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Divorce vs. Death: Pecuniary Rights And How They Differ

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Sometimes, the older client's question is posed in the starkest form: Am I better off getting a divorce or just waiting for my spouse to die? The smart lawyer's answer is "It depends on a lot of variables."

This article will discuss some of those variables, and the different ways in which New York law, and, in passing, the Uniform Probate Code which other states have adopted, protect surviving spouses from disinheritance. It also notes the dissimilar status of offspring. The applicable law with respect to estate and divorce rights will be the law of the state in which the deceased spouse was domiciled at the time of his or her death, or where the parties reside, in the divorce scenario. As part of the "death gamble", of course, there is always the risk that the monied spouse will transfer assets—fraudulently or otherwise—before the death, in such a manner as to place them beyond the reach of the provisions of the law designed to protect the surviving spouse (in New York, EPTL §5-1-1-A[b] and [c]). That possibility needs to be factored into the equation.

In New York, a surviving spouse's elective share of the estate of a deceased spouse is the greater of $50,000 or one-third of the decedent's net estate, as defined under 1990's statutory reforms designed to protect surviving spouses. EPTL §5-1.1-A(a)(2). Under the prior law, the elective share was 50% of the decedent's net estate if there were no living children of the decedent at the time of the decedent's death, and one-third if the decedent left living children. But a spouse could choose to place the amount of the elective share in trust, with the surviving spouse receiving only *the income therefrom* during his/her lifetime—a deprivation and an insult. In addition, the surviving spouse today is entitled to take or retain possession of (and not count toward the elective share) certain personal property, ranging from the family bible to clothing and household items worth up to $20,000, and one motor vehicle worth up to $25,000. EPTL §5-3.1.

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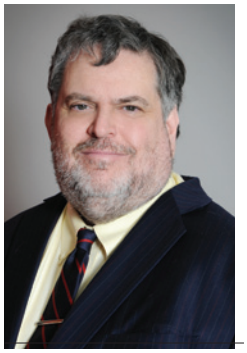

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One must resist the impulse to compare the one-third elective share guaranteed to a surviving spouse to the unofficially presumptive 50-50 division of marital property in divorce after a number of years of marriage or to conclude that divorce yields results more financially generous than death. First, in the absence of a will, a surviving spouse will inherit *all* of the deceased spouse's estate if the decedent has no living children, or $50,000 plus 50% of everything above that amount if the decedent has one or more living children. One does not get 100% of even the marital estate in a divorce. EPTL §4-1.1. Second, if spouses have assets that they hold as joint tenants or tenants by the entirety, such as real property or jointly titled bank or securities accounts, in the event of the death of one spouse, those assets will

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pass directly to the surviving spouse, outside of any will or intestate succession. By contrast, title does not control in divorce. Third, whereas equitable distribution applies only to *marital* property, a surviving spouse's elective share (or intestate share) applies *both* to assets that would be classified as marital property, *and* to assets that would be classified as separate property, in the context of a divorce action. Thus, where a spouse who dies has a significant amount of separate property, the surviving spouse's elective share may amount to significantly *more* than he or she would typically receive as equitable distribution in a divorce action.

As a result of reforms enacted in New York estate law in the 1960's and 1990's, the net estate based on which a surviving spouse's elective share is calculated is more inclusive than it was previously. Now it better protects the surviving spouse's inheritance rights against manipulations designed to deprive the survivor of what the law regards as his/her fair share of the decedent's estate. These protections are akin to those afforded a spouse where there has been dissipation of marital property in the context of a divorce. The net death estate now encompasses not only the "probate estate" (all assets titled in the decedent's name, minus the decedent's debts and the costs of administering the estate), and the value (at the time of the decedent's death) of testamentary substitutes, such as Totten trusts (see EPTL §7-5.1[d]) established by the decedent; the decedent's contributions to joint accounts with others; the

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decedent's contributions to jointly owned real property or other property; the proceeds of retirement, savings-pension, deferred-compensation, death-benefit, stock-bonus or profit-sharing plans (except that, with respect to qualified plans under §401 of the IRS Code payable to the surviving spouse, only half is deemed a testamentary substitute); gifts from the decedent during his/her lifetime which, by their terms, were to revert to the decedent in the event that the recipient predeceased the decedent; the value (as of date of death) of property transferred by the decedent during his/her lifetime, where such transfers were revocable by the decedent up until the time of his/her death, the assets that otherwise remained within the control of the decedent up until the time of his/her death, or where the decedent retained the use or possession of, or the right to receive the income from, the transferred property, up until the time of his/her death; and any property transferred by the decedent, not for fair consideration, within one year before his/her death (excluding the annual gifts of up to $15,000 provided for in IRS Code §2503). EPTL §5-1.1-A(b)(1). The "conclusive presumption" is that the decedent's contribution was 50%. (The law made a decision not to require tracing between spouses.)

New York estate law mitigates against windfalls, by specifying that various financial benefits received by the surviving spouse are to be counted against the amount he/she is entitled to receive as an elective share. These include assets that pass to the surviving spouse from the decedent by intestacy (in unusual circumstances), by disposition under the decedent's will or by the testamentary substitutes discussed above. So, for example, for a couple whose assets consist primarily of a residence jointly owned by the parties as tenants by the entirety, the passing of the deceased spouse's undivided 50% share of the home to the surviving spouse by operation of law may well satisfy the surviving spouse's one-third elective share of the decedent's net estate.

The Uniform Probate Code

In contrast to New York law, the Uniform Probate Code (UPC), as updated in 2008, provides for an elective share of 50% of the *marital* portion of the decedent's "augmented estate", subject to a minimum amount called a "supplemental share." UPC §2-202. But the UPC's definition of the decedent's "augmented estate"

differs from New York's "net estate" in that it focuses not only on assets that were held by the decedent (either at the time of his/her death, or before a transfer), but rather on the assets (including transferred assets) of *both* parties, and on ensuring that the surviving spouse receives a fair share of the parties *collective* assets. UPC §2-203(a). And the portion of the augmented estate that is deemed "marital" is based not on the origin of the assets, as in New York law, but on the length of the marriage, based on a graduated scale that tops out with 100% of the augmented estate deemed marital after 15 years of marriage. UPC §2-203(b).

UPC 2-203(a) provides that

> [T]he value of the augmented estate … consists of the sum of the values of all property, whether real or personal, movable or immovable, tangible or intangible, wherever situated, that constitute
>
> (1) the decedent's net probate estate;
>
> (2) the decedent's nonprobate transfers to others;
>
> (3) the decedent's nonprobate transfers to the surviving spouse; and
>
> (4) the surviving spouse's property and nonprobate transfers to others.

"Nonprobate transfers to others" are defined by UPC §2-205 and UPC §2-208 and are similar to the "testamentary substitutes" defined in New York's EPTL §5-1.1-A(b)(1).

To avoid windfalls, UPC §2-209 provides that the surviving spouse's elective share is to be fulfilled in the first instance by (1) assets in the augmented estate that have passed to the surviving spouse by will or by intestate succession, (2) nonprobate transfers to the surviving spouse by the decedent during his/her lifetime (as defined in UPC §2-206), which include insurance benefits paid to the surviving spouse on account of the death of the decedent (not classified as a "testamentary substitute" under New York's EPTL §5-1.1-A[b[[1]) , and/or (3) the "marital" portion of the surviving spouse's assets and nonprobate transfers (calculated as set forth in UPC §2-203[b], discussed below). If those assets are equal to or greater than the amount of the surviving spouse's elective share of the marital portion of the augmented estate, then the elective share is fulfilled without the need to override any portion of the testamentary provisions made by the decedent.

New York's courts have **set a high bar for disqualification** from the right to receive an **elective share based on abandonment.**

The intent of this scheme is to approach more nearly the principles behind the equitable distribution laws that apply in divorce actions in New York and most states. As explained in the Uniform Probate Code Official Comment (Article II, Part 2):

> *The main purpose [of the UPC's 2008 revisions] is to bring elective-share law into line with the contemporary view of marriage as an economic partnership … .*
>
> The general effect of implementing the partnership theory in elective-share law is to increase the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. *A further general effect is to decrease or even eliminate the entitlement of a surviving spouse in a short-term, later-in-life marriage … in which neither spouse contributed much, if anything, to the acquisition of the other's wealth …* except that a special supplemental elective-share amount is provided in cases in which the surviving spouse would otherwise be left without sufficient funds for support.

Id. (emphasis added). Touching on an issue that is often a sensitive one in late-in-life marriages, and often gives rise to prenuptial agreements, the same Comment observes that "*Conventional elective-share law … basically rewards the children of the remarried spouse who manages to outlive the other, arranging for those children a windfall share of one-third of the loser's estate."* (emphasis added).

Under UPC §2-203(b)'s "Alternative A," the "marital portion" of the parties assets is established via a presumption based on the length of the marriage, rather than based on the factors that distinguish marital

property from separate property under the laws of New York and other states which often give rise to extensive and expensive litigation. UPC §2-203(b). *The adoption of that approach to defining "marital property" would be very consequential, however, in cases where the marriage is of long duration, and the decedent had a large amount of pre-marital or inherited assets.* It is presumably for that reason that UPC §2-203(b) offers an "Alternative B." Under "Alternative B," marital property is defined pursuant to the terms of the Model Marital Property Act or the "definition chosen by the enacting state."

Living Separate and Apart and Abandonment: New York Law

Another variable to be considered in the "death vs. divorce" analysis is whether a spouse will lose or has lost the right to an elective share due to abandonment or the like. EPTL §5-1.2(a)(5) bars a surviving spouse from claiming an intestate share or an elective share where "[t]he spouse abandoned the deceased spouse, and such abandonment continued until the time of death." New York law also denies the right to an elective share to a spouse "who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so, unless such marital duty was resumed and continued until the death of the spouse having need of support." EPTL §5-1.2(a)(6).

New York's courts have set a high bar for disqualification from the right to receive an elective share based on abandonment. In *Matter of Reifberg's Estate*, 58 N.Y.2d 134 (1983), the Court of Appeals, citing, inter alia, *Matter of Maiden*, 284 N.Y. 429 (1940), explained:

> It is axiomatic that, to challenge a spouse's right of election [based on abandonment], *more must be shown than a mere departure from the marital abode and a consequent living separate and apart*. Sensitive to the reality that marital partnerships … run the range of conflicts common to all human relationships, the law has long required that *one who seeks to impose such a forfeiture must, in addition, establish, as in an action for separation, that the abandonment was unjustified and without the consent of the other spouse*.

Id. at 138 (citations omitted and emphasis added). Accord *Estate of Arrathoon*, 49 A.D.3d 325 (1st Dep't 2008) (no abandonment where "petitioner and decedent, who had been married for 65 years, were each forced by circumstances to live with, or near, the child who could provide them with emotional and practical support … and that their separate living arrangements were necessitated by their advanced age and failing health"). See, however, *Estate of Maull*, 161 A.D.3d 570, 571 (1st Dep't 2018) (court below "properly determined that petitioner abandoned decedent and that the abandonment was unjustified in that it was the result of orders of protection against him in favor of decedent … based on his acts of domestic violence"). Fault grounds, such as cruel and inhuman treatment (including domestic violence) and abandonment, may have lost their vitality as grounds for divorce, but they retain it for providing justification for denying wrongdoer surviving spouses their elective shares.

Offspring's Rights: Death vs. Divorce

In contrast with the strong concern with child support in the context of divorce actions, as manifested by New York's very strong and long Child Support Standards Act based on the payor parent's gross income and applicable until the child has reached age 21 neither the UPC nor the trusts and estates laws of New York and the 48 other common-law states mandate that a decedent's minor children must receive any share at all of the decedent's estate even if disinheritance leaves them destitute. By contrast, the one civil law state, Louisiana, grants the child of a decedent the right to receive a share of the decedent's estate if he/she is under the age of 24, or is "permanently incapable of taking care of his or her person or administering his or her estate" due to "mental incapacity or physical infirmity." Louisiana Statutes Annotated, Louisiana Civil Code (LSA-CC) Article 1493. But even in Louisiana, a parent may disinherit such a child for any of eight specified reasons that constitute "just cause." LSA-CC Articles 1619-1621.

Hypothetical: Arithmetic Examples for Death vs. Divorce

Husband and wife were married 10 years ago. It was the second

marriage for both. Husband is now 72. Wife is now 60. Husband retired three years ago. The parties reside in New York.

Husband has the following assets:

- His undivided joint interest in the marital residence, with a market value of $800,000, which has no mortgage, and which the Husband owned prior to the marriage. Shortly after the marriage, Husband conveyed title to Husband and Wife jointly, as tenants by the entireties. But the parties signed a memorandum stating that the Husband's intent was not to surrender his separate-property interest in the marital residence in the event of divorce, but to ensure that Husband's interest would pass to Wife in the event of his death during an intact marriage.
- Bank and securities accounts, solely titled in Husband's name, with a total value of $500,000, only $200,000 of which would be deemed marital in the event of a divorce.
- Retirement assets of $600,000, all of it in a qualified plan under ERISA and §401 of the IRS Code, $250,000 of which was accumulated during the marriage of the parties. As part of Husband's divorce settlement with his first wife, Husband retained all of the retirement assets and wife number one waived her interest therein.

In a New York divorce action, only marital assets would be subject to equitable distribution. Since the marital assets would amount to $450,000 in this hypothetical—the marital portions of the bank and securities accounts and the retirement plan—Wife might expect to receive equitable distribution of $225,000, or perhaps a little more if the Wife did not have any significant assets of her own, and the court awarded her more than 50%. Because Husband is retired, Wife would likely receive little or no maintenance.

If Husband were to die while the parties were still married, however, Wife would end up in a much better financial position than in divorce, even if Husband had executed a will purporting to leave his entire state to his daughter by his first marriage. While the marital residence would be treated as separate property in a divorce action, upon Husband's death, sole title to the marital residence worth $800,000 would pass to Wife outside Husband's estate by operation of law (a testamentary substitute to the extent of half the value thereof, or $400,000). As surviving spouse, Wife would also receive the $600,000 in Husband's ERISA retirement plan outside of Husband's estate, thereby emerging with assets worth $1.4 million. If Husband had *not* made Wife joint title- owner of the marital residence, Wife would still receive the $600,000 in Husband's retirement account—more than the one-third of Husband's net estate of $1,150,000, namely, $383,333, computed as follows: $400,000 (one-half the value of the marital residence) plus $300,000 (one-half of the amount in his retirement account), plus $500,000 (100% of his solely titled bank and securities accounts), minus $50,000 (the estate's estimated administration expenses) equals a net estate of $1,150,000, one-third of which would be $383,333. Wife's elective share would be more than satisfied by the $600,000 in retirement funds alone and all the more so if she received the marital residence as well. In either case, Wife would do better financially as a result of Husband's death during the intact marriage than she would in a divorce.

Conclusion

Whether a spouse should take the "death gamble" and wait it out, or opt for an immediate divorce, depends on numerous variables. Where the decedent is domiciled at the time of his/her death will be a key factor, and one which, especially in a dysfunctional marriage, may well be beyond the control of the surviving spouse. The possibility of the estate being denuded by the decedent before his/her death is another factor. What does the spreadsheet comparing the bottom lines in death and divorce show? Will waiting it out be safe? Tolerable? These and other questions will need to be answered. Giving the client the best possible advice requires the attorney's careful assessment of all possible variables.