

SEPARATED BUT NOT DIVORCED? YOU MAY NEED TO PROTECT YOUR ESTATE PLAN.

A growing number of married people who are separated choose not to finalize the separation with a decree of divorce. If you are one of these people, you should be aware that at your death, your surviving spouse could reappear and defeat your estate plan. This may be an issue for you even if you executed a will after your separation.

Your Surviving Spouse Will Inherit If You Have No Written Agreement.

If you have no separation and property settlement agreement (Separation Agreement) or similar contract, and no will, under Estates and Trusts, § 3-102, Annotated Code of Maryland, the court will award your surviving spouse, regardless of the length of the separation, half your estate if you have one or more surviving minor children. If you have surviving descendants but no minor children, or surviving parents but no descendants, your spouse will receive \$15,000, plus half the residue of the estate (after payment of debts, estate expenses and taxes, if any). If you leave no living descendant or parent, the surviving spouse will receive the entire estate.

Even if you have a will, again regardless of the length of the separation, on your death your surviving spouse can take a share of your estate by electing to disregard your will under § 3-203 of the Estates and Trusts Article. This is commonly called the "elective share." If you have living descendants, your spouse's elective share of your estate will be one-third. If there are no descendants, half of the estate will pass to your surviving spouse.

What Can You Do?

If you are separated, or plan to separate, there are two steps you should take to ensure that your estate is distributed according to your wishes. The first step is to have a carefully drafted Separation Agreement, ideally with both spouses represented by counsel, containing mutual waivers of certain statutory rights -- in particular, the right to inherit from your spouse and the right to claim the elective share. Obviously, updating your estate plan, with a will that reflects your current wishes, is a second, vital step. If your Separation Agreement clearly states your and your spouse's mutual waivers of your § 3-203 election rights, your estate should be protected from a surviving spouse's election. Under Estates and Trusts, § 3-205, the right of election of a surviving spouse can be waived by "a complete property settlement entered into after or in anticipation of separation." However, your surviving spouse may, after your death, claim his or her waiver is invalid because (1) the waiver was the result of reliance upon false representations you made (see Mr. C's success below), or (2) the entire Separation Agreement is void because both parties or you alone breached a material term of the Separation Agreement and the provisions of the Agreement are interdependent -- i.e., all are invalid if one is breached (see the efforts of Mrs. K and Mrs. B below). Such claims may not succeed, but they demonstrate that a waiver is subject to attack.

Mr. C Claimed His Waiver Was Obtained By False Representations.¹

Mrs. C appeared forgiving when she learned of Mr. C's past infidelity; however, she promptly visited her attorney. On Mrs. C's instructions, her attorney drafted wills for both spouses and forms waiving the right to claim an elective share of the other spouse's estate. Mrs. C's will left nothing to Mr. C. Mr. C's will (drafted by Mrs. C's attorney) left most of his estate in trust for Mrs. C's benefit. Mr. C first saw his new will at the attorney's office on the day the couple signed the wills and the waivers. Mrs. C died. Mr. C claimed

¹ Strasburg v. Clark, 573 A.2d 1339 (Md. 1990).

the elective share of her estate under Estates and Trusts, § 3-203. Mrs. C's executor and daughter presented Mr. C's waiver, signed of his own free will, as a defense. Mr. C testified he signed the waiver because the attorney advised him to do so and on the basis of false representations by Mrs. C. The Circuit Court jury found Mr. C had executed the waiver as a result of undue influence and in reliance upon false representations made by Mrs. C.

This case highlights the importance of including, in any Separation Agreement that waives § 3-203 election rights, a recital of the exchanged promises, covenants, testamentary provisions or other inducements to sign the document. Waivers by both spouses (mutual waivers), standing alone, may be based on genuine consideration. However, waivers are more likely to be impervious to attack if they are included in a Separation Agreement or other similar contract negotiated by parties, with each party represented by his or her own counsel.

Mrs. K Claimed Her Separation Agreement Was Void.²

Mr. and Mrs. K, both represented by counsel, entered into a Marital Settlement Agreement in which each party waived the right to claim the elective share. They continued to live together. Mr. K died while still living with his wife, leaving a will that was not favorable to her. Mrs. K exercised her § 3-203 right to the elective share, claiming the entire Marital Settlement Agreement was void because of the breach of one provision, the agreement to separate. The executor opposed her claim. The Orphans' Court (the court which oversees Maryland estates) agreed with Mrs. K that the provisions of the Agreement were interdependent. Therefore, the entire Agreement should be void because a key provision of the Agreement contemplated separation and Mr. and Mrs. K had never separated. However, the Court of Special Appeals reversed the decision of the Orphans' Court, finding that the Agreement was not premised on the separation of the parties. The Agreement, which included the waiver, was valid.

Mrs. B Also Claimed Her Separation Agreement Was Void.³

Mr. and Mrs. B separated and executed a Separation Agreement, drafted by counsel. The Separation Agreement included a waiver of the right to claim an elective share. Mr. B died, leaving no will, and Mrs. B was appointed executor, a right also waived in the Agreement. When Mr. B's children objected, the Orphans' Court removed Mrs. B as executor. However, Mrs. B appealed her removal, claiming the Separation Agreement was void. She asserted that the provisions of the Agreement were interdependent and one of the covenants had not been met -- Mr. B had failed to keep in force an insurance policy in her favor. When the Circuit Court agreed with the decision of the Orphans' Court, Mrs. B appealed again. She admitted she pursued the appeal to be reinstated as executor in hope the Agreement would be found invalid and she could have part of the estate - the elective share.

Maryland's highest court affirmed the validity of the Agreement, finding that Mr. B's failure to comply with one provision of the Agreement did not nullify the entire Agreement. Specifically, Mrs. B's waiver of the right to claim the elective share and Mr. B's failure to keep in force the insurance policy were not apportioned equivalents under the Agreement. The Agreement, including Mrs. B's waiver, was valid.

In both these cases, the Separation Agreements survived challenge. These cases demonstrate the importance of a well-drafted Separation Agreement, able to survive the scrutiny of a court.

² Kaouris v. Kaouris, 603 A.2d 1350 (Md. App. 1992).

³ Brees v. Cramer, 586 A.2d 1284 (Md. 1991).

Will a Living Trust Protect Your Estate Plan?

If you transfer all your assets to a living trust, will the transferred property be safe from election by a surviving spouse? No Maryland statute addresses this question. However, a well-known case, Knell v. Price,⁴ has put the safety of trust property in doubt. Mr. and Mrs. Knell separated, without a written agreement. Mr. Knell then lived with Ms. Price for 27 years, until his death. Mr. Knell left everything to Ms. Price under his will. In addition, by two deeds, he attempted to place a residence in trust, to pass at his death to Ms. Price. He deeded the residence to his attorney as trustee, then his attorney deeded back to him the right to use the property or to sell it during his lifetime. If Mr. Knell had not sold the residence at his death, it would pass to Ms. Price.

When Mr. Knell died, Mrs. Knell reappeared. She claimed her right to the elective share of Mr. Knell's estate, including the residence in trust. Mrs. Knell appealed her case to Maryland's highest court, which held Mr. Knell's "conveyance, through a straw man [the trustee] of the remainder of the property was not complete, absolute, and unconditional." Mr. Knell himself retained control over the property during his lifetime, and his attempt to place it in trust was a fraud on the marital rights of Mrs. Knell. If Mr. Knell had transferred the property to a revocable trust, the Court might have reached the same decision, finding the transfer an attempt to defeat Mrs. Knell's right to the elective share.

If you have no Separation Agreement and are relying on a trust to keep your assets from your surviving spouse, you should realize that, while a trust makes assets more difficult to reach, it might not be impenetrable. If you are separated, execute a well-drafted Separation Agreement (even if many years have passed since your separation), and keep your promises under the Agreement. If you do not want a divorce, a Separation Agreement can protect the provisions of your estate plan and guarantee your estate will pass to the beneficiaries you have chosen.

If you would like to discuss the protections offered both spouses by executing a Separation Agreement, please call James G. Nolan in our Family Law Department. If you would like to discuss your estate plan, please call Marianne R. Loman in our Estate Planning Department.

⁴ 569 A.2d 636 (Md. 1990).