Unintended Waiver of Spousal Rights:
When is a spouse not a surviving spouse?
By Susan F. Bullard

Attorneys drafting predissolution or prenuptial agreements, or any property agreements involving spouses, must take care to avoid the inadvertent waiver or failure to waive rights that may be contested in event of one spouse's untimely demise.

Spouses enter into a variety of agreements with each other. The most common are agreements relating to the termination of marriage and antenuptial agreements in anticipation of marriage. These agreements are generally intended to document the rights of each spouse regarding their property and to waive other rights they may have (by operation of law or otherwise) regarding property of the other.

But are these general waivers adequate to waive specific rights of a spouse -- such as the elective share, homestead, and maintenance -- at the death of the other? Conversely, if such a waiver is not intended, what rights are waived and what rights remain? These are pressing questions for practitioners in family law, estate planning, and probate, as well as for the principals. The law of unintended consequences can have serious repercussions for the client and their family.

Consider, for example, the case of a couple who executed a Property Agreement when filing a Petition for Dissolution, then were overtaken by the death of one spouse before the divorce became final.[i] Is the

survivor entitled to any portion of the estate of the deceased or did she waive those rights pursuant to the Property Agreement? Does it matter that neither spouse had any intentions regarding inheritance when they entered into the Property Agreement? Does it matter that the survivor received and accepted benefits of the "divorce" from her spouse before his death? This article will address the arguments each party might raise in support of their positions and the anticipated outcome, as well as offer some suggestions to prevent the issue from arising in the first place.

Case Study

The couple in question, whom we will call John and Jane, resided in California. They married in 1990 and separated several years later. They filed a Petition for Dissolution with the family court as part of a simplified procedure for divorce. As part of the petition, John and Jane attached a Property Agreement by which they agreed to divide up their property and their debts. The Property Agreement included a division of personal property, a division of debts, continuation of health insurance, a waiver by each of any rights to the other's pension and other retirement plans, a waiver by each of any rights or claims to future support from the other, and a relinquishment of *any and all*

rights in property of the other. The Property Agreement also provided for John to make certain payments to Jane.

Either of them could revoke the Petition within the subsequent six months by filing a signed Notice of Revocation with the court.[ii] Either John or Jane could ask the court to enter a Decree of Dissolution consistent with the terms of the Petition and the Property Agreement if neither party revoked the Petition and the Property Agreement during that time period.[iii] Once the Decree was entered, John and Jane would be divorced.

John and Jane divided their property and John made payments to Jane, all in accordance with the terms of the Property Agreement. Jane took her property and moved to Illinois. John remained in California for a month or so until he became ill, after which he moved to Minnesota and established residency to be closer to his doctors. While residing in Minnesota, John executed a will leaving everything to his adult daughter by a prior marriage. He also changed the beneficiary designation on his life insurance and on all of his retirement accounts, naming his daughter as the beneficiary. This will named John's cousin, whom we will call Bob, the personal representative. Eight months after filing the Petition for Dissolution and the Property Agreement, John died in Minnesota. He had had no

contact with Jane since she left California and neither of them had revoked the Petition.

A probate proceeding was commenced in Minnesota. At the time the probate proceeding was commenced, the Petition had not been revoked and the six-month revocation period had expired, but no Decree of Dissolution had been requested from the California court. Bob was appointed personal representative. Since John and Jane were not divorced at the time of John's death, Jane was served with notice of Bob's appointment and her statutory rights as a surviving spouse, in accordance with Minnesota Statutes.[iv]

Almost Divorced?

Suppose Jane files a claim with the probate court for a selection of personal property, family maintenance, homestead rights, and the elective share of the augmented estate.[v] She claims that neither she nor John intended to relinquish any rights to the other's estate in the event of death before their marriage was dissolved, and the waiver of "*any and all rights in the other's property"* did not include certain post-death elections. Both parties agree that John and Jane were not legally divorced at the time of John's death. Jane asserts that she was married to John at the time of his death and, therefore, she is his surviving spouse.[vi]

At first blush it would appear that Jane is right. There is no such thing as "almost divorced." Either John and Jane were married to each other when he died or they were divorced. The fact they intended to divorce, acted as if they were divorced, and took no affirmative action to prevent the divorce from becoming final would seem irrelevant. However, the situation is not nearly as clear as all that. John's estate asserts that the Property Agreement was a waiver of Jane's rights to inherit from John and Jane is equitably estopped from asserting any claims to John' s estate as a "surviving spouse."

Waiver

John's estate argues that Jane's waiver should be recognized. If California law is applicable, there is significant case law in support of the proposition that a spouse can waive her rights to the decedent's property through a Property Settlement Agreement.[vii] The case law supports this proposition even in circumstances in which the document at issue -- be it a prenuptial agreement, a separation agreement, or a decree of dissolution -- contains no express renunciation of a specific right of inheritance.[viii]

The Minnesota probate code recognizes that married parties may waive their rights to elect against the will of a deceased spouse.[ix] The waiver does not have to take any particular form nor must it be filed

with any court; the signature of the waiving party need not be witnessed nor notarized for the waiver to be binding on the signing party. The only requirement is that there be "fair disclosure." The issue of what constitutes "fair disclosure" has not been addressed by the Minnesota courts in the context of this statute, however, the courts have addressed this issue in the context of antenuptial agreements.[x] In *Rudbeck v. Rudbeck*[xi] the court stated that full disclosure of assets means that "... there was no fraud or concealment, and that [the other party] knew the extent, character, and value of his property and the nature and extent of her rights as wife and widow."[xii] Similarly, courts in other states have held that "full disclosure" does not require exact disclosure, but it does require an approximation of net worth.[xiii] Jane maintains that neither she nor John intended the Property Agreement as a waiver of any rights to each other's estate at death prior to the divorce. However, the Minnesota Court of Appeals has held that language similar to that used by John and Jane can be a valid waiver *of the right to an elective share*.[xiv] Minnesota Statute § 524.2-213, Waiver of Right to Elect and of Other Rights, provides, in part:

> Unless [the waiver] provides to the contrary, a waiver of "*all rights*," or equivalent language, in the property or estate of a spouse is a waiver *only* of the

> right to the elective share. (emphasis added)

It would appear that the Property Agreement may act *only* as a waiver of the elective share. As such, the Property Agreement probably does not constitute a waiver of the homestead, exempt property, or family allowance. Jane would have control over the homestead for her lifetime,[xv] which could be many years. Exempt property is defined as personal property up to $10,000 in value and one automobile, regardless of value.[xvi] The maximum family allowance is $1,500 per month for 18 months.[xvii] Jane is presumptively entitled to family allowance; however, the amount will likely be an issue. John's estate challenges Jane's claim for the maximum family allowance, given that he was not supporting her at the time of his death and that she was clearly capable of supporting herself since they had lived apart for several months prior to his death. The estate asserts that the amount of maintenance to which Jane is entitled is minimal, at best, and therefore if Jane receives any family allowance, it should not be the full $27,000 ($1,500 x 18 months). This may leave Jane with only a nominal sum, even if John's estate is sizable.

Equitable Estoppel

John's estate argues that Jane is equitably estopped from claiming the benefits of a statutory surviving spouse. Jane accepted all the benefits

of the Property Agreement, including the division of their property and payments from John. Jane should not be allowed to benefit from her "divorce" from John and benefit as his "surviving spouse." John and Jane clearly intended to divorce and both acted in conformity with that intent. John made payments to Jane that he was not otherwise required to make and Jane accepted the payments to which she was not otherwise entitled. Such is the very heart of the concept of equitable estoppel.[xviii] The Minnesota courts have recognized the concept of equitable estoppel in the context of a purported divorce and subsequent death. In *Marvin v. Foster*, the Minnesota Supreme Court stated that where a "surviving spouse" accepts the "privileges, benefits, and fruits of ... divorce, he is thereby estopped from claiming a portion of the estate of his deceased wife."[xix] In *Marvin*, the Supreme Court considered an action for partition of certain real estate. The husband left his wife and moved out of state without supporting her, without living with her again, and without returning to Minnesota. His wife commenced a divorce action and obtained a judgment of divorce against him. However, the judgment was void because of defective service of the Summons upon the husband, even though he had actual notice of the pending proceeding. When the wife died, the husband (and subsequently his heirs) claimed his statutory survivorship interest, asserting that due to a technical defect in the divorce action,

he was the "surviving spouse." In a scathing, and well-written opinion, the Minnesota Supreme Court held:

> The record in this case fully discloses the fact that Thomas Foster voluntarily accepted the privileges, benefits, and fruits of the void judgment of divorce, and he is thereby estopped from claiming any portion of the estate of his deceased wife. This estoppel refers, of course to the property rights of Thomas Foster.[xx]

John's estate asserts that he had taken all the steps necessary to give the full benefit of the divorce to Jane, which benefits she accepted. She should not be permitted to enjoy the benefits of divorce, and at the same time, at the expense of John's heirs, enjoy the benefits of a surviving spouse. The argument that the doctrine of equitable estoppel bars Jane from her elective share is compelling, and quite possibly persuasive.

Conclusion

In all likelihood, John and Jane never considered the impact of the Property Agreement and the waiver language on the distribution of assets in the event either was to die prior to the entry of a final Decree of Dissolution. It is probably safe to say that Jane and John had *no* intentions regarding post-death elections *at the time they entered into*

the Property Agreement because they never considered the possibility. If the Minnesota Probate Court is convinced that the Property Agreement is a binding waiver of Jane's spousal elections, the waiver may act as a complete waiver of all of Jane's elections against John's estate. In this case, Jane will get nothing from John's estate even though she was his spouse at the time of his death. On the other hand, the court could determine that since John and Jane were legally married at the time of John's death, the waiver is not adequate to waive all of Jane's elections against John's estate. In this case, Jane will likely receive property from John's estate which is in excess of the amount she bargained for, to the detriment of John's daughter. Regardless of the outcome, it will not reflect the parties' intentions because those intentions cannot be credibly determined.

Recommendations

Family law practitioners as well as estate planning and probate practitioners should be alert that a general waiver may not be adequate to waive specific rights to the elective share, homestead, personal property, and maintenance. The prudent course of action may be to include a specific waiver for each right. In the family law area, attorneys should take care in drafting the language of property agreements, even temporary agreements, in order to avoid the

inadvertent waiver of certain rights, or, if a waiver is intended, that the agreement includes a specific waiver of personal property and family allowance. In the estate planning and probate area, attorneys should inquire very carefully into the marital status of their clients, including a review of all relevant documents, and the impact of those documents. No assumptions should be made that the person claiming to be the surviving spouse actually is a "spouse" for probate purposes. Nor should an assumption be made that *a spouse is a spouse until the final decree of dissolution has issued* because, a spouse might not always be a "spouse ."

Notes

[i] *Names of the parties have been changed and selected facts have been omitted where not germane to the legal issues under discussion.*

[ii] *California Family Code § 2402*.

[iii] *California Family Code § 2403.*

[iv] See *Minn. Stat. § § 524.2-201 through 524.2-214 (right to elect percentage of augmented estate); Minn. Stat. § 524.2-402 (right to homestead); Minn. Stat. § 524.2-403 (right to allowance for personal property); and Minn. Stat. § 524.2-404 (family allowance).*

[v] *Minn. Stat. § § 524.2-403, 524.2-404, and 524.2-202.*

[vi] See *Minn. Stat. § 524.2-802;* see also In re Estate of Kueber*, 390 N.W. 2d 22 (Minn. App. 1986).*

[vii] *The conflict of laws issue regarding waiver of spousal rights has not been considered by the Minnesota courts; however, it has been addressed by the courts of other jurisdictions. The courts of New York and Delaware have concluded that marital property agreements are to be governed by the laws of the state that has the greatest connection to the parties and the agreement. Of particular relevance is the state of domicile of the parties at the time the agreement is executed and the jurisdiction in which the agreement was executed.* See Estate of Arde Bulova*, 14*

A.D.2d 49, 220 N.Y.S. 2d 541 (1961), In re Estate of Bowen*, 351 N.Y.S. 2d 113 (1973), and* Hill v. Hill, *262 A. 2d 661 (Del. 1970).* See also *Harold L Korn, "The Choice of Law Revolution, A Critic," 83* Colum. L. Rev. *772,777 (1983);* Restatement (2nd) of Conflicts of Law, *§ 188 (1971).*

[viii] See Estate of Smith, *241 Ca.2d 205, 50 Cal. Rptr 374 (Cal. App. 1st Dt. 1966), citing* Estate of Davis*, 106 Cal. 453, 455 (1895)*. See also Life Insurance Company of North America v. Shirley Jones Cassidy*, 676 P. 2d 1050 (Cal. 1984).*

[ix] *Minn. Stat. § 524.2-213 (1994).*

[x] *Minn. Stat. § 519.11 (1997).*

[xi] *365 N.W. 2d 330, 332 (Minn. App. 1985).*

[xii] Rudbeck, *citing* Slingerland v. Slingerland*, 115 Minn. 270, 275 132 N.W. 326, 328 (1911).*

[xiii] Nanini v. Nanini*, 166 Ariz. 287, 802 P.2d 438 (App. 1980);* In re Estate of Lopata*, 641 P.2d 952 (Colo. 1982);* In re Estate of Lewin*, 595 P.2d 1055 (Colo. App. 1979);* Fern v. Fern*, 207 So.2d 291 (Fla. App D3 1968);* Matuga v. Matuga, *600 N.E.2d 138 (Ind. App. 1992);* Re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986).* See generally *3 A.L.R. 5th 394 (1997).*

[xiv] See In re Estate of Lebrun*, 458 N.W. 2d 139 (Minn. App. 1990), citing Minn. Stat. § 524.2-204 (changed to § 524.2-213 for numbering purposes).*

[xv] *Minn. Stat. § 524.2-402 (1994). The homestead would be distributed to John's daughter at Jane's death.*

[xvi] *Minn. Stat. § 524.2.403 (1998).*

[xvii] *Minn. Stat. § 524.2.404 (1994).*

[xviii] Moberg v. Commercial Credit Corporation*, 230 Minn. 469, 42 N.W.2d 54 (Minn. 1950).*

[xix] *61 Minn. 154, 63 N.W. 484 (1895).* See also Estate of Kueber*, 390 N.W. 2d 22 (1986).*

[xx] Id. *at 63 N.W. 486.*

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