the Court of Appeals held that a separation agreement, which in broad language divided "all of the items of property" owned by the parties and stated that all bank accounts had been distributed to the mutual satisfaction of the parties, did not constitute waiver of ex-wife's rights in ex-husband's Totten Trust bank accounts because the accounts in dispute were not specifically mentioned in agreement.

It is clear from these cases that general releases and waiver provisions will not be sufficient to waive specific inheritance rights. Explicit and unambiguous language is the standard.

Relatedly, disputes often arise over use of the term "estate." This has been particularly troublesome when divorcing or separating parties promise to leave a certain percentage or other disposition in his or her "estate" or "property" to the other or to the children of their marriage. This is problematic because the terms "estate" or "property" can have different meanings depending on context. The parties might mean the probate estate (i.e., only those assets passing under a will), or the gross estate for estate tax purposes, which includes non-probate property. They also could intend to provide for persons to receive an interest in specific property or they could mean to give money in an amount equivalent in value to a certain percentage of an estate. Moreover, if the agreement commits the parties to leave their estates or property to another, do they intend the value of the estate at death or at the time of the separation?

> No amount of drafting expertise will avoid subsequent estate disputes altogether. That would take a fundamental change in human nature.

One common example of the myriad of cases that address these problems, is where the parties use the term "gross estate" without saying much more. Under such circumstances, gross estate is generally interpreted to carry the meaning employed by the Internal Revenue Code for estate tax purposes, such as in *Matter of Rosen* 128 A.D.2d 878 (2d Dep't 1987) (holding that an amendment to a separation agreement providing that the husband would leave two-thirds of his "gross estate" to his second wife, meant gross estate for estate tax purposes.). However, this is not always the case. It must be remembered that "when interpreting a [divorce agreement], the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized." *Herzfeld v. Herzfeld*, 50 A.D.3d 851, 852 (2d Dep't 2008). As such, in reviewing any particular agreement in its own right, courts may interpret the term "gross estate" to mean something different than the IRC definition. *See, e.g., Matter of Hill*, 39 Misc.2d 138 (Surr. Ct. Nassau Co. 1963)(where, despite use in a separation agreement of the term "gross estate" the court found, on a review of the four corners of the agreement, that the parties intended to exclude life insurance proceeds from the definition of gross estate).

The lesson embedded in all of the foregoing is that, courts zealously guard inheritance rights, and the corresponding freedom of testation by the requirement of great specificity in written marital agreements if such rights are to be altered. Where specificity is lacking, there are cases that guide courts in their interpretation of agreements, as seen in cases interpreting the meaning of the term gross estate, but it almost always comes down to a strict construction of all of

the language employed, without stretching interpretations through inference. This was well articulated by the court in *Blackmon v. Estate of Battcock* as discussed above.

However, there is at least one category of dispute that would seem to run counter to the specificity requirement of *Blackmon v. Battcock*. To wit, where, notwithstanding a provision requiring a divorcing spouse to make testamentary dispositions to another under a divorce or separation agreement, the party makes inter vivos gifts that would tend to frustrate the intent of the parties to the agreement. The prevailing case law shows courts routinely rejecting the argument that, under *Blackmon v. Estate of Battcock*, if the parties intended to prevent a spouse from making inter vivos gifts, then the agreement must have so specified in unambiguous terms.

For example, in *Estate of Wenzel*, 2010 N.Y. Misc. LEXIS 6779 (Sur. Ct. N.Y. Co. Sept. 2, 2010), decedent and his first wife entered into a separation agreement whereby he was required to treat the daughter of that marriage equally upon his death as any subsequent children he may have if he remarried. Decedent subsequently remarried and had another child. Seemingly in compliance with the technical terms of the agreement, decedent left a will treating the two children of both marriages equally by leaving them a nominal amount of property; however, he directed that the bulk of his estate pour over into an inter vivos trust for the benefit of only his second wife and the child from that marriage. Decedent also made lifetime transfers of other assets into the trust. In holding that these actions constituted a breach of the agreement, the court distinguished *Blackmon* from the case before it and noted that *Blackmon* did not concern a marital agreement between spouses and therefore did not demand the heightened scrutiny that is required of such agreements.

Another court similarly distinguished *Blackmon* in *Estate of Offerman*, 1995 N.Y. Misc. LEXIS 725 (Sur. Ct. N.Y. Co.. Mar. 21, 1995). There, the court found that decedent breached divorce agreement even though he made a will treating his four children equally (as required by the agreement) because he transferred his all of his assets to an inter vivos trust for the benefit of only one of them. See also, *Dickinson v. Seaman*, 193 N.Y. 18 (1908) (noting that a testator's agreement to leave his entire estate to a designated person prohibits him from making lifetime gifts "with actual intent to defraud" and gifts "so out of proportion to the rest of his estate as to attack the integrity of the contract…even if made without actual intent to defraud."); *Leonardi v. Leonardi*, 35 Misc.3d 1205(A) (Sup. Ct. Kings Cty. Mar. 29, 2012). These cases represent a common sense response to remedy what were clear attempts, through lifetime transfers, to circumvent the manifest intent of the parties to secure inheritance rights in another. They are rightly distinguishable from cases such as *Blackmon v Estate of Battcock*.

In sum, all of the foregoing demonstrates just some pitfalls that arise from imprecise drafting of divorce and separation agreements as it relates to estate issues. No amount of drafting expertise will avoid subsequent estate disputes altogether. That would take a fundamental change in human nature. It is clear, however, that a more comprehensive understanding of relevant estate law will help enable drafters to give their agreements the best chance of standing up to scrutiny and providing their clients (and heirs) with the benefit of the bargain to which they are entitled.