

Dying to Get a Divorce?

Why Interim Wills Are Essential for Divorcing Clients

By Naim D. Bulbulia and Jonathan W. Wolfe¹

On August 31, 2004, the New Jersey State Senate signed into law a bill that revises New Jersey's Probate Code, effective February 27, 2005. Among other changes, the bill substantially revises the intestacy laws. These changes impact all individuals who die without a Last Will and Testament, but can cause particularly unjust and unintended results for married persons with children who are even contemplating a divorce. Specifically, if an individual dies without a Will during a pending divorce, their spouse may nevertheless be entitled to receive **all** of their assets -- marital and non-marital alike.

Under New Jersey's prior intestacy law, if an individual died without a Will while married with children, \$50,000 plus one-half of the decedent spouse's estate passed to the surviving spouse and the remaining share was divided among their children. However, under the new law (N.J.S.A. 3B:5-3) (the "Intestacy Statute"), in the case of a married individual with children who dies without a Will, **all assets** pass to the surviving spouse and nothing passes to children.

This should be extremely troubling news for a spouse who is either contemplating or in the process of obtaining a divorce. Under a literal construction of the Intestacy Statute, the last person that such spouses may want to inherit any of their property (including what would otherwise be their separate, non-marital property), could now be in a position to inherit it all! Of course, an individual who has an existing Will that leaves assets to a spouse (as most married people do) is potentially in a similar position of inadvertently leaving a soon to be ex-spouse assets that he or she might not otherwise intend and to which their spouse might not otherwise be entitled in the event of divorce.

In order to avoid this potentially perverse result, it is crucial for all matrimonial attorneys to

¹ Mr. Wolfe and Mr. Bulbulia are colleagues at Skoloff & Wolfe, P.C., where they concentrate in Family Law and Trusts and Estates respectively.

immediately ascertain (i) whether or not a new client has a Will and (ii) if a Will is in existence, whether the existing Will leaves assets to the client's spouse. New clients must be alerted to the potential dangers they face at the outset of the representation, and in virtually all cases (other than when the client has a Will that excludes their spouse) an Interim Will should immediately be drafted. Even in the case where a client has no children, it is important that he or she execute an Interim Will in order to ensure that his or her property passes other than to the surviving spouse.

It should be noted that upon the actual divorce of the parties, all intestacy rights of the spouse are automatically extinguished, and all rights of said former spouse to take under an existing Will are also extinguished (under N.J.S.A. 3B:5-3 and N.J.S.A. 3B:3-14, respectively).

Can the Interim Will completely extinguish a soon to be ex-spouse's rights to receive any property, effectively disinheriting said spouse? Generally, New Jersey law bars an individual from completely excluding a spouse from sharing in his or her estate. New Jersey's elective share statute (N.J.S.A. 2B:8-1) (the "Elective Share Statute") permits a spouse that receives less than one-third of a decedent spouse's augmented estate to bring an action to obtain his or her rightful one-third share.

However, the Elective Share Statute explicitly bars spouses from recovering an elective share in cases in which the spouses are living apart in separate habitations or when spouses have ceased to cohabit as man and wife either because of a judgment of divorce from bed and board, or due to circumstances that would give rise to a cause of action for a divorce or nullity of the marriage.

When the above inability to exercise the right of election is coupled with the fact that death typically severs all rights to equitable distribution, a surviving spouse whose divorce is pending has no statutory right to share in the assets of the deceased. See *Carr v. Carr*, 120 N.J. 336 (N.J. 1990) (surviving spouse during pending divorce has no rights to equitable distribution or elective share). In *Carr*, the New Jersey Supreme Court recognized that a spouse left in such a "black hole" is nevertheless entitled to an equitable share of the marital assets under the equitable remedy of a constructive trust.

Unlike the Elective Share Statute, the Intestacy Statute does not explicitly exclude spouses who have separated or are in the process of divorcing, and there is little precedent elucidating how such a situation would be resolved. See e.g., *Matter of the Estate of K.J.R.(2002)*, 348 N.J. Super. 618 (App. Div. 2002) (finding termination of spouse's right to take under intestacy during pending divorce based only upon an explicit waiver in a signed property settlement agreement); *Di Bella v. Di Bella*, 372 N.J. Super. 350, 354 (Ch. Div. 2004) (appointing son - rather than the surviving spouse - as executor of estate of spouse who died intestate during divorce, but expressing no view on whether surviving spouse is entitled to participate in the estate).

In *Fulton v. Fulton*, 204 N.J. Super 544,550 (Ch. Div. 1985), the Court avoided the issue all together by awarding a divorce posthumously in order to prevent a spouse from receiving her intestate share of her deceased husband's estate. In that case, however, the divorce was virtually over and the only asset of value was a personal injury award recovered during the parties' separation. As the Supreme Court recognized in *Carr*, absent such "unusual or exceptional circumstances," the "general rule" remains that "statutory equitable distribution is conditioned on the termination of marriage by divorce" - not death. 120 N.J. at 875-76. Accordingly, posthumous entries of divorce will rarely be available to avoid the unintended passing of assets to a surviving spouse during a pending divorce.

Therefore, if no Interim Will is drafted and an individual dies prior to the divorce becoming final, a surviving spouse (with children) is presumptively entitled to the entire estate -- including the decedent's separate, non-marital property. As detailed above, there is little precedent concerning how a court would resolve this conundrum. A court could choose to disregard the literal application of the statute, see *Di Bella*, 372 N.J. at 584 ("If a literal construction of the statute be absurd, the act must be so construed as to avoid the absurdity"), or could award a portion of the intestate share to the parties' children under a theory of quasi contract or constructive trust. However, an argument certainly could be made that the Legislature's choice to include an explicit exception for separation in the Elective Share Statute on the one hand, and omit a similar provision in

the Intestacy Statute on the other hand, demonstrates the Legislature's intent to create no such exclusion for the Intestacy Statute. In any event, in order to eliminate uncertainty and to avoid placing the burden on the children to pursue their share of the estate through a lawsuit, it is essential that an Interim Will be drafted.

Drafting an Interim Will that removes the soon to be ex-spouse (or drastically reduces his or her share of the estate), creates a valid Last Will and Testament and confines the surviving spouse's rights to his or her equitable share of the parties' **marital** assets. This is of particular significance to clients with substantial non-marital assets, because the execution of an Interim Will will allow them to ensure that their separate assets pass to their children (or the party of their choosing) rather than to their soon to be ex-spouse.

Given the uncertainty and potential inequity under the existing statutory scheme, the New Jersey State Senate should consider enacting legislation to explicitly define the rights of separated spouses in the event of death before divorce. Such a statute could mandate that only marital assets would be subject to division between the surviving spouse and the decedent's estate. Thus, the decedent's share of the marital property and the decedent's separate property would remain in the decedent's estate, to pass either (i) to the beneficiaries designated in the decedent's Will, or (ii) by intestacy. In either case, the surviving separated spouse (having received his or her equitable share of the parties' marital assets) would be excluded entirely from further participating in the estate.

Be that as it may, unless and until New Jersey law changes, Interim Wills should be drafted for anyone that is even considering getting a divorce.