When **Worlds** Collide

The Interplay Between Family Law and Probate Administration

By John J. Pankauski

For the purpose of this article, it shall be assumed that there is a division within the court system that restricts its work to probate matters ("Probate Court") and a separate division whose exclusive domain is divorce proceedings ("Family Court"). This article will not consider a surviving spouse's challenge to a marital agreement that the surviving spouse may attempt to set aside based on fraud, undue influence, or mistake. A "divorce judgment" shall mean a judgment from the Family Court that dissolves the marriage. A "property distribution agreement" shall mean a court-ordered or court-approved allocation and distribution of property and rights between two divorcing spouses.

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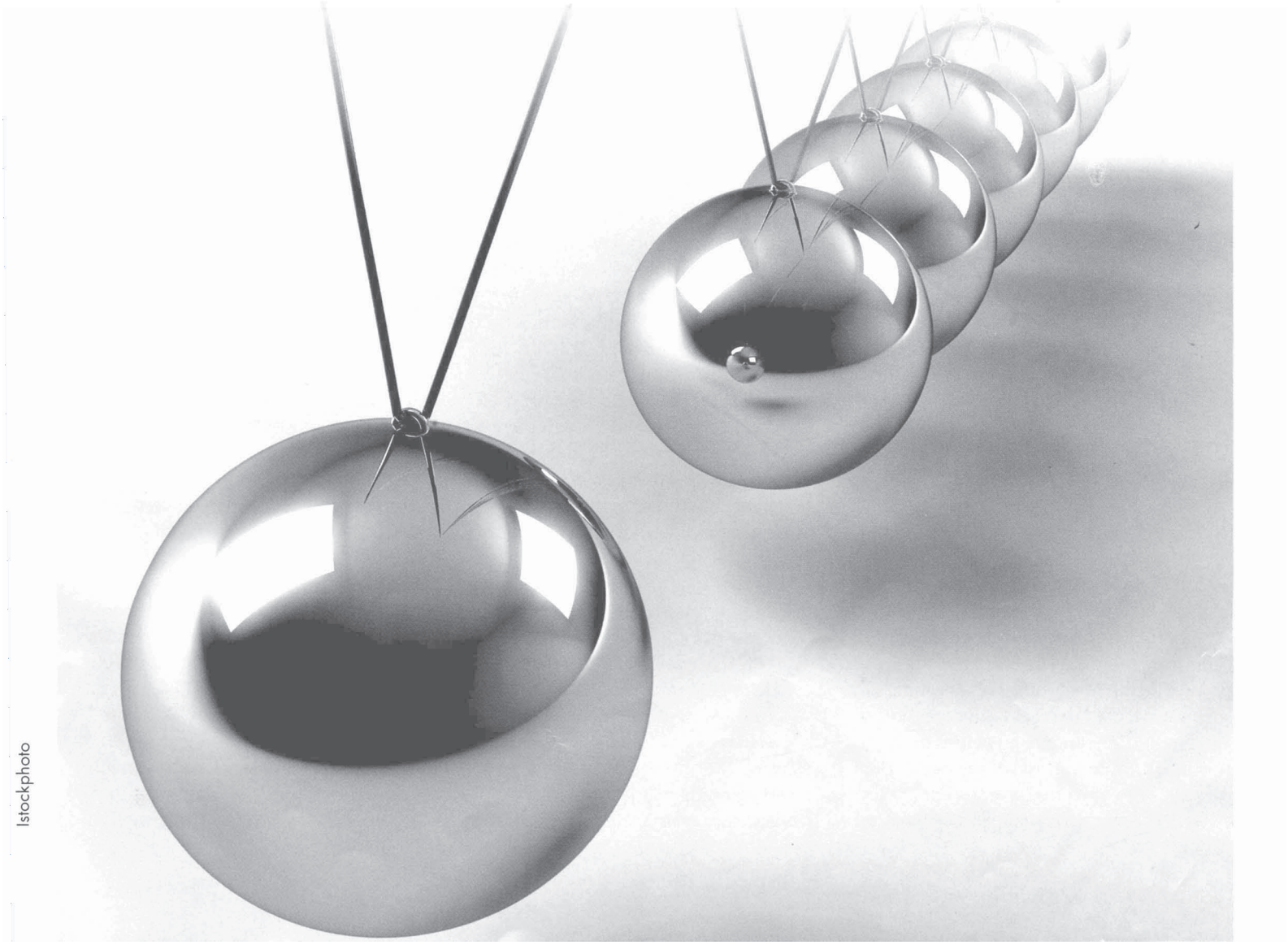
The interplay between probate and family law raises interesting challenges when those legal worlds overlap or collide. This is particularly true for probate attorneys who have not been faced with litigating contract rights, or court-created rights, of a surviving spouse or former spouse. Family law and probate are, today, considered separate subspecialties within the law. Although some practitioners handle both estate administration and divorces, many attorneys choose to limit their practices to only one of those areas.

This article will consider important issues that probate practitioners are faced with on the death of one who was a party to a marital agreement (prenup or postnup) or dissolution of marriage proceeding (divorce). Some of the many purposes of marital agreements and dissolution of marriage



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proceedings are to delineate, and even limit, legal and personal relationships, property, and rights. Although a divorce judgment may terminate a marriage, the legal issues between the spouses may not end but may actually linger on, even after the death of one of the spouses. Although most practitioners recognize that alimony payments and child support payments often terminate on the death of the obligated spouse, some probate practitioners do not recognize that a former spouse (under a property distribution agreement), a child, and even an existing spouse of the decedent can have claims against the decedent's estate. For spouses who do not divorce, marital agreements also can create property rights or other issues that need to be enforced or addressed on the death of the first spouse to die.

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These claims and rights raise a host of issues that practitioners need to consider when administering estates or advising fiduciaries, heirs, or spouses.

Dissolution Proceedings—Death Before a Divorce Judgment

A number of unique probate administration issues arise when two spouses are in the middle of a divorce proceeding and one dies. When the death of a party to a divorce is expected and imminent, most divorce attorneys recognize the importance of obtaining an expedited decree of divorce that dissolves the marriage before death. Generally, this shuts off the surviving spouse's rights to the other's property on death (for example, homestead rights, family allowance, spousal rights, elective share, and, in some instances, beneficiary designation rights), subject to a later property distribution in the family court.

If one spouse dies before a divorce judgment, then in most instances the divorce proceeding will abate. Thereafter, the surviving spouse will be entitled, under most states' laws, to pursue his or her marital rights to the deceased spouse's estate and property in the Probate Court. This may include the surviving spouse's filing a claim to obtain his or her elective share and to enforce other spousal rights or privileges.

Most estate planners advise that, when an individual is about to divorce, his estate plan, nominated fiduciaries, and beneficiary designations be considered and altered—often to disinherit his spouse, presuming that he does not wish to leave property or authority to one whom he is now divorcing. Sometimes this does not occur, and the decedent dies with a will that leaves a portion of the estate to the surviving spouse or nominates the surviving spouse as fiduciary—which may not be intended. In that case, the attorney representing the surviving spouse should carefully analyze what the spouse takes under the will compared to statutory or other rights. In some cases, the decedent may die without even having a valid last will. Some states provide that a surviving spouse may be entitled to preference to serve as the fiduciary to a deceased spouse's estate if the decedent died intestate. Although many state statutes provide no exception for surviving spouses who are in the middle of a divorce, most Probate Courts would have the absolute discretion to consider the divorce proceedings in determining whether to give preference to that surviving spouse.

In some instances, a spouse may improperly attempt to transfer assets before or during a divorce in a feeble attempt to thwart property distribution laws. On the other hand, a spouse to a divorce may engage in estate planning such as creating GRATs, entities, sales of interests in entities, and so on. If representing a surviving spouse, it is very important for a practitioner to learn of any inter vivos transfers of the deceased spouse because such transfers may be includable in the surviving spouse's elective share calculations (for example, "elective estate") if a death occurs before a divorce judgment. For example, some states provide that a surviving spouse's elective share includes not only so-called probate assets or assets in the decedent's own name but also assets transferred to the decedent's revocable trust and gratuitous transfers within a year of death. In addition, all inter vivos nongratuitous transfers (that is, sales, loans) of assets should be examined. Although most assets that are sold may not be "counted" in elective share calculations, because the sale proceeds, if any, are "counted," consider whether a sale was for less than adequate consideration ("sweetheart deal") or a part gift/part sale. In such an instance, a sale or transfer might indeed be "counted" in such calculations. Finally, practitioners representing a surviving spouse may wish to scrutinize self-cancelling installment notes, GRATs, and other estate planning techniques engaged in by the decedent, because valuation is an important part of any elective share proceeding.

Death After the Divorce Judgment

If a Family Court dissolves the marriage before the death of the dying spouse, but there is no property distribution agreement before death, the probate practitioner representing the survivor must take a number of steps that should be coordinated with the surviving spouse's family law attorney. In the divorce proceeding (Family Court), most states require that some notice of the decedent's death be given to the court and all interested parties (for example, a "suggestion of death"), followed by a motion to substitute the estate in place of the decedent. Some states place strict time limitations on when a suggestion of death must be filed and when a party should move to substitute a decedent's estate on behalf of the decedent. In addition, and contemporaneously, an estate administration proceeding should be commenced in Probate Court so that someone can be appointed to not only administer the estate of the decedent but also participate in the dissolution proceeding.

Once a fiduciary of the estate is substituted in the divorce proceeding, a question that undoubtedly arises is one of proper forum: which court has the authority to rule on matters regarding the decedent and his or her property? Practitioners should expect that, if they seek relief in the divorce proceeding, the opposing parties may suggest to the Family Court that the proper venue is actually in Probate Court. This can likewise happen in the Probate Court. Determining which court, Family or Probate, may or should rule on particular issues will be an important part of the practitioner's role for not only practical but also appellate purposes. In other words, all one's work in one of the courts may be for naught if rulings are later appealed and an appellate court rules that a particular court was without jurisdiction or authority to enter the rulings that it did.

Generally, a Family Court, if having issued a divorce judgment before the death of the decedent, shall retain exclusive authority to divide and distribute the property of the decedent and the surviving former spouse in the form of a final judgment. Generally, a Probate Court would have the exclusive authority to deal with the surviving ex-spouse's attempt to enforce the final judgment of property distribution against the estate (its beneficiaries and creditors). To put it another way, the Family Court will tell the estate and the surviving ex-spouse "who gets what." The Probate Court will tell the estate and the surviving former spouse, as well as other interested parties to the estate, whether the property distribution judgment will be satisfied and, if so, to what extent and when.

The surviving former spouse who has been divorced, and who is entitled to property distribution from the deceased spouse (or estate), is now a creditor of the estate and may be battling estate creditors, or others, to get paid or with the priority of his or her claim. As such, he or she should file a statement of claim with the estate

and otherwise take steps under local law to preserve his or her rights as a creditor. Failure to comply with what may be very short limitations periods in the probate setting may be fatal to enforcing one's rights against the decedent's estate. An independent action may need to be filed if the claim is objected to. In that case, it is necessary to consider whether the Family Court proceeding should constitute the independent action, or whether a separate action is advisable. If a judgment for property distribution in the Family Court is entered, counsel for the surviving spouse should consider recording such a judgment and having the Probate Court take judicial notice of it.

If the judgment is viewed by the estate as too generous to the surviving spouse, or legally deficient, the estate will most likely attempt to appeal the Family Court's property distribution judgment, which can prolong the distribution of property to the surviving former spouse. Although it is very common to consolidate two or more cases that involve the same or similar parties and issues, most states do not consolidate divorce proceedings with probate proceedings. There will be two "fronts" in the "war."

For those practitioners representing the deceased spouse's estate, a notice to creditors should be sent to the surviving former spouse and perhaps to that spouse's divorce attorney, who may be seeking fees from the decedent. Most states hold that creditors, including former spouses, are persons who are interested in the estate, requiring the estate's fiduciary to deal with that creditor in good faith and with fair dealing, and even with fiduciary duties. This can create a conflict of interest.

Consider a common conflict of interest that exists: when the surviving former spouse of the decedent is the second or third spouse of the decedent and the decedent's adult child from a prior marriage is not only the executor of the decedent's estate but also the sole or residuary beneficiary. On the one hand, the adult child fiduciary has a duty or obligation to deal fairly with the surviving former spouse. On the other hand, the decedent's adult child, now estate fiduciary, has a personal stake in the divorce proceeding—the less the former spouse "gets" in property distribution, the more the adult child inherits. In such a case, it may be appropriate to have an administrator ad litem or other temporary fiduciary appointed to deal solely with the litigation in the divorce proceeding. This may be particularly important if the estate appeals a property distribution agreement (or order) from the Family Court or opposes the surviving former spouse's attempt to obtain attorney's fees or costs from the divorce proceeding. Indeed, the estate fiduciary may attempt to use estate funds to finance an appeal of any Family Court ruling adverse to the surviving former spouse. In this instance, a frustrated surviving former spouse may view this as the estate using his or her money to oppose his or her property distribution agreement (order).

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Property Rights Under Marital Agreements—The Irony

Irony has been defined as "the use of words to convey a meaning that is the opposite of its literal meaning." As lawyers, we are accused of being deal breakers instead of deal makers. We are accused of getting caught up in the hyper-technical nuances of the law. Whether this criticism is fair or unjust, one arena of legal irony is marital agreements. Some believe that these contracts, while intended to limit disputes, actually increase, or some may say guarantee, litigation.

Marital agreements have as a main purpose to set out and define, and in many instances limit, the rights of one spouse to the property of the other spouse. Marital agreements are also intended to provide legal certainty and to limit litigation or disputes. In truth, many simple marital agreements do just that. Such contracts may be inexpensive, straightforward, and completely sensible, especially for second or third marriages.

Nonetheless, some surviving spouses who are parties to marital agreements seek to enforce inheritance rights by arguing that the marital agreements are improper for a number of reasons. Beyond that, however, litigation appears to ensue more regularly when the marital agreements have testamentary aspects.

Consider a marital agreement in which the decedent permits the surviving spouse to use the winter home (for example, a Florida condo) during life. (On the surviving spouse's death, it shall be distributed to the decedent's children from a prior marriage.) Or consider a second example: a marital agreement mandates that one of the parties shall execute a will or other document that leaves a financial account or fund for the benefit of the surviving spouse.

In each of these instances, assuming that the marital agreement is valid, the surviving spouse will most probably need to assert his or her rights as a creditor to the estate of the deceased spouse. In other words, the surviving spouse may need to file a statement of claim in the estate to enforce his or her rights under the marital agreement, which is a contract. An out-of-court acknowledgment of the agreement by any party may not be binding. Failure of the surviving spouse to assert his or her rights as a creditor in an estate proceeding can forever bar the surviving spouse from asserting his or her rights under the marital agreement. If a statement of claim is objected to by the estate, the surviving spouse may have to file an independent action to enforce his or her rights.

An estate administrator will need to consider whether to recognize the claim, or any parts of it, or to oppose it. Consider a marital agreement that calls for the devise and use of real property for a surviving spouse. One concern that an estate administrator may have is whether the marital agreement is actually a contract to make a will, or to leave a devise, under local law. Was the contract executed with the formalities required for (1) a valid marital agreement? (2) a contract to make a devise or leave an inheritance? or (3) a transfer of an interest in real property? The formalities of execution can differ for each type of contract.

An interesting choice of law question arises, for example, if the agreement was valid as a marital agreement in a state that did not require witnesses when executed and was valid under that forum's laws. Years later, however, the decedent dies after moving to another state, which requires two witnesses to a contract to make a will. The agreement may or may not have a valid forum selection clause that mandates *where* an action to interpret, construe, and enforce the agreement must be filed. That state could be different from the state where the decedent's estate is being administered, unless the parties agree to a forum change. This could cause the surviving spouse and estate to have two sets of attorneys (probate attorneys and trial attorneys) to enforce the agreement, perhaps in two different states.

If the agreement does not have a forum selection clause, then where does the surviving spouse file an independent action? The answer is wherever personal jurisdiction, subject matter jurisdiction, or venue are appropriate—probably in the same state where the probate is being administered. In addition, a governing law clause in the agreement may require that a particular state's laws be applied in the interpretation, construction, and enforcement of the agreement. Because clients move, and years later may live in a different state, the applicable law can be different from the state's laws where the surviving spouse is enforcing his or her rights.

States such as Florida often inherit many documents (for example, marital

agreements and trusts) whose governing law is that of another state. Knowing which state's law to apply is very important. Perhaps surprising to some, some lawyers, and even courts, have improperly applied the forum's laws rather than the governing law as written in the document. At least one court has held that applying the wrong substantive law to a written agreement amounts to a waiver of that governing law provision unless it is raised appropriately at the trial level.

An ethical or even moral issue can arise for the estate fiduciary who is a residuary beneficiary of the decedent's estate and who knows that his or her deceased parent wanted the surviving spouse to have the use and enjoyment of the Florida condo but recognizes that the contract is invalid for any number of reasons. Does the estate fiduciary fight the surviving spouse's claims or yield to the deceased parent's intent?

Third-Party Beneficiaries' Rights

Some property distribution agreements create rights in third parties. In the two examples above, the children of the deceased spouse are third-party beneficiaries to the contract if the agreement, on its face, elicits an intent to benefit the children of one of the parties—if they inherit the Florida condo and receive the account on the death of the surviving spouse. In this instance, those children who are third-party beneficiaries of that agreement should also assert their rights in the decedent's estate proceeding, under the agreement, as a creditor. They themselves must file statements of claims with the estate to assert their rights under the agreement.

Issues regarding ethics and conflicts of interest arise, for example, when a surviving spouse administers the estate of the decedent and the children do not have a copy of the marital agreement. Consider the surviving spouse, who administers the estate, as a party to the marital agreement, who sends a creditors' notice to the children, yet does not provide them with a copy of the marital agreement. Consider also that the time to file a timely statement of claim by the children expires. Afterwards the children learn of the contents of the agreement and realize that they are third-party beneficiaries. In that instance, the children can seek leave of the court to file a late statement of claim based on this nondisclosure. Third-party beneficiaries are considered intended beneficiaries of an agreement (for example, contract) even when they are not direct parties or signatories to the agreement. Most states hold that third-party beneficiaries have the same or similar rights to enforce an agreement as the original parties to the agreement.

Property settlement agreements often require a spouse to maintain life insurance for the benefit of a minor child. Consider the spouse who is ordered to maintain a half a million dollars' worth of life insurance death benefits for the minor child, but the order is silent on who is to be the owner and who is to possess or administer the death benefits if the spouse dies. After the spouse dies, it is learned that the spouse actually maintained a policy with $1 million in death benefits but named his or her parent as the beneficiary, not the minor child. Does the child get $500,000 or the entire $1 million? Or is the parent a constructive trustee in charge of the death proceeds for the minor? Those representing the minor child may be able to seek relief in either the probate proceeding or the Family Court that issued or approved the property distribution agreement.

Beneficiary Designations

Property issues ripe for dispute can arise when a party to a divorce who was awarded property in that divorce proceeding fails to remove the former spouse as a designated beneficiary but intended to. Consider the following: during a happy marriage, one spouse lists the other spouse as the beneficiary of a life insurance contract and also a bank account (Totten Trust). The spouses are later engaged in a bitter, hard-fought divorce, and the spouse who is owner of the life insurance and the Totten Trust maintains ownership under the property distribution agreement. The owner spouse then passes away, having intended but failed to remove the former spouse as beneficiary. Who receives the death proceeds for the life insurance and the bank account?

It should be pointed out that many spouses divorce yet maintain a close, personal relationship thereafter. Some even maintain a close financial relationship. It may indeed be the intent of a divorcing spouse to name the former spouse as a beneficiary of his or her assets.

Some states hold that beneficiary designations in favor of a spouse, much like benefits for a spouse under a will, are automatically terminated (void) on the entry of a divorce judgment and are of no effect.

For owners of assets who actually wish to name a former spouse as a beneficiary, care and thoughtful planning are required to ensure that this intent is clearly effectuated so that such a statute does not thwart the owner's intent. In that case, practitioners can consider re-designating the former spouse as beneficiary on a date that is after the date of the divorce decree and any property settlement. Another possibility is to identify this issue in any property settlement agreement with specific references to not only the owner of the asset but, more importantly, also the beneficiary designation and whether the owner may change that at a later time.

Other states without such a statute have ruled that beneficiary designations shall be honored unless there is specific contrary language in a property settlement agreement regarding the beneficiary, regardless of who gets the life insurance or Totten Trust. In other words, if a divorced spouse fails to remove his or her former spouse as a named beneficiary, the surviving former spouse, who is a named beneficiary, shall inherit that asset unless the property distribution agreement specifically speaks to the beneficiary designation.

There are, however, legal options for estates faced with an asset that is a will substitute in favor of a former spouse who was never intended to inherit that will substitute asset. Beneficiary designations, like most written documents, can be reformed to correct a mistake. A reformation action is an equitable action that is brought by an interested person, not to rewrite a document, but to merely have it accurately and correctly reflect the intent of the parties. In addition, reformation of a beneficiary designation is an appropriate remedy to have an insurance contract accurately reflect the purpose of a property settlement agreement.

In addition to reforming a beneficiary designation of a life insurance contract, the marital settlement agreement and property distribution agreement may be reformed to correct a mistake and to succinctly reflect the intent of the parties and the purpose of that document. In other words, a purpose of most marital settlement agreements is for each spouse to receive specific assets and to waive or acknowledge an interest in the property that goes to the other spouse.

When such an intent in a marital settlement agreement is not clear on the face of the document, equity may permit reformation. In reformation actions, unlike the construction or interpretation of the document, extrinsic evidence including testimony and statements regarding the deceased former spouse's intent and state of mind may be admissible even in the face of an unambiguous document.

Conclusion

Probate practitioners should be mindful of the unique contractual, agreed, or court-ordered rights and privileges of surviving spouses, former spouses, and heirs when a decedent dies having been exposed to either a marital agreement or divorce proceeding. Often, the probate world provides short time frames within which to attempt to enforce these rights or to object to them. When these worlds of family law and probate overlap or collide, they provide the practitioner with unique factual and legal hurdles that require careful consideration and immediate action. ■