



## TRUSTS AND ESTATES

# Separation Agreement or Stipulation Impact on Statutory Right of Election Divorce Settlement

By Robert M. Harper

Section 1421 of the Surrogate's Court Procedure Act ("SCPA"), authorizes a "person interested in obtaining a determination as to the validity [of] or effect" on a surviving spouse's right of election to file a petition with the court that admitted the decedent's will to probate or issued letters of administration for the decedent's estate for the consideration of a particular question. In this regard, recent decisions from two Surrogate's Courts address the extent to which a decedent's separation agreement or stipulation of settlement in a divorce from a former spouse affects the decedent's surviving spouse's right to an elective share.

This article discusses that issue and explains why a separation agreement or stipulation in a previous divorce action may adversely affect the decedent's surviving spouse's right of election.

In *In re Calligaro*, the decedent, a corrections officer in New York City, married his former spouse in December 1993. Although the decedent and his former spouse had a daughter in June 1995, their marriage ultimately failed, with the decedent's former spouse filing for divorce in 1996. In February 1997, the decedent and his former spouse entered into a separation agreement, which provided for the "equitable division and distribution of property" and the designation of their infant daughter as the "beneficiary of [the decedent's] pension/retirement survivor benefit [(the "survivor benefit")]" until her emancipation." The Superior Court of the State of New Jersey entered a judgment of divorce in June 1997, "which incorporated, but did not merge, the parties' separation agreement." The decedent retired in or about 1997, and remarried in February 2004.

The decedent died about a year and a half later, in July 2005. Following the decedent's death, his surviving spouse commenced a SCPA section 1421 proceeding in the Surrogate's Court, Bronx County, to determine the affect of the decedent's separation agreement on her right of election. The surviving spouse argued that the decedent's

survivor benefit was a testamentary substitute and subject to her elective share. In response, the guardian ad litem for the decedent's minor daughter posited that the decedent's designation of his daughter as the beneficiary of his survivor benefit was a contractual obligation, which could not be changed without violating the separation agreement.

Upon consideration of the parties' contentions, the court explained that the decedent had a contractual obligation under the separation agreement to ensure that his daughter received the survivor benefit until her emancipation. Indeed, as the court opined, had the decedent failed to provide for the distribution of his survivor benefit to his daughter during his life, she could have sued the decedent to enforce her right to the survivor benefit before her emancipation. As such, the court explained that it "would defy logic to hold that the daughter has less of a right to the [survivor benefit] because the decedent honored his contractual obligation than she would have had in the event that the decedent breached [his] contractual obligation." Accordingly, the court held that the decedent's surviving spouse could only elect against the portion of the survivor benefit payable after the decedent's daughter's emancipation.

The Surrogate's Court, Kings County, reached a similar conclusion in *In re Raninga*. There, the decedent entered into a stipulation of settlement with his former spouse, the terms of which were incorporated, but not merged, into their judgment of divorce. As per the stipulation, the decedent and his former wife "agreed to divide their retirement benefits between them on an equal basis." The decedent also contracted to designate their three children as the beneficiaries of a trust funded with his portion of the retirement benefits, "to pay sums certain for alimony and child support[.]" and to secure his alimony obligations with a \$300,000 life insurance policy "designating his former wife as [the] beneficiary."

The decedent remarried and died shortly thereafter. He also left a last will and testa-

ment, which predated his second marriage, did not provide for his second spouse, and was admitted to probate. Pursuant to EPTL section 5-1.1-A, the surviving spouse filed for her elective share. She also objected to the accounting of the decedent's estate's executor, contending that "the executor improperly deducted the values of the claims of the former wife and children for retirement funds, unpaid child support, alimony obligations and \$300,000 in lieu of the insurance policy which decedent failed to purchase . . . , in calculating the decedent's net estate" for elective share purposes.

The court rejected the surviving spouse's objection.<sup>1</sup> In doing so, the court opined that "the decedent and his former spouse contracted to create certain alimony and child support rights which became the decedent's debts to meet from the time of the parties' divorce." As a result, the court dismissed the surviving spouse's objection to the amount deducted from the net estate as debts to the decedent's former wife and children in connection with the calculation of the surviving spouse's elective share.

Both *Calligaro* and *Raniga* stand for the proposition that a decedent's obligations pursuant to a separation agreement or stipulation of settlement with a former spouse in a divorce action should be treated as debts, not testamentary substitutes, for right of election purposes. The prudent practitioner will recognize that these obligations do not give rise to increases in the value of the surviving spouse's elective share, since they do not involve increases to the value of the decedent's net estate. Rather, the value of the obligations should be deducted from the net estate, and the surviving spouse should be denied a credit for the obligations when his or her elective share is calculated.

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## ENDNOTES

<sup>1</sup> N.Y. S.C.P.A. § 1421(1).

<sup>2</sup> *In re Calligaro*, 19 Misc.3d 895, 896 (Sur. Ct., Bronx County 2008).

<sup>3</sup> *Id.* at 896-97.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 896-97.

<sup>7</sup> *Id.* at 896.

<sup>8</sup> *Id.* at 897.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 899-901.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 900-01.

<sup>14</sup> *Id.* at 901.

<sup>15</sup> *In re Raninga*, N.Y.L.J., Jan. 18, 2008, at 38, col. 6 (Sur. Ct., Kings County).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*<sup>xxv</sup> *Id.*