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INSIDE THIS ISSUE

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MARITAL AGREEMENTS AND RECIPROCAL WILLS

The Supreme Court of Virginia recently addressed the issue of marital agreements and reciprocal wills in the case of *Plunkett v. Plunkett*, (2006 Va. Lexis 14, January 13, 2006).

In this case, the husband and wife executed a marital agreement that contained the following provisions.

> 1. Testamentary Disposition of Separate Estates. The parties each agree that in light of the fact that this was a second marriage for each of them, and that Pete has children from his previous marriage, that their separate property be devised and bequeathed to his children.
>
> Accordingly, the parties agree that they will execute the wills, copies of which are attached to this Agreement, and make no subsequent changes in testamentary disposition of their separate property to Pete's children.
>
> 2. Testamentary Disposition of Marital Estate. The parties agree that they will execute the wills, copies of which are attached to this Agreement, and make no subsequent changes . . . in contravention [of] their intent to leave their marital property as set forth and described in this Agreement first to the survivor and then equally to all of Pete's children.

Two wills were attached to the marital agreement, one executed by the husband and one executed by the wife. All three documents were signed at the same time.

At the husband's death, the wife submitted his will to probate. The husband's will in Article IV states in part: "I give and bequeath my jewelry, personal

effects, automobiles and other tangible personal property, to my spouse, if said spouse survives me; and if not, to my children." Article V's residuary clause states: "My Residuary Estate, I give, devise, and bequeath to my spouse, if [she] survives me. If said spouse shall not survive me, I give, devise, and bequeath said property to my children and their descendants." The husband's will further provides that "if . . . any share of my residuary estate becomes distributable to my son, Peter," then such share is to be held in trust until Peter reaches a certain age or completes college.

The husband's three children alleged that the husband had significant separate property, including real estate, stocks, and items of personal property with a total value "greater than the federal and state estate tax exemption amount." They also claimed that the will's language was inconsistent with the husband's intent and his relationship with his children. They asked the trial court to impose a constructive trust on the husband's separate property. The wife argued that the "terms of the Agreement are not ambiguous, the will conforms to the Agreement, and conforms to the intent she shared with Pete in executing the Agreement." The trial court imposed a constructive trust on the separate property for the benefit of the husband's children. The wife appealed.

The Supreme Court reviewed the trial court's interpretation *de novo*, as a review of contract construction. The Court first said that the matter did not involve a breach of contract, as the children had asserted, because the Agreement incorporated the wills by reference. The Court said it had to consider all of the terms of the Agreement and the two wills together.

The Court began its analysis by stating that the first two paragraphs of the marital agreement "set forth seemingly distinct treatment of the "separate" and "marital" property," and held that the provisions may be harmonized. The Court noted that the agreement incorporated the wife's will. Articles IV and V of the wife's will were reciprocal to the same articles in the husband's will, and read together, leave the wife's entire estate to the husband, and then to his children if he does not survive her. The Court said that "[t]he practical effect is that all assets in Linda's estate will pass to Pete's children upon her death. She is not free to make changes to this will, as paragraphs 1 and 2 of the Agreement require that there be "no subsequent changes" to the testamentary disposition. As a result, any children who survive Linda will receive an equal share of the entire estate upon Linda's death."

The Court also noted that paragraph 1 of the marital agreement refers to "their separate property" rather than "his" or "her" separate property, and that such plural language is not often used. The Court said that using the plural form demonstrates the intent of the parties that the separate property of each spouse would be combined and then devised to the children. This could only occur at the deaths of both spouses, rather than at the death of each spouse. The Court said that paragraph 1 clearly does not mean that both wife's and husband's separate property would be devised to the children upon his death. If the language is supposed to mean "each" set of separate property owned by each spouse, and the wife had predeceased the husband, then it would be unusual for the wife to devise only her separate property to her husband's children while devising all other property to her husband first.

The Court stated that the far more reasonable interpretation is that the spouses intended the language to reflect what was actually provided in the wills. The Court rejected the assertion that paragraph 1 of the

marital agreement means that the husband's separate property must be devised to his children upon his death, because that language does not refer specifically to "his" separate property at "his" death. The Court said that "the language used, 'their separate property,' therefore leads to the conclusion that it must have referred to some combination of the separate property owned by" husband and wife. The Court also said that it could not ignore the language requiring the simultaneous execution of the wills and the circumstances under which the simultaneous execution was accomplished. The Court ruled that "the simultaneous execution of all these documents demonstrates that the Agreement and the incorporated wills accomplish precisely what the spouses intended." The Court concluded that the spouses intended to leave their property first to the surviving spouse, and then to the husband's children. The Court reversed the judgment of the trial court and entered final judgment in favor of the wife.

This case demonstrates the need for clear estate planning, especially in the event of a second marriage. The attorneys at Oast & Hook can assist clients with these unique estate planning needs.

Announcement

Oast & Hook is pleased to announce its sponsorship of a series on WHRO-TV entitled "Boomers: Redefining Life After 50." This week's episode will cover Retirement Reconsidered and will be aired at 4:30 p.m., Saturday, February 4th.

Seminar

Oast & Hook is proud to present an advanced seminar entitled: "Special Needs Trusts: A Wealth of Information." This seminar is open to the public, and it will be held at the Chesapeake Conference Center, 900 Greenbrier Circle, Chesapeake, Virginia 23320, from 9:00 a.m. to 12:30 p.m., Wednesday, March 8, 2006. This seminar has been approved for three CLE credits by the Virginia State Bar. For more information, please telephone Jennifer Lantz or Linda Gerber at 757-399-7506.

Distribution of This Newsletter

Oast & Hook encourages you to share this newsletter with anyone who is interested in issues pertaining to the elderly, the disabled and their advocates. The information in this newsletter may be copied and distributed, without charge and without permission, but with appropriate citation to Oast & Hook, P.C. If you are interested in a free subscription to the *Elder Law News*, then please e-mail us at eln@oasthook.com, telephone us at 757-399-7506, or fax us at 757-397-1267.