



**SUFFOLK ACADEMY OF LAW**  
*The Educational Arm of the Suffolk County Bar Association*  
560 Wheeler Road, Hauppauge, NY 11788  
(631) 234-5588



## **SPOUSAL RIGHTS AT DEATH UNDER NEW YORK LAW**

**FACULTY**  
**Robert M. Harper, Esq.**  
**Partner at Farrell Fritz, P.C.**

**August 3, 2022**  
**Suffolk County Bar Association, New York**

Like us on:



*“The opinions, beliefs and viewpoints expressed herein are those of the authors and do not necessarily reflect the official policy, position or opinion of the Suffolk County Bar Association, Suffolk Academy of Law, their i Board of Directors or any of their members”*

**There's a whole new way to obtain your CLE certificate! It's fast, easy and best of all you can see the history of courses that you've attended!**

**Within 10 days of the course you attended, your CLE Certificate will be ready to view or print. Follow the instructions below:**

1. Go to SCBA.org
2. Member Log In (upper right corner)
3. If you **do not** know your username or password, click the area below and enter your email that is on file with SCBA. Follow the prompts to reset your username and password.
4. After you log in, hover over your name and you will see “Quick Links”. Below that you will see:
  - a. My SCBA
  - b. My CLE History
  - c. Update My Information
  - d. Update My Committees
5. Click on **My CLE History**, you will see the courses you have attended. Off to the right side you will see the Icon for certificates. You are now able to download the certificate, print it or save it. You may go to your history and review the courses you have taken in any given year!
6. **CLE certificates will no longer be mailed or emailed.** Certificates will be available within 10 days after the course.



## **Robert M. Harper, Esq. – Partner at Farrell Fritz, P.C.**

Robert M. Harper is a partner at Farrell Fritz, P.C. He concentrates in trust and estate-related litigation in Surrogate's Court and Supreme Court. His practice includes probate contests, accounting proceedings, discovery and turnover proceedings, guardianship proceedings, and trust invalidation proceedings. Rob is a frequent contributor to Farrell Fritz's New York Trusts & Estates Litigation blog. In addition to his work at Farrell Fritz, Rob is a special professor of law at Hofstra University School of Law. He also coaches Hofstra's moot court teams. Rob earned his J.D. from Hofstra University School of Law and his B.S. from Boston College Carroll School of Management. He is an American College of Trust and Estate Counsel (ACTEC) Fellow.





# Understanding Spousal Rights at Death under New York Law

Suffolk Academy of Law

**Presented By:**  
**Robert M. Harper**

August 3, 2022

## The Statutory Rights That One Spouse Has in Another Spouse's Estate

- New York law generally does not permit one spouse to disinherit another spouse (Margaret V. Turano, Practice Commentaries: EPTL § 5-1.1-A [McKinney's]).
- Consistent with New York's strong public policy against permitting a person to disinherit a spouse, New York law affords surviving spouses statutory rights relative to their spouses' estates and/or assets.
  - Intestate Distribution under EPTL § 4-1.1;
  - Right of Election under EPTL § 5-1.1-A; and
  - Exempt Property under EPTL § 5-3.1.

## The Statutory Rights That One Spouse Has in Another Spouse's Estate

- Where a decedent dies without a will, the decedent's estate may be administered in intestacy (EPTL § 4-1.1).
- When an intestate decedent is survived by a spouse, but no issue, the surviving spouse will receive all assets of the decedent's estate (*id.*).
- To the extent that a decedent dies intestate, and is survived by a spouse and issue, the spouse will receive \$50,000 and one-half of what remains (with the balance passing to the issue by representation) (*id.*).

## The Statutory Rights That One Spouse Has in Another Spouse's Estate

- A surviving spouse may exercise the right of election (EPTL § 5-1.1-A).
  - The right of election “allows [a] surviving spouse to take a statutorily specified share of [a] deceased spouse’s estate”, consistent with New York’s strong public policy against permitting one spouse to disinherit another spouse (6 *Warren’s Heaton on Sur Ct Prac* § 73.01).
  - The right to elect against a decedent’s estate generally is personal to a surviving spouse (*id.*).
  - That is, except to the extent that one of the following individuals exercises a surviving spouse’s right of election –
    - A guardian, committee, or conservator of a spouse, when authorized by a court having jurisdiction to grant authorization; and
    - A guardian ad litem for the surviving spouse, when authorized by the court that appointed the guardian ad litem (*id.*).
- While New York does not recognize common-law marriages, a person who enters into a common law marriage in a state where common-law marriages are permitted may be able to exercise the right of election in New York (*Matter of Landolfi*, NYLJ, Mar. 10, 2000, at 34 [Sur Ct, Kings County]).

## **The Statutory Rights That One Spouse Has in Another Spouse's Estate**

The right of election entitles the surviving spouse to a “pecuniary amount equal to the greater” of –

- \$50,000 (or if the capital value of the decedent's net estate is less than \$50,000, to such capital value); or
- One-third of the decedent's net estate (EPTL § 5-1.1-A).



## The Statutory Rights That One Spouse Has in Another Spouse's Estate

For purposes of calculating a surviving spouse's elective share, the following testamentary substitutes shall be included in the decedent's "net estate" –

- Gifts causa mortis;
- Gifts made within one year of the decedent's death;
- Totten trust accounts;
- Joint bank accounts/payable on death accounts;
- JTWRROS property held by the decedent and payable to another person;
- Certain retirement and pension plans; and
- Presently exercisable general powers of appointment (EPTL § 5-1.1-A).

## The Statutory Rights That One Spouse Has in Another Spouse's Estate

- The following categories of assets do not constitute testamentary substitutes that will be included in the decedent's "net estate" –
  - Life insurance proceeds (*Matter of Green*, NYLJ, Jan. 22, 2008, at 27 [Sur Ct, Bronx County]); and
  - Exempt property (*Matter of Vitelli*, NYLJ, Mar. 16, 2004, at 24 [Sur Ct, Queens County]).
- In contrast to life insurance proceeds, however, annuities do constitute testamentary substitutes against which a surviving spouse may elect (*Matter of Zupa*, 48 AD3d 1036, 1037 [4th Dep't 2008]).

## The Statutory Rights That One Spouse Has in Another Spouse's Estate

The surviving spouse's net elective share shall be reduced by the capital value of any interest passing absolutely from the decedent to the surviving spouse (*id.*).

- At times, an estate fiduciary may dispute that the surviving spouse is entitled to elect against a decedent's estate by asserting that the surviving spouse received testamentary substitutes that exceed the elective share in value (*Matter of Janssen*, NYLJ, June 7, 2012, at 28 [Sur Ct, Queens County]).
- Where an estate fiduciary seeks to do so, the fiduciary will need to support its position with facts and documentation evidencing the value of the assets in question (*id.*).

# The Statutory Rights That One Spouse Has in Another Spouse's Estate

- The net elective share shall be reduced by –
  - Debts;
  - Administration expenses; and
  - Funeral expenses (EPTL § 5-1.1-A).
- Where a decedent has contractual obligations to an ex-spouse, such as a duty to pay alimony, the obligations give rise to debts that will be subtracted from the net estate for purposes of calculating the decedent's surviving spouse's elective share (*Matter of Raninga*, NYLJ, Jan. 18, 2008, at 38 [Sur Ct, Kings County] [involving claims made by the decedent's ex-wife and children that arose from a separation agreement and concerned the decedent's retirement benefits]; *Matter of Dunham*, 63 Misc2d 1029, 1034 [Sur Ct, Greene County 1970] [addressing contractual alimony payments], *aff'd*, 36 AD2d 467 [3d Dep't 1971]).
- In contrast, however, where a decedent merely enters into a contract to leave a testamentary disposition to a particular person, the decedent's right to contract to make a will is subordinate to the decedent's surviving spouse's right of election, and will not result in a reduction of the net estate for purposes of calculating the surviving spouse's elective share (*Dunham*, 63 Misc2d at 1034).

## The Statutory Rights That One Spouse Has in Another Spouse's Estate

- The pecuniary amount of the surviving spouse's elective share is fixed as of the decedent's death (*Matter of Kasenetz*, 196 Misc3d 318, 321 [Sur Ct, Nassau County 2006]).
  - A surviving spouse who exercises the right of election does not share in the appreciation or depreciation of the decedent's assets after the decedent's death (*id.*).
  - However, the surviving spouse may be entitled to receive interest on the elective share to the extent that the payment of it is delayed (*id.*).
  - "The elective share must be paid ratably by the decedent's other beneficiaries, including intestate beneficiaries (if there are any), beneficiaries under the will, and beneficiaries of testamentary substitutes" (Turano, Practice Commentaries: EPTL § 5-1.1-A, *supra*).
- Under current law, a spouse cannot use an elective share trust to defeat a surviving spouse's right of election (*Matter of Bank*, 184 Misc2d 322, 324 [Sur Ct, Kings County 2000]).

## The Statutory Rights That One Spouse Has in Another Spouse's Estate

- Where a decedent dies testate, the surviving spouse who exercises the right of election forfeits his or her interest as a beneficiary under the decedent's will.
- If the decedent dies intestate, the surviving spouse is entitled to (a) exempt property under EPTL § 5-3.1, (b) his or her intestate share of the decedent's estate, and (c) a share of testamentary substitutes sufficient to satisfy the surviving spouse's elective share (Turano, Practice Commentaries: EPTL § 5-1.1-A, *supra*).

## The Statutory Rights That One Spouse Has in Another Spouse's Estate

- When a decedent dies, survived by a spouse, EPTL § 5-3.1 provides that certain “exempt property” shall be set aside for the surviving spouse (EPTL § 5-3.1).
- What constitutes exempt property?
  - “[H]ousekeeping utensils, musical instruments, sewing machines, jewelry unless disposed of in the will, clothing of the decedent, household furniture and appliances, electronic and photographic devices, and fuel for personal use, not exceeding” \$20,000 in total value;
  - “The family bible or other religious books, family pictures, books, computer tapes, discs and software, DVDs, CDs, audio tapes, record albums, and other electronic storage devices, including but not limited to videotapes, used by such family, not exceeding” \$2,500 in total value;
  - “Domestic and farm animals with their necessary food for sixty days, farm machinery, one tractor and one lawn tractor, not exceeding” \$20,000 in total value;
  - “One motor vehicle not exceeding” \$25,000 in value; and
  - “Money including but not limited to cash, checking, savings and money market accounts, certificates of deposit or equivalents thereof, and marketable securities, not exceeding” \$25,000 in value (*id.*).

## The Statutory Rights That One Spouse Has in Another Spouse's Estate

- The exempt property is not considered to be part of the decedent's estate, and, thus, is exempt from creditors' claims against the estate (*id.*).
- Exempt property is deemed to be reasonably necessary for the surviving spouse's support while the decedent's estate is settled (*id.*).



## Asserting And Securing The Right Of Election

- To assert the right of election, a surviving spouse must –
  - Serve upon the personal representative of the decedent’s estate, or “upon a person named as executor in a will on file in the surrogate’s court” in a case where such will has not yet been admitted to probate, written notice of the election; and
  - File and record the original notice of election, with proof of service thereof, in the Surrogate’s Court where letters issued (EPTL § 5-1.1-A).
- The notice of election “may be served by mailing a copy thereof, addressed to any personal representative, or to the nominated executor, as the case may be, at the place of residence stated in the designation [filed under SCPA § 708], to the domicile address of such nominated executor, or in such other manner as the surrogate may direct” (*id.*).

## Asserting And Securing The Right Of Election

- A surviving spouse may assert the right of election, provided that the surviving spouse does so “within six months from the date of letters of administration but in no event later than two years after the date of death of [the decedent]” (EPTL § 5-1.1-A ).
- EPTL § 5-1.1-A authorizes the Surrogate’s Court, upon a showing of reasonable cause, “to relieve” a surviving spouse from the failure to timely assert the right of election, “provided that no decree settling the account of the personal representative has been made and that twelve months have not elapsed since the issuance of letters and two years have not elapsed since the date of [the] decedent’s death” (*id.*).

## Asserting And Securing The Right Of Election

- Practitioners representing a surviving spouse in asserting the right of election should be careful to follow the procedure set out in EPTL § 5-1.1-A meticulously.
- In *Matter of Otcasek*, the decedent’s surviving spouse attempted to assert her right of election by mailing notice of the election to the attorneys for the duly-appointed preliminary executor of the decedent’s estate, rather than to the preliminary executor himself (*Matter of Otcasek*, NYLJ, Aug. 11, 2021, at 18 [Sur Ct, New York County]).
  - More than six months after the issuance of full letters testamentary to the then-executor, the surviving spouse realized that she had failed to comply with EPTL § 5-1.1-A’s service requirements (*id.*).
  - The surviving spouse, therefore, brought an application to be relieved from her default, and for the late service and filing of a notice of election, which the Surrogate’s Court granted (*id.*).

## Asserting And Securing The Right Of Election

When a surviving spouse elects against a decedent's estate, the surviving spouse can seek a determination concerning the validity or effect of the election in –

- A proceeding that is brought under SCPA § 1421; or
- A proceeding to judicially settle the accounting of the fiduciary of the decedent's estate (SCPA § 1421).

## Marital Agreements

---

- Parties to a marriage oftentimes enter into a marital agreement to reach a “consensus in defining a potentially complex marital estate”, especially when one or both parties to the marriage have “significant wealth” (*Anonymous v Anonymous*, 70 Misc3d 1216[A], at \*2 [Sup Ct, New York County 2021], *aff’d*, 198 AD3d 526 [1st Dep’t 2021]).
- Properly executed marital agreements, including prenuptial and postnuptial contracts, generally are “valid and enforceable” in light of New York’s “strong public policy favoring individuals . . . deciding their own interests through contractual arrangements” (*id.* at \*3).
- However, when marriages go awry, prenuptial and postnuptial agreements oftentimes lead to litigation.

## Marital Agreements

---

- Parties should be mindful of “the perils of having prenuptial [and postnuptial] agreements drawn by lawyers, even highly competent ones, who do not specialize in family and divorce law” (*Anonymous*, 70 Mis3d 1216[A], at \*1).
- When parties rely upon lawyers who are not familiar with family and divorce law to prepare marital agreements, the “unfortunate consequence is that even if a flawed prenuptial [or postnuptial] agreement is ultimately upheld or enforced . . . , a permeable one will almost always wind up [in court], costing the parties, and particularly the more-monied spouse, monumental sums of legal and expert fees in the process” (*id.* at \*2).
- As one New York court has explained, “if you ask a neurosurgeon to perform your knee-replacement surgery, you may wind up with a limp” (*id.*).

## Marital Agreements

---

- An agreement by the parties to a marriage, “made before or during the marriage, shall be valid and enforceable” if it is –
  - In writing;
  - Subscribed by the parties; and
  - Acknowledged or proven “in the manner required to entitle a deed to be recorded” (Domestic Relations Law § 236[B][3]).
- A marital agreement may include –
  - A “contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will”;
  - “[P]rovision for the ownership, division or distribution of separate and marital property”;
  - “[P]rovision for the amount and duration of maintenance or other terms and conditions of the marriage relationship”; and
  - “[P]rovision for the custody, care, education and maintenance of any child of the parties” (*id.*).

## Marital Agreements

---

- Domestic Relations Law § 236(B)(3)'s acknowledgment requirement has resulted in extensive litigation.
- As the Court of Appeals recently explained, Real Property Law §§ 292, 303, and 306 “must be read together to discern the requisites of a proper acknowledgment” in a marital agreement (*Anderson v Anderson*, 37 NY3d 444, 449 [2021]).
  - Real Property Law § 292 “requires that the party signing the document orally acknowledge to the notary public or other officer that [the party] in fact signed the document” (*id.*).
  - Real Property Law § 303 “requires that the notary or other officer taking the acknowledgment ‘knows or has satisfactory evidence[] that the person making it is the person described in and who executed [the] instrument’” (*id.*).
  - Real Property Law § 306 “compels the notary or other officer to execute a certificate . . . stating all the matters required to be done, known, or proved’ and to endorse or attach that certificate to the document” (*id.*).



## Marital Agreements

---

- A certificate of acknowledgment “establishes that the ‘signer made the oral declaration compelled by Real Property Law § 292’ and the ‘notary or other official either actually knew the identity of the signer or secured ‘satisfactory evidence’ of identity ensuring that the signer was the person described in the document” (*id.* at 450).
- A “properly executed certificate is the means by which the parties document that past events comply with the statutory requirements” of Domestic Relations Law § 236(B)(3) (*id.*).



## Marital Agreements

---

- Relevant Case Law –
  - *Matisoff v Dobi*, 90 NY2d 127 (1997) – An unacknowledged postnuptial agreement is void.
  - *Galetta v Galetta*, 21 NY3d 186 (2013) – In a divorce action in which the husband claimed that a prenuptial agreement was valid, the Court of Appeals held the agreement to be void, based upon defects in the certificate of acknowledgment concerning the husband’s signature.
  - *Anderson v Anderson*, 37 NY3d at 450-55 – An acknowledgment that accompanies a nuptial agreement must be executed contemporaneously (though not necessarily simultaneously) with the party’s signing of the agreement.
  - *Matter of Koegel*, 37 NY3d at 455-59 – When a nuptial agreement contains a defective certificate of acknowledgment, the defect “may be overcome with adequate evidence that the statutory requirements were met”.
- The Court of Appeals has explained that a party’s admission that the party signed a marital agreement is insufficient to save the marital agreement where the marital agreement is not acknowledged (*Matisoff*, 90 NY2d at 134).

## Marital Agreements

---

- As an alternative to having a marital agreement acknowledged, Domestic Relations Law § 236(B)(3) permits a marital agreement to be substantiated in the “manner in which a conveyance of real property could be proved” (*Matter of Menahem*, 16 Misc3d 1125[A], at \*4 [Sur Ct, Kings County 2007], *aff’d*, 63 AD3d 839 [2d Dep’t 2009]).
- Real Property Law § 304 states that, where “the execution of a conveyance is proved by a subscribing witness,” the “witness must state his [or her] own place of residence, and if his [or her] place of residence is in a city, the street and street number, if any thereof, and that he [or she] knew the person described in and who executed the conveyance” (Real Property Law § 304).
- Where an acknowledgment in a marital agreement is defective, “the defect may be cured by the notary supplying the necessary proof as a subscribing witness” (*Menahem*, 16 Misc3d 1125[A], at \*4).

## Marital Agreements

---

- A marital agreement that is “fair on its face will be enforced according to its terms unless there is proof of unconscionability, or fraud, duress, overreaching, or other inequitable conduct” (*McKenna v McKenna*, 121 AD3d 864, 865 [2d Dep’t 2014]).
- “An unconscionable bargain is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense” (*id.*).

## Marital Agreements

---

- When entering into a prenuptial agreement, best practices dictate that the parties (a) exchange “meaningful financial disclosure”, and (b) be represented by independent counsel (*id.* at 866-67).
- The failure to follow those best practices may raise questions concerning whether the prenuptial agreement is enforceable (*id.*).
- In *McKenna v McKenna*, the parties entered into a prenuptial agreement, which stated that the parties exchanged “full disclosure” of their finances, but did not include such disclosure in the agreement itself (*id.*). Additionally, one spouse selected and paid for the other spouse’s attorney (*id.*). While the Supreme Court initially granted summary judgment determining that the prenuptial agreement was valid, the Appellate Division modified that determination (*id.*).

## Marital Agreements

---

- A party seeking to invalidate a marital agreement on the ground of fraud or undue influence generally must bear the burden of proof (*Matter of Greiff*, 92 NY2d 341, 344 [1998]).
- However, where the bargaining power of the parties to a marital agreement is unequal, and the risk of undue influence, fraud, and deception is heightened, a “special burden” may shift to the party seeking to enforce a marital agreement to establish that the agreement did not result from fraud or overreaching (*id.* at 344-47).

## Marital Agreements

---

Courts oftentimes consider the following factors in evaluating the inequity of a marital agreement –

- Detrimental reliance upon the marital agreement by the spouse seeking to invalidate it;
- Disparities in the financial positions of the parties;
- The formality of the marital agreement's execution;
- The extent to which the parties made full disclosure of their finances;
- The physical or mental condition of the party seeking to avoid the marital agreement at the time of the instrument's execution;
- The superior knowledge and/or influence of the party claiming that the marital agreement is valid;
- The involvement of independent counsel on behalf of the parties;
- Whether the marital agreement is fair and reasonable on its face; and
- Whether the marital agreement provides for the less-monied spouse to waive inheritance rights (*Menahem*, 16 Misc3d 1125[A], at \*9).



## Marital Agreements

---

- Most disputes concerning the validity of a marital agreement arise after the marriage has fallen apart (*Brody v Brody*, 20 Misc3d 350, 351 [Sup Ct, Nassau County 2008], *aff'd*, 62 AD3d 928 [2d Dep't 2009]).
  - As a result, the disputes may not arise until many years after the parties married.
  - That delay historically made marital agreement disputes more susceptible to statute of limitations claims than other contract matters.
- Domestic Relations Law § 250 addresses this issue.
  - It provides that the “statute of limitations for commencing an action or proceeding or for claiming a defense that arises from” a marital agreement “prior to the service of process in a matrimonial action or proceeding,” is three years (Domestic Relations Law § 250).
  - However, the statute of limitations is tolled until –
    - Process is served in a matrimonial action or proceeding; or
    - One of the spouses dies (*id.*).

## **Waivers Of Spousal Rights In Marital Agreements**

Marital agreements oftentimes contain waivers of the following spousal rights –

- The right of election;
- The right to exempt property;
- Retirement plan interests; and
- Fiduciary appointments.

## Waivers Of Spousal Rights In Marital Agreements

- A surviving spouse may waive the right of election (*Matter of Cash*, NYLJ, July 6, 2015, at 31 [Sur Ct, Kings County]).
  - To be valid, the waiver must be –
    - In writing;
    - Subscribed by the waiving party; and
    - Acknowledged or proved in the manner required by New York law for recording a conveyance of real property (EPTL § 5-1.1-A).
  - “A waiver of the right of election is effective whether ‘[u]nilateral in form, executed only by the maker thereof, or bilateral in form, executed by both spouses’” (*Matter of Abady*, 76 AD3d 525, 526 [2d Dep’t 2010]).
- A waiver of the right of election may be effective whether executed before or after marriage, and whether absolute or conditional (EPTL § 5-1.1-A).

## Waivers Of Spousal Rights In Marital Agreements

- A surviving spouse only will be held to have waived the right of election upon doing so “in the most unambiguous and unquestionable language” (*Matter of LeRoy*, 118 Misc2d 382, 389 [Sur Ct, Onondaga County 1983]).
  - A statement that a spouse waives the right to elect against another spouse’s estate likely would suffice (*Matter of Mimoun*, NYLJ, Sept. 24, 2008, at 39 [Sur Ct, New York County]).
  - So too would language stating that a person waives “any and all rights to or in [a spouse’s] property which, apart from [the spouse’s] will, [the surviving spouse] will have under the law as [his or her] surviving husband” or wife (*Matter of Ballin*, 26 Misc2d 808, 808-09 [Sur Ct, New York County 1960]).
- Where a surviving spouse merely waives the right to elect against another spouse’s estate, but does not waive the right to be treated as an intestate distributee of his or her spouse’s estate, the surviving spouse’s rights as an intestate distributee will be preserved (*Mimoun, supra*).

## Waivers Of Spousal Rights In Marital Agreements

- “The statutory right to exempt property may be waived by a prenuptial or separation agreement”, but “such waivers are strictly construed” (*Matter of Marrone*, 36 Misc3d 225, 227-29 [Sur Ct, Queens County 2012]).
- When drafting a marital agreement that attempts to waive the right to exempt property, it is helpful to reference EPTL § 5-3.1 in the document (*id.*).
- “In the absence of an explicit waiver referencing EPTL § 5-3.1, the language of the agreement must otherwise clearly indicate an intention to relinquish the right to exempt property” (*id.*).
  - “[G]eneral language such as ‘waives all statutory rights in the other’s estate’ or ‘waives all rights under any statute of distribution or any other statute’” does not suffice (*id.*).
  - However, language stating that parties to a marital agreement “waive any statutory right or interest each may have as a surviving spouse” has been held to effect a valid waiver of the right to exempt property (*id.*).

## Waivers Of Spousal Rights In Marital Agreements

- Under New York law, distinctions exist as to whether parties to a prenuptial agreement can waive certain ERISA rights.
- On the one hand, for equitable distribution purposes, ERISA does not preclude a party to a prenuptial agreement from waiving an interest in a pension as marital property (*Strong v Dubin*, 75 AD3d 66, 72 [1st Dep't 2010]).
- On the other hand, ERISA does not permit a party to a prenuptial agreement to waive an interest in mandatory survivor benefits (*Edmonds v Edmonds*, 184 Misc2d 928, 930-33 [Sup Ct, Onondaga County 2000]).

## Waivers Of Spousal Rights In Marital Agreements

- A marital agreement may provide for a spouse to waive the right to serve as the fiduciary of his or her spouse's estate (*Matter of Rimland*, 2003 NY Slip Op 50966, at \*2 [Sur Ct, Bronx County June 3, 2003]).
- To the extent that a marital agreement does not contain such a waiver, a surviving spouse – even one who seeks an elective share – may be appointed to serve as the fiduciary of a deceased spouse's estate (*Matter of Neeley*, 64 Misc2d 419, 419-20 [Sur Ct, Nassau County 1970]).

## Divorce And Its Consequences

---

- In general, where a spouse dies during a divorce proceeding, the parties remain married for estate and trust purposes.
  - The surviving spouse typically will receive all bequests in a will and benefit from joint accounts.
  - The surviving spouse usually will be entitled to an elective share and to exempt property.
- What can a spouse do to minimize another spouse's interests in his or her affairs while a divorce proceeding is pending?
  - Execute a will leaving the surviving spouse nothing more than an elective share.
  - Execute new advance directives.



## Divorce And Its Consequences

---

Where a matrimonial court “has made a final adjudication of divorce but has not performed the mere ministerial act of entering the final judgment”, the surviving spouse may not succeed in retaining his or her spousal rights upon the other spouse’s death (*Matter of Mirizzi*, 187 Misc2d 481, 483 [Sur Ct, Richmond County 2001], *aff’d*, 291 AD2d 451 [2d Dep’t 2002]).

- *Matter of Mirizzi*, 187 Misc2d at 482-84 – Spouses entered into a settlement agreement resolving their matrimonial proceeding, which they placed on the record in open court. After the wife’s attorney served and filed proposed findings of fact and conclusions of law, the husband died. The Surrogate’s Court rejected the wife’s attempt to exercise the right of election, finding that all that remained in the divorce proceeding was the ministerial act of issuing the judgment.
- *Matter of Rabalis*, NYLJ, Nov. 19, 2003, at 29 (Sur Ct, Kings County) – The wife commenced a divorce proceeding, at which point her husband signed an affidavit stating that he would not respond or seek equitable distribution. In June 2001, the note of issue was filed. The wife died in the September 11, 2001 terrorist attacks, weeks before the court signed the findings of fact and judgment of divorce in October 2001. The Surrogate’s Court declined to deny the husband the rights of a surviving spouse.

## Divorce And Its Consequences

---

- Domestic Relations Law § 236(B)(2)(b) contains “automatic orders” that go into effect at the start of a divorce proceeding, and prohibit the parties from making changes concerning certain assets (Domestic Relations Law § 236[B][2][b]).
- However, where one of the parties to a divorce proceeding dies, that party’s death divests the matrimonial court of jurisdiction to enforce automatic orders, even when the deceased party violated the automatic orders prior to death.
- *A.V.B. v D.B.*, 44 Misc3d 331 (Sup Ct, Westchester County 2014) – In September 2012, the wife commenced a divorce proceeding. In February 2013, the wife changed the beneficiary designations for her 403(b) account to benefit her children, not her husband. In April 2013, the wife committed suicide. After the wife’s death, the husband asserted that the February 2013 beneficiary designation changes were invalid, since they violated the automatic orders. The court held that it lacked jurisdiction to remedy the violation of those orders, since the divorce proceeding abated upon the wife’s death.

## Divorce And Its Consequences

---

- Under EPTL § 5-1.4, except where the governing instrument provides otherwise, a divorce or annulment of a marriage will revoke any revocable disposition to a spouse (EPTL § 5-1.4).
  - The former spouse will be treated as having predeceased the decedent (*id.*).
  - A disposition that is “revoked solely by [EPTL § 5-1.4] shall be revived by the divorced individual’s remarriage to [a] former spouse” (*id.*).
- Examples include dispositions by –
  - Will;
  - Security registration in beneficiary form;
  - Beneficiary designation concerning a life insurance policy or, where permitted by law, a pension or retirement benefits plan;
  - Revocable trust, including a bank account in trust form;
  - Provision conferring a “power of appointment or power of disposition” on a former spouse; and
  - Nomination of the former spouse to serve as a fiduciary (*id.*).
- As to transfer on death accounts, a financial institution’s account agreement may supersede EPTL § 5-1.4, and provide that divorce will not result in revocation of a beneficiary designation.

## Divorce And Its Consequences

While EPTL § 5-1.4 revokes certain dispositions to former spouses, does the statute also revoke dispositions to a decedent's former in-laws? Not necessarily.

- *Matter of Lewis*, 114 AD3d 203 (4th Dep't 2014), *modified*, 25 NY3d 456 (2015) – In 1996, the decedent executed a will benefitting her husband, or, if the husband predeceased the decedent, his parents (*id.*). In 2007, the decedent and husband divorced (*id.*). Thereafter, the decedent died, and her parents obtained Letters of Administration concerning her estate (*id.*). In 2010, the decedent's ex-husband's parents offered the decedent's will for probate (*id.*).
  - All parties agreed that EPTL § 5-1.4 revoked the testamentary dispositions to the ex-husband (*id.*).
  - The courts concluded, however, that the statute did not revoke the dispositions to the ex-husband's parents (*id.*).

## Divorce And Its Consequences

- Does EPTL § 5-1.4 apply when the parties to a civil commitment ceremony end their relationship? No.
- *Matter of Leyton*, 135 AD3d 418 (1st Dep't 2016) – A same-sex couple participated in a civil commitment ceremony before same-sex marriage became legal in New York State or at the federal level (*id.*). Although the couple broke up, one of the parties to the relationship executed a will naming the other party as a beneficiary and executor (*id.*). After the death of the party to the relationship who executed the will, the other party successfully offered the will for probate (*id.*). Following the United States Supreme Court's decision in *Obergefell v Hodges*, 576 US 644 (2015) (recognizing a federal constitutional right to same-sex marriage), a party who was interested in the decedent's estate argued that the surviving member of the couple should be disqualified as a beneficiary and executor under EPTL § 5-1.4 (*id.*). The Surrogate's Court and Appellate Division rejected the argument, finding that EPTL § 5-1.4 does not apply to civil commitment ceremonies (*id.*).

## Disqualification Of A Spouse

---

- Even in the absence of a divorce or annulment, a surviving spouse can be disqualified from exercising rights relative to a predeceased spouse's assets, including the right to receive an inheritance under a will or as an intestate distributee, to elect against an estate, to receive exempt property, and to share in wrongful death settlement proceeds (EPTL § 5-1.2).
- Under EPTL § 5-1.2, disqualification is appropriate when –
  - A final decree or judgment of divorce, annulment, nullification, or dissolution of a marriage was in effect at the time of a deceased spouse's death;
  - The marriage was incestuous, bigamous, or otherwise void as against public policy;
  - The surviving spouse procured an out-of-state final decree or judgment of divorce, annulment, nullification, or dissolution of the marriage from the deceased spouse that was in effect at the time of the deceased spouse's death;
  - The surviving "spouse abandoned the deceased spouse, and such abandonment continued until the time of death"; or
  - The surviving spouse failed to support the deceased spouse up to and including the time of the deceased spouse's death, despite having the duty and means to do so (*id.*).
- The party seeking to disqualify a spouse under EPTL § 5-1.2 must bear the burden of proof (*id.*).

## Disqualification Of A Spouse

- EPTL § 5-1.2 does not set forth a minimum time frame in order to invoke an abandonment claim (EPTL § 5-1.2).
  - A departure from the marital residence, without more, is insufficient to establish abandonment (*Matter of Riefberg*, 58 NY2d 134, 138 [1983]).
  - Rather, in order to have a viable abandonment claim, the party raising abandonment as an issue generally must establish that a spouse's departure from the marital residence was unjustified, and that the other spouse did not consent to it (*id.*).
- *Matter of Duplessis*, 123 AD3d 927 (2d Dep't 2014) – The decedent and his wife married in 1963. In 1987, the wife left the marital residence. The wife lived separately from the decedent until he died in 2010. After the decedent's death and the admission of his will to probate, the wife asserted elective share and exempt property rights, to which the executor of the decedent's estate claimed that the wife was not entitled by reason of her abandonment of the decedent. The Surrogate's Court held that the executor had failed to establish abandonment, and the Appellate Division affirmed.
- *Matter of Henry*, 35 Misc2d 1217(A) (Sur Ct, Bronx County 2012) – The decedent and her husband married in 1970. In 1972, the husband left the marital residence and never returned. The husband saw the decedent only two times after vacating the marital residence. In 1987, the husband married a new spouse, despite having failed to divorce the decedent. After the decedent died, the husband claimed that he was entitled to a share of the wrongful death proceeds that arose from the decedent's death. The fiduciary of the decedent's estate claimed that the husband had abandoned the decedent.
  - The Surrogate's Court agreed that the husband had abandoned the decedent, noting that the husband had engaged in a ceremonial (though apparently bigamous) marriage with his new spouse.
  - Even in the absence of proof that the husband's departure from the marital residence was unjustified and that the decedent had not consented to it, an abandonment occurred when the husband entered into the second (albeit ceremonial) marriage with his new spouse.

## Divorce Settlements

---

- Divorce settlements oftentimes carry with them estate-related obligations.
- Child Support – Child support obligations generally will not survive a parent’s death, unless the deceased parent entered into a contract to bind his or her estate to pay child support after the deceased parent’s death (*Flatto v Flatto*, 59 AD2d 695 [1st Dep’t 1977]).
- Maintenance – Under Domestic Relations Law § 236, “an award of maintenance shall terminate upon the death of either party” to a marriage (Domestic Relations Law § 236).
- Life Insurance – A spouse’s obligation in a divorce settlement to maintain a life insurance policy for the benefit of the spouse whom that person is divorcing and/or their children may survive death (*DeAngelis v DeAngelis*, 104 AD3d 901, 902-03 [2d Dep’t 2013]).



## Divorce Settlements

---

- Reasonable funeral expenses are “preferred to all debts and claims against [a decedent’s] estate and shall be paid out of the first moneys received by” the decedent’s fiduciary (SCPA § 1811).
- Where a decedent’s estate is insolvent, SCPA § 1811 sets forth that creditors’ claims shall be subject to priority in the following order –
  - “Debts entitled to a preference under the laws of the United States and” New York State;
  - Taxes assessed against a decedent’s property prior to his or her death;
  - “Judgments docketed and decrees entered against the decedent according to the priority thereof respectively”; and
  - “All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts” (*id.*)
- In certain instances, such as when decedents maintain the power to dispose of assets during their lifetimes, it may be possible for creditors whose claims arise from divorce settlements to access decedents’ non-probate assets in order to enforce their claims (*Matter of Gallet*, 196 Misc2d 303, 307 [Sur Ct, New York County 2003]; *Granwell v Granwell*, 20 NY2d 91, 95 [1967]).

## Divorce Settlements

---

- Where a divorce settlement contains provisions that benefit the parties' children, the children are third-party beneficiaries who can enforce the provisions that benefit them (*Matter of Friedman*, 146 Misc2d 91, 94 [Sur Ct, New York County 1989]).
- Where a divorce settlement agreement obligates a party to maintain a life insurance policy to secure his or her child support obligations, and that party fails to honor that duty, the damaged parties may have a valid claim against the deceased spouse's estate, but not priority under SCPA § 1811 (even if the settlement agreement is incorporated into a divorce judgment by reference) (*Matter of Oshry*, File No. 353410/H, Decision and Order, dated Jan. 26, 2018 [Sur Ct, Nassau County]).

## Divorce Settlements

---

It is critically important to draft divorce settlement agreements carefully, as the interpretation of those documents regularly results in litigation.

- Where a divorce settlement agreement obligates a party to leave his or her “estate”, “gross estate”, or “net estate”, or a portion thereof, to specified individuals, disputes may arise as to the meaning of the term in question (*Matter of Pozsonyi*, 2018 WL 5085140, at \*3-6 [Sur Ct, New York County Oct. 12, 2018]).
- Likewise, disputes may arise as to whether one spouse’s use of his or her assets during lifetime should be limited when that spouse commits to bequeath a part of his or her estate to the children of the marriage in a divorce settlement (*Rand v Rand*, 138 Misc2d 226, 231 [Sup Ct, Nassau County 1987], *aff’d*, 150 AD2d 543 [2d Dep’t 1989]; *Van de Walle v Van de Walle*, 68 Misc3d 1224[A], at \*9 [Sup Ct, Nassau County 2020], *aff’d*, 200 AD3d 1095 [2d Dep’t 2021]).

## Divorce Settlements

In *Rand v Rand*, a husband and wife entered into a separation agreement, pursuant to which the husband agreed to leave a will that provided for a bequest equal to twenty percent of his net taxable estate to the wife (*Rand*, 138 Misc2d at 227-31). Based upon that separation agreement, the husband and wife divorced (*id.*). Years later, the divorced wife received a letter from her former husband's representative, advising that he was assisting the former husband with his estate plan (*id.*). The former husband's representative indicated that the former husband's health was failing and that he desired to transfer all of his assets to his second wife (*id.*). The former husband offered to enter into a new agreement with his ex-wife, proposing to provide her with an immediate payment of \$100,000 cash and to designate her as the beneficiary of a \$350,000 insurance policy on his life, among other things (*id.*). The former wife rejected her ex-husband's proposal, and instead sought to prevent him from transferring assets out of his estate, arguing that allowing him to do so would frustrate the purpose of their separation agreement (*id.*).

- The Supreme Court rejected the former wife's argument, and the Appellate Division affirmed.
- The Supreme Court explained:

The [separation agreement] requires the former husband to make a will containing a provision bequeathing twenty (20%) percent of his net taxable estate to the former wife in the event that she remains unmarried and survives him. The [separation agreement] does not set forth a minimum dollar amount which must be left to the former wife, nor does the [separation agreement] in any fashion restrain the former husband's disposition of his property during his lifetime. The [separation agreement] does not require the former husband to utilize his best efforts during his lifetime to maximize the value of his estate at his death nor does the [separation agreement] prohibit the husband from wasteful dissipation of his assets. The [separation agreement] does not prevent the husband from making gifts during his lifetime or contain any restrictions as to the manner in which the husband must manage or enjoy his assets during his lifetime. In short, the [separation agreement] contains no mechanism to assure or guarantee that the former husband die possessed of an estate worth an established minimum value and provides the former wife with no right to compensation should the husband diminish his estate through unwise investment, wasteful spending or gifts made during his lifetime. While it is clear that the intent of the [separation agreement] was that the former wife inherit twenty (20%) percent of an estate of some value if she remain unmarried and survive the defendant[, the separation agreement] contains no provision which prevents the former husband's depletion of his assets during his lifetime in any manner in which he might choose (*id.* at 230-31).



# Thank you.

---

Robert M. Harper

Farrell Fritz, P.C.

400 RXR Plaza

Uniondale, New York 11556

(516) 227-0625

[rharper@farrellfritz.com](mailto:rharper@farrellfritz.com)



## **SCBA Lawyers Helping Lawyers Committee**

**The SCBA Lawyers Helping Lawyers Committee** provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

**Please call the  
Lawyers Helping Lawyers Helpline at (631) 697-2499  
to speak with an attorney who will provide support and recommend  
resources. All calls are private and confidentiality is protected under  
Judiciary Law Section 499. (Lawyer Assistance Committee)**

***Feel Free to Join Us at Our Weekly Recovery Meeting***