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DO US PART!"

Monday, May 2, 2011

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‘TIL DIVORCE AND DEATH DO US PART: IMPLICATIONS OF DIVORCE ON ESTATE PLANNING, ESTATE ADMINISTRATION, AND ESTATE LITIGATION

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Presented to:
Nassau County Bar Association
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I. Pre-Nuptial Agreements: Pension Rights, Elective Share

A. Pre-Nuptial Agreements

To be valid, must be signed by each party and acknowledged before a notary public in the manner required for a deed to be recorded (RPL § 309-a). This requirement is mandatory (DRL § 236 B [3]).

Generally, covers areas such as separate property, estate rights, spousal support obligations, debts, joint property and retirement benefits.

Pension Provisions – Some agreements provide for a spousal waiver of pension and other deferred compensation plans – INVALID if it is a qualified plan under ERISA. Only a spouse can waive ERISA rights and the person signing the waiver is not a “spouse” yet. Ex-401(k) plans. Does not apply to IRAs.

Solution:

1. Roll qualified plan into an IRA (so no waiver needed).

2. Pre-nuptial agreement can provide that parties will sign spousal waivers of pension rights once they are married. Such a provision IS enforceable (Richards v Richards, NYLJ, July 10, 1995, at 29, col 1 [Sup Ct, NY County]).
Gift and Estate Tax Deductions – Under IRC § 2043(b)(1) – generally, relinquishment of marital rights (e.g., right of election) is NOT treated as consideration in money or money’s worth BUT after July 1984 Code §§ 2043(b)(2) and 2516 transfers ARE treated as having been made for full consideration in money or money’s worth when:

1. there is a written agreement addressing such marital rights;
2. divorce occurs within 1 year before or 2 years after the agreement; and
3. the property was transferred to the spouse in settlement of marital rights or in order to provide support for children during minority.

B. Challenging Pre-Nuptial and Post-Nuptial Agreements

Generally, party seeking to set aside these contracts on grounds of fraud or undue influence bears the burden. However, in situations where the bargaining power of the spouses is unequal and the risk of undue influence, fraud, and deception increased, the burden falls on the party seeking to uphold the instrument purporting to waive the surviving spouse’s right of election (Matter of Greiff, 92 NY2d 341 [1998]). To determine whether a “fact based, particularized inequality exists,” courts consider numerous factors, including:

1. detrimental reliance on the part of the poorer spouse;
2. relative financial positions of the parties;
3. formality of the execution ceremony;
4. full disclosure of assets as a perquisite to a knowing waiver;
5. physical or mental condition of the objecting spouse at the time of execution;
6. superior knowledge/ability and overmastering influence on the part of the proponent of the agreement;

7. present of separate independent counsel for each party;

8. circumstances under which the agreement was proposed and whether it is fair and reasonable on its face; and,

9. provision for the poorer spouse in the will.

(see also Estate of Menahem, 16 Misc 3d 1125[A], 2007 NY Slip Op 51571[U], *9 [Sur Ct, Kings County 2007]).

Statute of Limitations – DRL § 250; Brody v Brody, 20 Misc 3d 350 [Sup Ct, Nassau County 2008].

Statutory Requirements in Execution - An instrument waiving of a surviving spouse’s right of election must be “acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property” (EPTL § 5-1.1-A[e][2]). The failure of acknowledgement of an agreement waiving inheritance rights may not be cured after the death of one of the spouses Estate of Menahem (13 Misc 3d 1226 A [Sur Ct, Kings County 2007]). However, a waiver that has been acknowledged, but contains an “improper” or “defective” certificate of acknowledgment results in an invalid acknowledgment that may be cured or corrected by the testimony of the officer who allegedly took the acknowledgment (Matter of Felicetti, NYLJ, January 22, 1998, at 31, col 3 [Sur Ct, Nassau County]). Even in the event of proof of a defective acknowledgement, the waiver can be proved through “substantial compliance” (Matter of Cerrito, NYLJ, June 12, 1995, at 36, col. 3 [Sur Ct, Nassau County]).
Cerrito, Decedent’s wife admitted that she signed the applicable pre-nuptial agreement in the presence of the notary, was personally known by the notary, and appeared before the notary for the express purpose of executing the pre-nuptial agreement. Notary testified that he observed the execution of the agreement by the decedent and the decedent’s wife, signed the agreement and affixed his signature and notary stamp below his signature. The notary admitted that there was no oral declaration required for a valid acknowledgement, because he did not ask the decedent’s wife whether she signed the instrument, and that Decedent’s wife did not orally declare to him that she signed the instrument. In Cerrito, Surrogate Radigan decided, after hearing these admissions, that the substantial requirements of an acknowledgment were satisfied even in the absence of an oral declaration. Cerrito stands for the general proposition that substantial compliance with the statutory requisites of an acknowledgment is sufficient to prove a waiver of spousal inheritance rights.

Other cases addressing “substantial compliance” include Matter of Doman, NYLJ, February 22, 2008, at 35, col 1 [Sur Ct, Suffolk County] and Matter of Kaszuba (Seviroli), 9 Misc 3d 1116[A] [Sur Ct, Nassau County 2005] Estate of Menahem, supra.
C. Waiving Rights in a Spouse’s Estate or Property other than the Elective Share

Even if the survivor has waived elective share rights in a pre-nuptial agreement, if he/she did not specifically waive rights to receive the survivor’s intestate share of decedent’s estate, the survivor can still object to the probate of a deceased spouse’s Will as a statutory distributee (Estate of Mimoun, NYLJ, September 24, 2008, at 39, col 3 [Sur Ct, NY County])

A waiver of the elective share does NOT include a waiver of the family benefits exemption under EPTL §5-3.1. A waiver of the family exemption must be “clear & unequivocal” to be binding (Matter of Dito, 630 NYS2d 575 [2d Dept 1995]; Matter of DeRoo, 562 NYS2d 925 [Sur Ct, Yates County 1990])

D. Waiving Fiduciary Appointments

Can your former spouse be disqualified from serving as a fiduciary by agreement? Of course. However, make certain that you address fiduciary when addressing your estate plan in the separation and divorce process – because even having waived his right to serve as fiduciary, surviving spouse may serve (see Matter of Neely, 64 Misc 2d 419 [Sur Ct, Nassau County 1970]; SCPA § 1418; SCPA § 1402; SCPA Article 17). See following example from a separation agreement:
ARTICLE IX

MUTUAL RELEASE AND DISCHARGE
OF CLAIMS AGAINST ESTATES

1. The Husband and Wife each renounce and release to the other party any and all rights and claims against the other party's estate including, without limitation, dower, curtesy and community property rights and interests, and any right of election, right of intestate succession, and right to a statutory allowance under the relevant provisions of the Estates, Powers and Trusts Law of the State of New York, including but not limited to or under the laws of testacy or intestacy in any jurisdiction whatsoever.

2. The Wife and Husband each waives, renounces and releases to the other party any and all rights and claims which the Wife or Husband now has or may in the future acquire in the real or personal property or estate of the other party, wheresoever situated, whether before or after the date of execution of this Stipulation, by reason of (i) inheritance or descent, (ii) any decedent estate law, (iii) any other statute or custom, (iv) the marital relationship, or (v) any other reason whatsoever.

3. Each party expressly revokes (i) any disposition whether outright or in trust to or for the benefit of the other party in her or his last Will and Testament executed prior to the date of execution of this Stipulation, and (ii) any nomination of either party as an estate representative or as any other representative or fiduciary in connection with her or his estate and/or last Will and Testament.

4. The Wife and Husband each renounce and they shall each execute any documents necessary to renounce any designation of a party as a beneficiary or survivor in a
testamentary substitute pursuant to which any interest in property does not pass under a last Will and Testament.

5. The Wife and Husband renounce and they shall each execute any documents necessary to renounce any right to act as administrator of the estate of the other party. Except as is necessary to enforce his or her rights under this Stipulation, the Wife and Husband shall not object to the probate of the other party's last Will and Testament. In the event that the Wife or Husband dies intestate, the surviving party shall allow administration upon the estate and personal effects of the deceased party to be taken and received by any person who would have been entitled thereto had the surviving party predeceased the deceased party.

6. Nothing herein, however, shall affect any disposition to either party or any nomination of a party as an estate representative in a last Will and Testament executed after the date of execution of this Stipulation.

7. Promptly upon the request by the executors, administrators or other legal representatives of the other party, the Wife and Husband shall each execute, acknowledge and deliver any instrument, which in the opinion of the executors, administrators or other legal representatives is necessary to effectuate the waivers contemplated by this Article.

8. Nothing in this Article shall bar a claim for a breach of this Stipulation during the lifetime of the deceased party brought by the Wife or Husband against the deceased party's estate, in addition to any other remedies which may be available.
II. No Pre-Nuptial or Post-Nuptial Agreement – Revocation of Bequests & Appointments, Denial of Elective Share

A. In General

When one spouse dies during the divorce, the parties are still legally married for estate disposition purposes. Spouse receives all bequests in Will, joint accounts and rights under EPTL §§ 4-1.1 (intestacy) and 5-1.1A (elective share).

B. EPTL §5-1.4 - Revocation of Bequests and Appointments

As soon as divorce decree signed, all Will provisions for the former spouse, including fiduciary appointments, are null and void and Will is read as if the former spouse pre-deceased, unless Will specifically provides otherwise.

In 7/2008, Section 5-1.4 was broadened to extend the revocatory effect of divorce to non-probate assets and certain fiduciary designations of a former spouse. Upon divorce, dispositions to or for a former spouse by Will, revocable trust, transfer on death accounts, life insurance beneficiary designation and, TO THE EXTENT PERMITTED BY LAW, pension and retirement beneficiary designations (see ERISA). (After divorce, make sure to check all beneficiary designations).

Section 5-1.4 also revokes upon divorce all nominations of a former spouse to serve in any fiduciary or representative capacity, including as executor, trustee, conservator, guardian, agent or attorney in fact.
Additionally, under Section 5-1.4, divorce severs the interests of former spouses in property held by them at the time of divorce jointly with right of survivorship and transforms into a tenancy in common (as had always been the case w/tenancies by the entirety).

Will or Revocable Trust can specifically provide that divorce does not revoke such bequests and appointments. Also, on TOD accounts, an institution’s account agreement supercedes the statute and can provide that divorce does not nullify the designation.

C. Denial of Elective Share

Elective share is the greater of 1/3 of the net estate or $50,000. Testamentary substitutes include some pension and profit sharing plans, as well as other non-probate assets. Other than by agreement/waiver, when is a surviving spouse disqualified from taking elective share? EPTL § 5-1.2 enumerates the legal bases. Abandonment is often interposed as ground to deny the elective share. “The spouse abandoned the surviving spouse, and such abandonment continued until the time of death” (EPTL § 5-1.2 [5]; see Estate of Arrathoon, NYLJ, August 30, 2006, at 29, col 3 [Sur Ct, NY County]; Estate of Arrathoon, NYLJ, October 22, 2007, at 32, col 4 [Sur Ct, NY County]; Estate of Carmona, NYLJ, May 12, 2000, at 30, col 2 [Sur Ct, Bronx County]; Estate of Perkins, NYLJ, January 8, 2003, at 19, col 3 [Sur Ct, Bronx County]).

Courts Wielding Equitable Powers to Deny Claims for the Statutory Right of Election- In addition to statutory grounds under EPTL § 5-1.2, courts can deny elective share on equitable grounds. In Matter of Berk (20 Misc 3d 691 [Sur Ct, Kings County 2008]), summary judgment was granted to the “surviving spouse” holding that she was entitled to elective share. Decedent’s
“spouse” had been the decedent’s live-in caretaker since 1997. By the time the two secretly married in 2005, he had become completely dependent upon her. In fact, the marriage occurred almost exactly one year prior to his death, when he was 99 years old (she was 47), was suffering from dementia, and had been deemed by a physician to be incapable of entering into binding contracts or managing his social affairs. The Second Department reversed (Matter of Berk, 71 AD3d 883 [2d Dept 2010]), holding that there existed “a triable issue of fact as to whether the petitioner had forfeited the statutory right of election” on equitable grounds. In particular, relying on Campbell v Thomas (2010 NY Slip Op 02082 [2d Dept 2010]), the Court stated that the estate had presented evidence that could prove the petitioner was aware of the decedent’s incapacity and inability to consent to marriage, and deliberately took “unfair advantage . . . by marrying that person for the purpose of obtaining pecuniary benefits that becomes available by virtue of being that person’s spouse, at the expense of that person’s intended beneficiaries.”

In Campbell, Decedent was 72 years old suffering from cancer and severe dementia. Daughter assumed 24 hour supervision. Daughter takes a week off and has a woman fill in for care of Decedent. Caretaker marries Decedent and Decedent dies six months later. Caretaker filed her notice of right of election. Appellate Division would not allow an absurd result of wrongful “surreptitious deathbed marriages,” and intervened based on equitable principles, denied her elective share positing that EPTL § 5-1.2 could not have been intended for this kind of conduct to be an exception to the disqualification provisions.

If in midst of divorce or separation - Client should change Will to provide for NO MORE than the elective share unless a separation agreement has been executed in which the spouses waive the right of election. EPTL § 5-1.4 will operate to nullify any bequests to spouse once the divorce is final, unless the Will specifically provides otherwise.
QTIPS - Couples that are separated or in the midst of a divorce, may want to consider a QTIP Trust. This way the spouse cannot change the ultimate beneficiaries but you preserve the marital deduction until the spouses are divorced. BUT – since spouse can still elect against the Will, it’s important to make the terms of the QTIP more attractive than the elective share.

Ex – the QTIP should be funded with enough to produce enough income to be greater than the income which would come from the elective share.

- Trustee of QTIP should be someone spouse is comfortable with and QTIP terms should permit invasions for emergencies.
III. Divorce, Life Insurance and Estate Tax Deductibility

**Life Insurance for Ex-Spouse** – If the spouses have a written agreement with respect to their marital and property rights and divorce occurs within 1 year before or 2 years after the date the agreement is entered into, and the obligation to maintain life insurance on one spouse naming the other as beneficiary is in settlement of his or her marital or property rights, then the insurance proceeds will still be included in the insured spouse’s estate for estate tax purposes, BUT an estate tax deduction will be allowed under Code 2053 to the extent such proceeds are found to be in settlement of marital or property rights (see Code §§ 2516(1) and 2043(b)).

So, if the life insurance of the ex-spouse is NOT put in a trust, you should be VERY clear in your drafting that the obligation to maintain the life insurance for the ex-spouse is in settlement of marital and property rights. To be ABSOLUTELY sure that none of the proceeds will be included in the insured spouse’s estate, the safest thing is to put it in an insurance trust.

**Life Insurance for Children** – The rules are different.

For Minor Children - Life insurance for the benefit of minor children will be included in the insured parent’s estate, but an estate tax deduction will be allowed **ONLY** to the extent that the life insurance is clearly needed to satisfy the support obligations to the children (Code § 2053). Any amount of the insurance proceeds that is not for a “reasonable allowance” for support of the children will be taxed and there will be no offsetting deduction.
For Adult Children - If the children have reached majority, then no part of the proceeds will be deemed to be for support. In that case (with adult children), you must show that the non-monied spouse gave up some support (i.e., a portion of maintenance) in consideration for the amounts provided for the adult children. This should be spelled out explicitly in the divorce settlement agreement. So, when you have a policy for the benefit of children, you should put it in a life insurance trust to make sure it’s sheltered from estate tax.

Life Insurance Trusts – should be drafted to include the “current spouse” and to exclude a spouse if an action for separation or divorce is commenced. This will preserve the life insurance trust for the decedent’s children. Consider the following language from a separation agreement:

**Life Insurance**

22. The Father shall establish a life insurance trust which the corpus will be a life insurance policy on his life in the amount of at least Two Million ($2,000,000) Dollars in order to secure his child support obligations for the Children in the event of his death prior to the Children’s Emancipation. The Children shall be named as irrevocable beneficiaries of the trust with the Wife as the sole trustee.

23. The Father shall pay all insurance premiums necessary to maintain such life insurance policy in full force and effect and shall maintain such policy free of any and all liens, encumbrances, loans or pledges, and each party shall deliver to the Wife copies of such insurance policy and letters of authorization enabling the Wife to document that he is in compliance with this provision within ten (10) days of the execution of this Agreement.

24. In the event that the Father predeceases the Mother prior to the Emancipation of the Children and has not maintained the life insurance policy or established such a life insurance trust required herein, and there are no proceeds from such insurance, then the Wife will be deemed as a creditor with a claim of $2,000,000 which shall be considered a charge against the Father’s estate.
IV. Divorce Settlements

A. Obligations to former spouses and children from that marriage and § 2053 Deduction

Facts – H & W divorced in 1972. Under the terms of their divorce agreement, they agreed to leave in their respective Wills “at least 50% of their net estate” to their two children of the marriage. Prior to the final divorce settlement, W had been receiving $1,800/month in alimony, while after the final divorce settlement, W received $700/month in alimony, such reduction made in consideration of the provision for the testamentary bequests to the children.

H remarried and was married to the second wife for over 30 years, having made many inter vivos transfers to his 2nd wife over the years. Most of H’s assets were held jointly with the second wife or in an IRA for second wife at H’s date of death. Total gross estate was about $6 million, probate assets were minimal and he left 2 annuities for his 2 children, totaling about $2 million.

Issues –

1. Definition of “net estate” – Does this mean net residuary estate? Does it include only probate assets? What about inter vivos transfers? All must be explicitly set forth in the divorce agreement. In the case above, the 2nd wife settled by making a substantial cash gift to each of the children.

2. Estate Tax Rules for the Deductibility of Payments to Former Spouses and Children from 1st marriage
§ 2053(c)(1)(A) – provides for the deductibility of “any indebtedness … when founded on a promise or agreement … to the extent that they were contracted bona fide and for an adequate and full consideration in money or money’s worth … .”

§ 2053(e) – concerns the relinquishment of marital rights as consideration in money or money’s worth, and cross references and adopts § 2043(b)(2), which sets forth the standard for determining estate tax deductibility.

§ 2043(b)(2) provides as follows:

For purposes of section 2053 (relating to expenses, indebtedness and taxes), a transfer of property which satisfies the requirements of paragraph (1) of section 2516 (relating to certain property settlements) shall be considered to be made for an adequate and full consideration in money or money’s worth.

Section 2516 provides, in relevant part, as follows:

Where a husband and wife enter into a written agreement relative to their marital and property rights and divorce occurs within the 3-year period beginning on the date 1 year before such agreement is entered into (whether or not such agreement is approved by the divorce decree), and any transfers of property or interests in property made pursuant to such agreement –
(1) to either spouse in settlement of his or her marital property rights … shall be deemed to be transfers made for a full and adequate consideration in money or money’s worth.”

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1 year before Agreement 2 years after

(a) Payments to Former Spouse

_Harris v CIR_, 340 US 106 [1950] - While Harris was a gift tax case, the gift and estate tax are construed _in pari materia_ (Id. at 107). In _Harris_, the Wife transferred certain real properties as part of their separation agreement and divorce and the court held that such a transfer was not a taxable gift.

_Natchez v US_, 705 F2d 671 [2d Cir 1983] - At issue was the deductibility of a lump sum settlement payment provided for in a separation agreement that was then embodied in a consent divorce judgment. Citing _Harris_, the court concluded that “if the separation agreement is executed in contemplation of divorce and incorporated in the [divorce] decree, the payments are not founded on the agreement, but on the decree, even if the agreement provides that it survives the decree.”

_Rev Ruling 60-160_, 1960-1C.B. 374 (1960) – Held that:

[where] the divorce court has the power to decree a settlement of all property rights or to vary the terms of a prior separation agreement, and does approve the agreement, any indebtedness arising out of such settlement is not considered to be founded on a promise or agreement
but, rather, it is considered to be founded upon such court
decree and is, therefore, an allowable deduction from the
gross estate in the amount of such indebtedness.

(b) Payments to 3rd parties – Children – Here, courts look to the
circumstances surrounding the execution of the separation/divorce agreement to determine if the
contract to transfer assets to the children was supported by consideration. The critical question is
whether the decedent used the circumstance of entering into the separation/divorce agreement to
avoid gift or estate taxes by transferring property to his children; that is, was there donative
intent (see Estate of Hawthorne, 402 F2d 592 [2d Cir 1968]).

(i) Minor Children – indebtedness arising out of an agreement
providing for the settlement of marital property rights or the maintenance of minor children is
deductible. This rationale does not apply to adult children (see Hawthorne, supra).

Under NY Law – parents of a child under age 21 must support such child and is
required to pay a fair and reasonable amount for child support (NY CLS Family Court Act
§ 413).

A decedent can contractually bind his estate to make support payments after his
death. The law does not authorize child support payments after the death of a parent absent an
agreement to the contrary (Flatto v Flatto, 59 AD2d 695 [1st Dept 1977]).

The decedent by his own voluntary act may bind his estate to pay child support or
maintenance. The agreement must specifically provide for the continuation of payments or
evidence a clear intention when the agreement is read as a whole that support payments are to continue after death (Riconda v Riconda, 90 NY2d 733 [1997]; Cohen v Cronin, 39 NY2d 42 [1976]).

In Chilson’s Will (54 Misc 2d 51 [Sur Ct, Ulster County 1966]), the deceased husband had agreed in the separation agreement to pay the entire cost of his infant children’s college education. The decedent’s son brought an action to enforce this provision. The court found that the provisions of the separation agreement survived the death of the parties because the agreement contained a provision binding the “heirs, distributes, executors, representatives and assigns” of the parties.

Leopold v United States, 510 F2d 617 [9th Cir 1975] - H had agreed in the property settlement agreement with his former wife to make payments to his daughter, and the estate had made payments to the guardian for the daughter. The executor sought to deduct such payments on H’s estate tax return. The IRS argued that a bequest to one’s own child can never be a deductible claim against the estate. The court found the payment was deductible because such payment was contracted for bona fide and for adequate and full consideration. The court was persuaded by the fact that the former wife had accepted a substantially smaller amount in alimony for herself in consideration for H’s promise to leave a specific sum of money to their daughter.
(Query – did the court even need to address the consideration issue as the payment was to a minor child? Perhaps the payment exceeded the value of the minor child’s support rights?)

(ii) **Adult Children** - Payments to adult children go beyond what is legally required of a parent so that consideration for such payments must be shown.

*Law v United States*, 1982 US Dist LEXIS 17319 [ND Ca] – H agreed to pay certain amounts to or for the couples’ daughter during and after the child’s minority. W waived her rights to alimony under the agreement. After H died, the daughter brought an action against H’s estate, alleging H failed to make the required payments to her and H’s estate settled with her. H’s executor deducted such payments made on H’s 706. The court found that the waiver of W’s alimony rights was good consideration, the agreement was legally enforceable and the payment deductible.

*In Kosow v CIR* (45 F3d 1524 [11th Cir 1995]), W agreed to forego support payments commensurate with her former lifestyle in exchange for H’s promise to give their 2 sons 2/3 of his estate in H’s Will. Contrary to the agreement, H did not provide for the sons and the sons sued. H’s estate reached a $4 million settlement with the sons and the Executor claimed such payment as a deduction on H’s 706.
The court found that W’s decision to receive lesser support payments in return for H’s promise to provide for their children in his Will constitutes full and adequate consideration so that the deduction was allowed.

In *Chemical Bank NY Trust Co. v. United States* (249 FSupp 461 [SDNY 1966]), H and W agreed in a separation agreement that H would leave 1/3 of his net estate to their daughters in exchange for W’s promise to pay the daughters’ expenses not provided by him. The court found there was not adequate consideration because the daughters received substantial monies from H during his life so that W’s promise had no value because there was no proof her obligation to make payments would be required.

In the case discussed first under “Facts” above, the IRS argued that a deduction was allowed only for the actuarial value of the difference in the payments W actually received and what she would have received without the reduction for the period from the date of the agreement to H’s date of death. Ultimately, based on *Kosow*, the IRS relented and permitted the full deduction.

B. Enforcing Settlement Agreements

**The Surrogate’s Court** - The primary function of the Surrogate’s Court is to administer justice in all matters relating to the estates and affairs of decedents. What procedural rules govern Surrogate’s Court practice?

1. The Surrogate’s Court Procedure Act;
2. The Civil Practice Laws and Rules;
3. Uniform Rules for the Surrogate’s Court;
4. How do you reconcile which rules to follow? (see SCPA § 102).

Every proceeding in the Surrogate’s Court is a special proceeding.

Article 31 of the CPLR governs disclosure in the Surrogate’s Court, except for limitation in probate proceedings.

**Dead Person’s Statute** - CPLR § 4519 precludes testimony if an objection is interposed at the trial or at a hearing on the merits where the witness has a financial interest in the outcome of the litigation, she is to be examined about a personal transaction or communication with the decedent, she is to be examined as a witness on her own behalf, and the testimony sought to be elicited is against the fiduciary or the survivor of a deceased person or a person deriving his title from a deceased person.

**Article 18 of the SCPA – Claims** - A person dies, and her husband or former husband seeks to avail himself of his rights under a settlement agreement. What is the procedure? The husband or ex-husband of the Decedent is a “claimant,” and the procedure governing his claim against Decedent’s estate is governed by SCPA Article 18. Generally, in the Surrogate’s Court the issues will be raised in a proceeding to determine the validity of a claim under SCPA Article 18, or in an accounting proceeding pursuant to SCPA Article 22. However, the Decedent’s husband or ex-husband has the option of bringing his action to avail himself of his rights or perceived rights in another civil court with subject matter jurisdiction, usually, the Supreme Court.
Under SCPA Article 18, claimants may present written notice of claims in writing to the fiduciary (SCPA § 1803). Timing is important - Seven-month “statute of limitations” - the fiduciary of a Decedent’s Estate will be free from personal liability to a claimant who does not present her written notice of claim within seven months of the issuance of letters if that fiduciary disposes of all estate assets. That does not mean that the estate or the beneficiaries would not be required to satisfy a valid claim, it just takes the fiduciary “off the hook” for personal liability (SCPA § 1802).

The estate fiduciary has 90 days to either allow or reject the claim, but, if the fiduciary fails to allow a claim within 90 days of the notice, it is deemed rejected (SCPA § 1806).

Options of claimant upon rejection of claim - 1) Compel an accounting pursuant to SCPA § 2205, and have the validity of the claim determined in the accounting proceeding; 2) bring a proceeding pursuant to SCPA § 1809 to determine the claim; or 3) bring an action in another Court. However, if the claimant desires to bring an action in another court, this must be done within 60 days of the rejection of the claim or the Surrogate’s Court becomes the only place where the matter can be adjudicated (SCPA § 1810).

Statute of Limitations - For statute of limitations purposes, a properly filed notice of claim puts the parties in the same position as if an action had been commenced in Supreme Court, and issue had been joined (Matter of Feinberg, 18 NY2d 499 [1966] SCPA § 1808; See also CPLR § 210 (18 month tolling for death); 2B Carmody-Wait 2d § 13:377).
Settlement Agreements – Substantive Law - Rights are governed by contract law, and we look to the provisions of the agreement (generally). In Matter of Granwell (20 NY2d 91 [1967]) the Court of Appeals held that a separation agreement providing for the distribution of a portion of one party's estate to the other, or their children, is enforceable against an estate. There, a separation agreement provided for the husband to leave one-half of his estate to his son from the marriage, and prohibited the husband from transfers without adequate consideration. The husband remarried and funded joint accounts with his second wife and funded a revocable trust. Decedent’s son was held to be a third-party beneficiary of his parents' separation agreement, a creditor of his father's estate (see also Estate of Small, NYLJ May 3, 1991, at 28, col 1 [Sur Ct NY County]).

Pre-nuptial and post-nuptial agreements will be enforceable at death (Carracino v Carracino, NYLJ, April 16, 2009, at 28, col 3 [Sur Ct, Nassau County]).

Matter of Pavese (195 Misc 2d 1 [Sur Ct, Nassau County 2002]) provides the clearest explanation of the bit of uncertainty in the current law. Surrogate Riordan looked at the apparent split between two Appellate Division cases, Passmore v King, from the Second Department, and Brower v Brower, from the Third Department. At this point, it may be safe to assume that separation agreements will be enforceable provided that on their face, the intent of the parties is that they be enforceable independent of whether there is a divorce (see Zuckerman v Zuckerman, NYLJ, April 1, 2005, at 21, col 1 [Sup Ct, NY County]; Estate of Dindiyal, [Sur Ct Nassau County, 9/24/2009]).

Interesting Cases Arising out of Settlements in Divorce and Schneider v Finmann - Estate of Wallens (9 NY3d 117 [1997]) – Facts: Petitioner, the trustee of a trust created under his
father’s will for the benefit of Petitioner’s daughter sought judicial settlement of his account.

After the execution of the will, Petitioner and his wife, the mother of Petitioner’s daughter, were divorced. Petitioner agreed, pursuant to a separation agreement to pay child support, including educational expenses and any and all uninsured medical expenses for daughter. Upon Petitioner’s father's death, the testamentary trust, which permitted Petitioner to distribute monies “as the Trustee shall deem advisable for her proper support, education, maintenance and general welfare,” was funded.

_Leff v Fulbright & Jaworski, LLP_ (2009 WL 1995896 [Sup Ct, NY County], aff’d 78 AD3d 531 [1st Dept 2010]) - Facts: Separation agreement between husband and wife has the husband agreeing to draft a will in which he would leave “one-half of his probate estate” to the son.

_Schneider v Finmann_ (15 NY3d 305 [2010]) – The Court has relaxed the privity bar, and held that privity, or a relationship approaching privity, exists between the personal representative of an estate and the estate planning attorney.
‘TIL DEATH & DIVORCE
DO US PART”
DRAFTING ISSUES:
MARITAL AGREEMENTS/ESTATE CONSIDERATIONS

Mary Ann Aiello, Esq., Mary Ann Aiello PC, Garden City
Nancy Gianakos, Esq., Albanese & Albanese LLP, Garden City
**DRAFTING ISSUES:**
**MARITAL AGREEMENTS/ESTATE CONSIDERATIONS**

**Formality of Agreements**

*DRL §236 Part B(3)* – Writing, subscribed by parties and proper acknowledgment of marital agreements or proven in the manner required to entitle a deed to be recorded. Ignore formality at your own peril.

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**Waiver of Estate Rights**

<table>
<thead>
<tr>
<th>Right of Election</th>
<th>EPTL 5-1.1 (Life insurance excluded from elective share)</th>
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</thead>
<tbody>
<tr>
<td>Right of Set off</td>
<td>EPTL 5-3.1 (General Waiver will not suffice – could equal $56,000)</td>
</tr>
<tr>
<td>Distributive Shares</td>
<td>EPTL 4-1.1</td>
</tr>
</tbody>
</table>

Until the Judgment of Divorce is entered or by formal written Agreement to the contrary, if the matrimonial litigant dies – the surviving spouse retains all of the foregoing rights.

Spouse can relinquish right to exempt property but must do so specifically, see:

*Matter of DeRoo* 148 Misc 2d 856, 562 N.Y.S. 2d 925
(Surrogate’s Court, Yaks County 1990)

*Matter of Schepps.* N.Y.L.J. April 8, 2008 at 34 col 5
(Surrogate’s Court Westchester County)

Wife did not waive dispositions under Husband’s will when she signed separation agreement relinquishing her interests in her husband’s property and estate without specific mention of will bequest.

**Example 1 – Deficient Clause of Waiver**

**Example 2 – Legally sufficient Clause of Waiver**

**Example 3 – Clause quid pro quo of testamentary disposition in consideration of Waiver of other estate rights**
Waiver of Retirement Rights

No effective waiver prior to marriage; recommended clause for future execution by parties subsequent to marriage and use of power or attorney if party fails to cooperate.

Obtain “Form” Waivers for ERISA Plans and attach to antenuptial agreement as exhibit.

*Example 4 – Provision for Waiver Execution and P.O.A.*

Qualified Domestic Relations Orders (s)- if client previously married, assure client has complied with Divorce Judgment in obtaining QDRO.

Insurance Issues

Long Term Care Insurance
Disability Insurance
Life Insurance

*Example 5* Sample of Deficient Clause
*Example 6* Legal Sufficient Clause (to obligate estate)
*Example 7* Trust Provision

Hypotheticals/Drafting Recommendations:

**Hypo 1**
1. Review by estate attorney
2. Define “estate” Hypo 1 – what is included.

**Hypo 2**
3. Acknowledgment by new spouse of any uneffectuated QDRO(s)
4. Place Plan Administrators on notice if QDRO not yet entered and served on Plan Administrator
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Hypo 2  3. Acknowledgment by new spouse of any uneffectuated QDRO(s)
          4. Place Plan Administrators on notice if QDRO not yet entered and served on Plan Administrator

Hypo 3  5. Each party waives interest in life insurance policies; may not be binding upon third party insurer.
ARTICLE 2

WAIVER OF ESTATE RIGHTS

2.1 The “Wife” hereby irrevocably and forever waives, renounces, surrenders and relinquishes the right of election to share in “Husband’s” Estate given to her by Section 5-3.1 and 4-1.1 of the Estates, Powers and Trust Law of the State of New York, or any amendment thereto or by any other section or by any other law now or hereafter existing, pursuant to the Statutes of the State of New York or elsewhere, to elect to take against the Will of “Husband”.

2.2 That “Husband” hereby irrevocably and forever waives, renounces, surrenders and relinquishes the right of election to share in “Wife’s” Estate given to him by Section 5-1.1 of the Estates, Powers and Trust Law of the State of New York, or any amendment thereto or by any other section or by any other law now or hereafter existing,
pursuant to the Statutes of the State of New York or elsewhere, to elect to take against the Will of “Wife”.

2.3 Each party releases and relinquishes any and all claims and rights that he or she may have had, now has or may hereafter acquire to act as Executor or Administrator of the other party's Estate.

2.4 The purpose of this agreement is to declare that it is the intention of the parties hereto that neither shall have an interest in the Estate of the first one dying, nor have any claim or demand on the Estate of each decedent nor have any claim as representative of such decedent regardless of any Statute of Distribution or any other Statute to the contrary of the State of New York or any other State or country.

2.5 Nothing herein contained shall be deemed to constitute a waiver of either party of any bequest that the other party may choose to make to him or her by Will or Codicil in an amount greater than has been set forth herein. However, the parties acknowledge that no promises
of any kind have been made by either of them to the other with respect to any such bequest.

2.6 The Husband agrees that in consideration of the Wife’s waiver as set forth herein, he will provide in his Last Will and Testament that in the event he predeceases the Wife, and in the event the parties are married less than ten (10) years on the date of his death, the Wife shall receive a sum equal to 25% of his net estate and in the event the parties are married more than ten (10) years on the date of his death, the Wife shall receive a sum equal to 34% of his net estate.
the event ownership of said property is documented by an instrument such as a stock
certificate, bank deposit etc. said instrument is in joint name.

ARTICLE 2

WAIVER OF ESTATE RIGHTS

2.1 The “Wife” hereby irrevocably and forever waives, renounces, surrenders and relinquishes,
the right of set-off now provided in Section 5-3.1, all distributive shares presently provided
in Section 4-1.1, the right of election to share in “Husband’s” Estate given to her by Section
5-1.1 all as set forth in the Estates, Powers and Trust Law of the State of New York, or any
amendment thereto or by any other section or by any other law now or hereafter existing,
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2.6 The Husband agrees that in consideration of the Wife’s waiver as set forth herein, he will provide in his Last Will and Testament that in the event he predeceases the Wife, and in the event at the time of his death a “separation event” has not occurred, the Wife will receive a 33% interest in the Husband’s business known as 

2.7 The Wife agrees that in consideration of the Husband’s waiver as set forth herein, she will provide in her Last Will and Testament that in the event she predeceases the Husband, and in the event at the time of her death a “separation event” has not occurred, the Husband will have the right at his sole option to exclusive use and occupancy of the residence located at for a period of up to twenty-four months, following the Wife’s death and further that during said period of exclusive use and
occupancy the Wife’s estate will maintain home-owner’s insurance and will be responsible for the cost of any repairs in excess of $250.00. The Husband agrees that during his period of exclusive use and occupancy he will be responsible for payment of the real estate taxes and the utilities.
choose to make to him or her by Will or Codicil in an amount greater than has been set forth herein. However, the parties acknowledge that no promises of any kind have been made by either of them to the other with respect to any such bequest.

2.6 The Husband agrees that he will provide in his Last Will and Testament that in the event he predeceases the Wife, and if at the time of his death the parties had been married more than five years but less than 10 years, then in that event a trust will be created funded with 25% of his estate and that the Wife will be the beneficiary of the income of said trust until her death, and upon the Wife’s death, the principal of the trust will pass on to the designated beneficiaries as determined by the Husband. The Husband further agrees that he will provide in his Last Will and Testament that in the event he predeceases the Wife, and if at the time of his death the parties had been married more than 10 years, then in that event a trust will be created funded with 50% of his estate and that the Wife will be the beneficiary of the income of said trust until her death, and
upon the Wife’s death, the principal of the trust will pass on to
the designated beneficiaries as determined by the Husband.
The Husband further agrees that he will provide in his Last
Will and Testament, that in the event he predeceases the Wife,
and in the event at the time of his death the parties’ residence
was the premises known as: ___________________,
then in that event the Wife shall have the exclusive right
to continue to use and occupy said premises for a period of up
to one year following his death. The Wife agrees that during
the period that the wife continues to use and occupy said
premises and provided the Husband has complied with his
Agreement as set forth in Article 6.2, the Wife will be
responsible for paying all the expenses incident to her use and
occupancy, including the real estate taxes, mortgage payment,
fire insurance, and utilities. In the event the Husband does not
comply with his Agreement as set forth in Article 6.2 the
Husband agrees that it will be the obligation of his estate to
pay all the expense incident to the Wife’s use and occupancy of the residence.

2.7 The Wife agrees that she will provide in her Last Will and Testament that in the event she predeceases the Husband, and if at the time of her death the parties had been married more than five years but less than 10 years, then in that event a trust will be created funded with 25% of her estate and that the Husband will be the beneficiary of the income of said trust until his death, and upon the Husband’s death, the principal of the trust will pass on to the designated beneficiaries as determined by the Wife. The Wife further agrees that she will provide in her Last Will and Testament that in the event she predeceases the Husband, and if at the time of her death the parties had been married more than 10 years, then in that event a trust will be created funded with 50% of her estate and that the Husband will be the beneficiary of the income of said trust until his death, and upon the Husband’s death, the principal of
the trust will pass on to the designated beneficiaries as determined by the Wife.
6.1 **Pensions/Retirement Plans.** The parties acknowledge and agree that each may be a participant in one or more individual retirement accounts, pension and/or other types of deferred income plans (collectively called the “Plans”); that each shall hold all rights in their respective Plans without any claim, in fact or in law, which the other party may otherwise have therein; that each expressly waives all rights which may now, or hereafter, exist in the Plans of the other, including, but not limited to, preretirement and joint survivor annuities, becoming a participant in, and/or beneficiary of, the Plans of the other; or, to require the consent of the other with respect to any right, option, distribution or benefit which a party may now, or hereafter, have or choose to exercise. It is the essence of this Agreement that, within ten (10) days of the parties’ marriage, either party shall present to the other party such documents, as required by their respective plans to effectuate the foregoing and the other party, without charge, shall execute and acknowledge such documents. [Redacted] acknowledges that upon her failure to execute said documents within fifteen (15) days of presentment of same to her by [Redacted] or his agent, that [Redacted] pursuant to a power of attorney from [Redacted] to [Redacted], executed simultaneously with this Agreement, shall execute said documents on her behalf.
ARTICLE 6

INSURANCE

6.1 Each of the parties agree that during their marriage, each will maintain disability insurance and long term disability insurance, including nursing home insurance.

6.2 The Husband agrees that during the parties’ marriage and until a dissolution of the parties’ marriage, he will maintain a term life insurance policy in the amount of $100,000.00 insuring his life, and naming the Wife as the irrevocable beneficiary.
ARTICLE XXIX

LIFE INSURANCE

29.1  A. it is agreed that each party shall maintain at their sole cost and expense life insurance policies on their respective lives designating the other party as the beneficiary of said policies.

Husband shall maintain:

<table>
<thead>
<tr>
<th>Carrier</th>
<th>Face Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aviva</td>
<td>$350,000.00</td>
</tr>
</tbody>
</table>

Wife shall maintain:

<table>
<thead>
<tr>
<th>Carrier</th>
<th>Face Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Metropolitan Life Insurance</td>
<td>$100,000.00</td>
</tr>
</tbody>
</table>

29.2  B. Each party acknowledges and agrees that he/she shall not encumber or hypothecate any of said policies in any manner during the period the policy(s) are in effect.

29.3  C. Each party shall provide the other party proof that the aforesaid insurance policy(s) are in effect on an annual or more frequent basis and the necessary beneficiary designation has been made.

29.4  D. If a party predeceases the other party, and should the policy(s) herein above described not be in effect, then the deceased party’s estate shall be liable to the surviving party to the extent set forth for the face amount of the policy(s) which should have been in effect, which distribution shall be made by his/her estate.
ARTICLE XXXII

LIFE INSURANCE

32.1 A. Until the emancipation of all three (3) children as defined by this Agreement, the parties agree that:

(i) each party shall maintain at their sole cost and expense the Life Insurance policies set forth in Schedules B and C of this Agreement;

(ii) each party shall have the right to withdraw and or borrow from their respective policies the cash value therefrom;

(iii) Husband shall establish and maintain a trust as set forth herein for the benefit of the children with Wife designated as trustee and fund the trust with the life insurance proceeds of his policies as set forth in Schedule C of this Agreement paid at his death in the sum of ONE MILLION FIFTY THOUSAND ($1,050,000.00) DOLLARS;

(iv) Husband shall name Wife as irrevocable beneficiary of ONE MILLION FIFTY THOUSAND ($1,050,000.00) DOLLARS of life insurance proceeds of his policies as set forth in Schedule C of this Agreement; and

(v) Wife shall establish and maintain a trust as set forth herein for the benefit of the children with the husband designated as trustee and fund the trust with the life insurance proceeds of her policies as set forth in Schedule B of this Agreement paid at her death in the sum of THREE HUNDRED FIFTY THOUSAND ($350,000.00) DOLLARS.

B. The life insurance proceeds designated by this Agreement for the benefit of the children shall be paid to a trust, the trust to be established by each party within sixty (60) days of this Agreement; the terms of the trust shall provide that the children are equal beneficiaries, that the proceeds of the trust shall be used for their health, education and welfare and upon each child attaining twenty-five (25) years of age, he shall receive one sixth of the trust corpus and upon attaining thirty (30) years of age, each child shall receive one sixth (1/6) of the trust corpus.
HYPOTHEticals
Bar Association Program for May 2, 2011

Hypothetical One

Client, Ms. Adams, plans to be married and requests a prenuptial agreement. She wants assurances that the prenuptial won’t be set aside. She was married before and pursuant to an agreement that was incorporated into Judgment of Divorce agreed that children from former marriage would be left the residence that she is now living in and which was the former marital residence. The residence has a fair market value of approximately 1 million dollars and a mortgage of about $100,000.00. She has three children who are 22, 18 and 14. In addition, Ms. Adams has other assets totaling $1,000,000.00.

The client’s former husband, Mr. Adams, had given up his interest in the marital residence in consideration of her agreement to leave the residence to the three children upon her death.

Ms. Adams wants to know if she should transfer title to the house now to her children and take back a life estate. However, she also wants to make sure if after she marries, she dies before her new husband Mr. Brown that he can stay in the house for at least a year after her death.

Client, Mr. Brown has no residence but liquid assets that equal approximately $2,000,000.00. He thinks that each of them should agree that upon his/her death the other
receives 25% of the estate of the deceased spouse. He assumes that the value of Ms. Adams house will be considered when the 25% is calculated. He is not aware of the terms of Ms. Adams divorce agreement.

Ms. Adams would agree but needs to make sure that her house which must go to her children is not part of her estate. In addition pursuant to the divorce with Mr. Adams she has to maintain life insurance in the amount of $750,000.00 for the three children until all three children are emancipated.

She also has a recurring problem with Mr. Adams not paying his child support timely. At the present time Mr. Adams owes Mrs. Adams almost $50,000.00. If he pays it she wants to make sure that Mr. Brown is not entitled to it.

What drafting advice do the matrimonial attorneys have if representing Ms. Adams/Mr. Brown?

What drafting advice do the estate attorneys have if representing Ms. Adams/Mr. Brown?
Hypothetical Two

Mr. Canon, a physician, is 55 years old and recently divorced. He is obligated to pay maintenance to his former wife for ten years. He expects to retire at 65 at which time he will start collecting his pension from the hospital where he has been chief of surgery for many years. However at that time his former wife will be entitled to 37% of the monthly payment. Pursuant to the agreement that was incorporated into the Judgment of Divorce, he is in the process of transferring half of the value of his IRA’s and his TDA into an IRA for his former wife. He is also obligated to pay child support for his only child, a daughter, who is eighteen and to pay for her college expenses at Harvard University. In the separation agreement that was incorporated but not merged in the divorce judgment, he also agreed to pay for her post college education if she chooses to go to medical school. He has been saving money for this purpose for years and now has over $100,000.00 in a 529 plan and $100,000.00 in a custodial account.

Mr. Canon plans to marry his thirty year old girlfriend who is seven months pregnant. He is madly in love with her and has promised to take care of her forever. However, his divorce was very expensive and although he thinks that he has finally met his true love, his business colleagues, financial planner and accountant have all strongly recommended that he have a prenuptial agreement.
Ms. Davis, a struggling actress, is thrilled to have met and been impregnated by Mr. Canon. She knows that Mr. Canon has responsibilities to his ex-wife and his daughter consisting of maintenance and child support. She does not know that Mr. Canon’s former spouse is going to get a share of his pension or half his other retirement accounts. She is not happy about signing a prenuptial agreement but wants to be married before her children are born. If she has to sign a prenuptial agreement, she wants to make sure that if Mr. Canon dies before her, a likely scenario, she and more importantly the twin boys that she is carrying will receive everything else that he has.

What drafting advice do the matrimonial attorneys have if representing Mr. Canon/Ms. Davis?

What drafting advice do the estate attorneys have if representing Mr. Canon/Ms. Davis?
Hypothetical Three

Mr. Edwards and Mrs. Edwards are getting a divorce. They have two children, twins, who will be starting college in two years. The Edwards are using a mediator to assist them in reaching an agreement. Mr. Edwards inherited money from his parents. However, after he received it he put it in an account with Mrs. Edwards. The money deposited into a Fidelity investment account, was never touched and it has grown significantly. Mr. Edwards always said he was saving it for the children’s college education and post graduate studies. Therefore, in the parties’ agreement that became part of the Judgment of Divorce, Mrs. Edwards waived any interest in the money and Mr. Edwards agreed that he would be solely responsible for his children’s education including graduate studies for a period of up to four years after each received his/her college degree. Mr. Edwards never bothered to take Mrs. Edwards name off the Fidelity account since he had the agreement in which she waived any interest. He also did not change his will which left 50% of his estate to his first wife and 50% to be divided between his children. Further he was supposed to provide a life insurance policy for the two children for $500,000.00 but he never did. The only policy he has which he has continued to maintain although he was under no obligation to do so was for 1 million dollars and named his former wife as beneficiary.

Mr. Edwards remarried a year after his divorce. He did not have a prenuptial agreement with his new wife, Ms. Grant. He never made any provisions for her in a Will. He did
name her as the beneficiary of life insurance that he obtained through his new employer and he did name her as beneficiary of his new 401k plan into which he deposited by means of a roll-over money that was in a prior plan.

When his children started college he paid for their first year from the Fidelity account. To pay for the children’s second year of college he used a significant sign on bonus he received when he changed companies and trust funds for the twins. *

. During that year he took some of the money out of the Fidelity account and used it to buy a weekend home in the Hamptons which he put in his name and the name of his new wife. Just before the children started their third year of college, Mr. Edwards died of a massive heart attack.

Mrs. Edwards immediately withdrew the balance in the Fidelity account. In addition she is suing Mr. Edwards’ estate for the cost of the children’s third year of college and has made it clear that she expects the estate to assume Mr. Edwards’ obligations regarding payment of college. The twins also have commenced an action against Mr. Edward’s estate to recover trust fund money he used to pay their college expenses.

• Mr. Edwards at the time of his death was a trustee of a testamentary trust established by his bachelor uncle for the twins; the trust funds were to be used for college and post graduate studies, the balance of the principal paid to them upon reaching age 30.
Ms. Grant is seeking advice. Mrs. Edwards and the twins are seeking advice.

What advice do the matrimonial attorneys have if representing Ms. Grant/Mrs. Edwards?

What advice do the estate attorneys have if representing Ms. Grant/Mrs. Edwards?

Hypothetical Four:

Ms. Amour, a 55 yr old divorcee and successful business woman of a major publishing company, becomes romantically involved with her 28 year old apprentice, John. They have been dating for about a year and John is giving Ms. Amour an ultimatum that she either marry him by June 15th his birthday or it’s over.

Ms. Amour calls her attorney on April 18th and explains that she wants a prenuptial agreement. Her attorney prepares a draft agreement for review by Ms. Amour – watermarks it “draft” and sends in a pdf format to the client about a week later.

Mr. Amour and his sons are in an uproar over the impending nuptials. They are the limited partners in the publishing company with Ms. Amour and they want to be protected in the event Ms. Amour should predecease John –
they do not want to deal with John having being involved in the business as his wife’s successor.

On May 1, Ms. Amour and John sign the draft agreement where each waives their right of election. The next day they get married and sign and redate the agreement and have their signatures witnessed by a notary.

On May 11th, Ms. Amour contacts her attorney and tells her what has transpired. She tells her lawyer that John is unhappy with the provisions in the event they divorce and she wants to increase his maintenance package. John now has an attorney representing him. Further, Mr. Amour and his sons have sent a notice pursuant to their limited partnership agreement that they demand a copy of the prenup whereby John waives his interest in the publishing company at her death. Ms. Amour forgot to tell her attorney about this provision.

Ms. Amour dies on May 30th of a brain aneurysm.

What advice does Ms. Amour’s matrimonial/estate lawyers have for her estate?

What advice does John’s matrimonial/estate lawyer have regarding his post marital rights at Ms. Amour’s death in light of the prenuptial agreement he signed on May 1 and May 2?

What advice has the estate lawyer for the Amour sons and ex-husband?