

TRUSTS AND ESTATES LAW

Expert Analysis

Clarifying When and Whether Divorce Revokes Bequests

Marriage is on everyone's mind with the recent ruling of the Supreme Court concerning same-sex marriage. Yet, two decisions in the past month from the surrogate's court have explored the other side of marriage—divorce and its potential revocatory effect on an estate plan. This article reviews several decisions that provide guidance for matrimonial and estate practitioners when advising divorced and divorcing clients.



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EPTL 5-1.4

Pursuant to New York Estates, Powers and Trusts Law (EPTL) §5-1.4, unless the will expressly states otherwise, divorce, judicial separation, or annulment of a marriage revokes all dispositions or appointments of property made by the divorced spouse to a former spouse. The former spouse is treated as having predeceased the testator. This means any bequests to the former spouse, the nomination of the former spouse as executor or trustee and any appointments of property in his or her favor under a power of appointment are revoked.¹

When the statute was enacted in 1966, it represented a significant change from prior public policy and case precedent. Previously, courts held that the termination of a marriage did not revoke gifts to the former spouse in a decedent's will. New York courts consistently held that there could be no implied revocation of a will. Decedent's Estate Law §34 provided the only methods through which a will or a bequest could be revoked. *Matter of Parker*, 100 Misc. 219 (Surr. Ct. New York Co. 1917). Thus, any other act (like divorce) did not revoke any provisions to a will regardless

of the changed marital status. *Matter of Simpson's Estate*, 155 Misc. 866 (Surr. Ct. Kings Co. 1935) (finding a bequest to "my wife, Louise Ryan Simpson" was descriptive and did not create a condition that Louise must still be married to the testator at his death in order to take under his will); *Matter of Wainwright*, 82 NYS2d 345 (Surr. Ct. Westchester Co. 1948) (gift to "wife" meant the wife at the time he made his will while gift to "widow" meant surviving spouse).

When the Bennett Commission reviewed this issue in the 1960s, it found it counterintuitive that any testator would provide a gift to an ex-spouse, and the Legislature agreed. Upon the enactment of EPTL 5-1.4 on Sept. 1, 1966, the revocatory effect of divorce upon a will bequest took effect no matter when the will was executed or when the divorce occurred.²

EPTL 5-1.4 was repealed in 2008, and a new statute was enacted in its place with an expanded purview. The new statute now also affects the ex-spouse's rights to in-trust-for bank accounts (Totten Trusts), life insurance policies, lifetime revocable trusts, and joint tenancies with right of survivorship. The revocation is valid even if the will was enacted before the marriage. *Matter of Knopske*, 165 Misc.2d 45, 626 N.Y.S.2d 701 (Surr. Ct. Erie Co. 1995).

'Matter of Coffed'

Matter of Coffed,³ an older case, provides an interesting fact pattern which may

provide essential guidance for matrimonial practitioners. While married, the deceased and his second wife entered into an agreement which provided that upon the death of either party the entire estate of the deceased would pass to the surviving spouse. The agreement further provided that upon the death of the survivor, or in the event that both parties died simultaneously, the estate would be divided into equal parts and distributed one part equally to the three children of the deceased by his first marriage and one part to the child of his second wife from her former marriage. The agreement further provided that neither party would revoke, change or in any way modify the reciprocal will. In accordance with the agreement, the parties did in fact execute reciprocal wills with the same terms as outlined in the agreement.

Testator and his second wife subsequently divorced, and certain property was awarded to the second wife as part of the divorce settlement. The parties also executed mutual general releases of all claims of any nature which either had against the other including contracts, agreements or promises. The releases were expressly declared binding on each party's respective heirs and assigns. The testator subsequently died without executing a new will or otherwise revoking the will that had been executed pursuant to the terms of the agreement with his second spouse.

Upon review, the Erie County Surrogate's Court denied probate to the will. The Surrogate found that when the parties obtained their divorce they did not consider the continuing legal effect of their agreement and reciprocal wills. The Surrogate also opined that the later execution by the parties of mutual general releases and the divorce, taken together, effectively revoked their underlying reciprocal wills, and was "persuasive evidence" that the decedent did not intend for the proffered will to be admitted as his Last Will and Testament. Finally, the Surrogate found that EPTL 5-1.4

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did not apply where the will was executed pursuant to a reciprocal agreement or where the testator is a party to a joint or a mutual will.

Upon further review, the Appellate Division, Fourth Department, reversed and focused upon the difference between a will (which is ambulatory in nature and revocable at any time) and a contract (which is supported by consideration and must be enforced).⁴ The Fourth Department found that the principles of contract control mutual reciprocal wills drawn pursuant to an agreement. Once the parties enter into an agreement, they are ordinarily no longer free to use or dispose of their property as they please. It follows that once one of the parties to an executed and accepted agreement dies, the parties and their estates are bound to the terms.

Once the parties executed general releases terminating the agreement, no viable contract existed between the parties. Yet, that did not work to also revoke their mutual wills. The testator could have revoked or amended his will after the divorce (and the exchange of the general releases), but did not do so. The court stated that under those circumstances it would not find a revocation by implication, and concluded that the will should be admitted to probate.

However, the admission of the will to probate did not end the analysis. The court further found that the second spouse would not benefit under her former spouse's (now admitted) will because of the revocatory effort of EPTL 5-1.4. The second spouse was statutorily barred from taking under the will as having predeceased the testator, but the statute had no effect upon her son's ability to take. The second wife's son (the decedent's stepson) was entitled to one-half of the decedent's estate, while the other half was shared by the decedent's three biological children. The Court of Appeals affirmed.⁵

'In re Estate of Lewis'

*In re Estate of Lewis*⁶ is a more recent case which also involves the family of a divorced spouse. At the time of her death in March 2010, it appeared that decedent had left no will, and letters of administration were issued to her parents. The decedent had previously been married, but the marriage ended in 2007 when the couple divorced. The couple did not have any children. After receiving letters of administration, decedent's parents renounced their interest in decedent's Clayton, N.Y., residence in favor of her brothers, intending that the Clayton property (which had been in decedent's family for generations) would have passed to blood relations.

This plan was thwarted by a subsequently filed petition to revoke the parents' letters of administration and to admit to probate a will

executed by decedent in Texas in 1996. That will bequeathed all of decedent's property, real and personal, to her then husband and named him as the will's executor. Pursuant to EPTL 5-1.4 and 5-1.2, the ex-husband was disqualified from taking under the will or acting as fiduciary of decedent's estate. However, the decedent's former father-in-law, who was named in the will as decedent's alternate executor and beneficiary, was not disqualified under New York law.

The Jefferson County Surrogate's Court held that the nomination of testator's ex-husband's father as alternate executor and alternate beneficiary under her will was valid, notwithstanding the divorce. The revocatory effect of divorce did not extend past the ex-spouse to other family members of the ex-spouse who were specifically named in the will. The decision was affirmed by the Fourth Department and, most recently by the Court of Appeals on June 4, 2015.⁷

'Matter of Leyton'

*Matter of Leyton*⁸ involved the petition of a decedent's mother and sister to revoke letters testamentary issued to the decedent's former same-sex partner and to otherwise disqualify him as a beneficiary under a will. The decedent and his former partner had entered into a commitment ceremony in New York in 2002, but later separated.⁹ The petitioners asserted that the former partner was the equivalent of a former spouse, and that he was disqualified from inheriting from the decedent's estate pursuant to EPTL 5-1.4 and EPTL 5-1.2.

As an interesting argument, the petitioners asserted that the State of New York "wrongfully and unconstitutionally deprived decedent and his partner of the right to marry and subsequently divorce," and claimed that the Surrogate's Court, "as a matter of right and equity, should apply the statutory provisions defining a surviving spouse and his rights."¹⁰ In response, the former partner argued that at the time of the commitment ceremony, the union was not considered a formal marriage in New York State, and that the subsequent breakup was not a "separation," "abandonment" or "divorce" within the meaning of the statutes cited by petitioners.

Upon review, Surrogate Nora Anderson stated that it is for the Legislature to decide questions regarding same-sex marriage, and same-sex marriage was only recognized in the State of New York in 2011. The court noted that petitioners were seeking to retroactively apply the Marriage Equality Act, and found that because the Legislature did not legalize same-sex marriage until 2011, "this court cannot deem the commitment ceremony to have sanctified a marriage, so decedent

and the executor cannot be deemed to be divorced." The court denied the petition to disqualify the former partner as executor and beneficiary under the will.

Conclusion

Each of these cases provides an important lesson to matrimonial and estate practitioners alike. Estate plans must be reviewed and updated when a couple is divorced, or even while they are divorcing.¹¹ You cannot rely solely on the language of EPTL 5-1.4 to revoke all bequests to a former spouse. There may be further implications and complications to review and analyze to make certain that a decedent's true wishes are reflected.

Endnotes:

1. See Margaret Valentine Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL §5-1.4.

2. See Margaret Valentine Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL §5-1.4 citing Fifth Report of the Commission on Estates, Leg. Doc. (Bennett Commission) (1966) No. 19 (March 31, 1966) at 453.

3. *Matter of Coffed*, 59 AD2d 297, 298-301, 399 N.Y.S.2d 548, 549-51 (1977) aff'd, 46 N.Y.2d 514, 387 N.E.2d 1209 (1979)

4. 59 AD2d 297 (4th Dept. 1977).

5. 46 NY2d 514 (1979).

6. 114 AD3d 203 (4th Dept. 2014) aff'd as modified 2015 N.Y. Slip Op. 04674.

7. 2015 N.Y. Slip Op. 04674.

8. 2015 WL 3882524 (Surr Ct New York Co 2015)

9. The admitted will was executed on Jan. 11, 2001, prior to the commitment ceremony. The decision does not state when the couple separated.

10. Id.

11. See e.g., *A.V.B. v. D.B.*, 44 Misc3d 331 (Westchester Co. Sup Ct 2014) (finding the court is divested of jurisdiction over a divorce action when a party dies, and cannot enforce automatic orders precluding parties from changing beneficiaries on life insurance policies and accounts); see also *Forgione v. Forgione*, 231 AD2d 603, 603 (2d Dept. 1996); *Matter of Alfieri*, 203 AD2d 562 (2d Dept. 1994); *Sperber v. Schwartz*, 139 AD2d 640 (2d Dept. 1988). Notwithstanding the referenced decisions, a spouse will likely still be entitled to their elective share pursuant to EPTL 5-1.1-A.