When Family Law and Estate Planning Collide: General Waivers in Premarital Agreements Can Waive Spousal Rights in Decedent’s Estates

By Daire Roebuck

In April 2018, the Court of Appeals published its opinion in a review of the trial court’s denial of a surviving spouse’s petition to claim an elective share. But the opinion was not a review of the valuation of total net assets, or the express terms of the decedent’s will, or even the provisions of the related irrevocable trust. Using the lens of contract law, the opinion was focused upon the intent of the parties as expressed in their premarital agreement. In re: Estate of Thomas S. Sharpe, Deceased, reminds us that what estate planners and family attorneys do or don’t know about the impact of provisions in the clients’ premarital agreement matters quite a bit. In re Sharpe is the now-applicable precedent that certain specific marital rights will be included in the general waivers within a premarital agreement.

NC Case Law Before Sharpe

About sixty-five years ago in Iredell County, Christine McCrary Bowles (“Christine”) and husband, Louis Bowles (“Louis”) recorded a “deed of separation”: a general warranty deed that conveyed the marital home to their children, but reserved to Christine a lifetime right to live in the home. Bowles v. Bowles, 237 N.C. 462, 75 S.E.2d 413 (1953). As you might expect, Christine not only moved out a few years later, but she and Louis then disagreed about whether the net rent owed to her meant gross rent “without any deduction [for] the cost of major repairs and upkeep, property taxes and payments on fire insurance[.]” The Supreme Court found in Christine’s favor: Louis was stuck with all costs of maintenance, taxes and insurance; and Christine was entitled to the balance after the property management company had taken its fee. Bowles, 237 N.C. 466–467, 75 S.E.2d at 416.

How did the Court reach its construction of the deed of separation? “All through the deed of separation runs the clear intent of [Louis] to provide support for his minor children, to give them an advanced education, and to provide for them and his wife during her life, whether subsequently divorced or not, a home in Statesville[.]” Id. The Court held that the clear intent of the parties was paramount to construing the deed of separation as a whole. Id. 1 repeat: the Court used “clear intent of the parties,” not reading the instrument as a whole to construe the contract in controversy.

Twenty years after Bowles, the North Carolina Supreme Court reviewed another separation agreement. But this time, Thomas G. Lane, Jr., (“Lane”), administrator of the estate of Tommy Colee (“Tommy”), opposed Tommy’s separated but surviving spouse, Lynn Colee (“Lynn”), and Tommy’s surviving parents, Betty and Thomas. Lane v. Scarborough, 284 N.C. 407, 200 S.E.2d 622 (1973). “Yes!” you just said to yourself, “A decedent – finally!” And, to validate your cynicism, Lynn and Tommy’s parents were fighting over an estate worth less than $10,000. (Even adjusted for inflation, that’s less than $57,000 in 2018.)

The Supreme Court reviewed the separation agreement between Tommy and Lynn to determine if Lynn had or had not released her right to sue the estate for her intestate share. “Each agreed that the other would thereafter hold, acquire, and dispose of all classes and kinds of property, both real and personal as though free and unmarried, without the consent or joinder of the other party[.]” Lane, 284 N.C. at 411, 200 S.E.2d at 624. The Court held that, “the specific terms of the contract are totally inconsistent with an intention that the parties would each retain the right to share in the estate of the other under [intestate statutes], if he or she were to become the surviving spouse.” Id. “In this case the intention of each party to release his or her share in the estate of the other is implicit in the express provisions of their separation agreement, their situation and purpose at the time the instrument was executed. The law will, therefore, imply the release and specifically enforce it.” Id. And so, the Court’s opinion in Lane pulled through the thread from Bowles: the contract will be construed by the “clear intent of the parties.”

About twenty-five years after Lane, the Court of Appeals reviewed a postmarital agreement between Dottie and Joe Napier. Napier v. Napier, 135 N.C. App. 364, 520 S.E.2d 312 (1999), disc. rev. denied 351 N.C. 358, 543 S.E.2d 132 (2000). The Court noted that the Napiers “were living together at the time the Agreement was executed.” Napier, 135 N.C. App. at 367, 520 S.E.2d at 314. Maybe, like me, you’re picturing Kathleen Turner and Michael Douglas in 1989’s The War of the Roses. Let’s treat our property as if we are separated people, but why be separated?

In contrast to the separation agreements at issue in Bowles and Lane, the Court of Appeals held that “the general releases in the [agreement] cannot be construed to include a waiver of alimony.” The Court reasoned, “Indeed, we have specifically held that any waivers or agreements, made during the marriage, concerning the right of spousal support must be made in the context of a separation agreement and executed pursuant to section 52-10.1.” Napier, 135 N.C. App. at 368, 520 S.E.2d at 315 (emphasis added). Because the contract in controversy was a property agreement and not an express separation agreement, “the validity of the Agreement as it relates to the waiver of alimony is not to be judged in the context of section 52-10.” Thus, the Court of Appeals held that a postmarital agreement does not “constitute an ‘express’ release or settlement of alimony claims, [if] it does not specifically, particularly, or explicitly refer to the waiver, release, or settlement of ‘alimony’ or use some other similar language having specific reference to the waiver, release, or settlement of a spouse’s support rights.” Id. 367, 520 S.E.2d at 314.
Quick recap: Under Bowles and Lane, if the contract is a separation agreement, it will be construed using the clear intent of the parties. Under Napier, if the contract is a postmarital agreement, then it will be construed according to express, specific, particular or explicit waivers, releases or settlements regarding spousal support rights. But if the contract is a premarital agreement, will the Court use clear intent of the parties or require specific waiver of spousal rights in a decedent’s estate?

In re: Estate of Thomas S. Sharpe, Deceased

To answer that question, we return to the land of decedents and surviving spouses. Shortly after Thomas S. Sharpe (the “Decedent Spouse”) died in Jan. 2016, his will was submitted for probate with a premarital agreement and an irrevocable trust agreement attached thereto. In re: Estate of Thomas S. Sharpe, Deceased, COA17-1151 (April 3, 2018). Decedent Spouse’s will distributed all probate property to the trustee of an irrevocable trust. Sharpe at *1-2. And yes, the sole beneficiaries of the irrevocable trust were Decedent Spouse’s two children and – wait for it – those two children were from the Decedent Spouse’s prior marriage. Id. So, you can only imagine the Decedent Spouse’s children’s delight when in June 2016, their stepmother (the “Surviving Spouse”) filed a claim for an elective share. Id. In Jan. 2017, the Clerk of Superior Court awarded an elective share to the Surviving Spouse. In re Sharpe at *3. The personal representatives’ appeal to Superior Court, decided in June 2017, reversed the Clerk’s award of, and thus denied the petition for, the Surviving Spouse’s claim for elective share. Id. (By the time Surviving Spouse’s personal representative gave notice of appeal, we can probably assume that there was more than $57,000 in dispute as in Lane, supra.)

The Superior Court in Sharpe focused only upon the Clerk’s tenth finding of fact: “The Prenuptial agreement executed by [Decedent Spouse] and [Surviving Spouse] contains no clause waiving her right to claim an elective share of [the] estate.” Sharpe at *5. The first argument of the Surviving Spouse as Petitioner-Appellant: “Our Courts have consistently held that such a waiver of rights must be expressed and unambiguous. The language in the subject ‘Premarital Agreement’ is ambiguous and does not support a waiver of rights in the estate of the other upon the death of a party.” See McIntyre v. McIntyre, 188 N.C.App. 26, 645 S.E.2d 798 (2008), Brief of Petitioner-Appellant, COA 17-1151, at 10. But the Court of Appeals disagreed: the Premarital Agreement waived the Surviving Spouse’s right to petition for an elective share without any specific waivers regarding the rights of surviving spouse in the estate of a decedent spouse.

In reviewing the premarital agreement de novo, the Court of Appeals stated, “It must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.” Sharpe at *9, quoting Hartford Acc. & Indem. Co. v. Hood, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946). The Court of Appeals, relying heavily on Lane (and by extension, Bowles), held that “the specific terms of the contract are totally inconsistent with an intention that the parties would each retain the right to share in the estate of the other . . . if he or she were to become the surviving spouse.” Sharpe at *10, quoting Lane, 284 N.C. at 411, 200 S.E.2d at 625. (I’m now wondering, “But how can an intention be clearly expressed when there isn’t an express or specific waiver of a surviving spouse’s rights, such as the right to claim an elective share?”).

So, I guess I need to amend my recap, supra. Napier provides that if the contract is a postmarital agreement, but not a separation agreement, “[and not a premarital agreement],” then “a release of ‘all claims and obligations or the settling of ‘marital rights’ . . . does not constitute an “express” release or settlement of alimony claims.” Napier, 135 N.C. App. at 367, 520 S.E.2d at 314. The Court of Appeals, via In re Sharpe, applied the principles of construction of separation agreements to the construction of premarital agreements: “Although the Premarital agreement does not expressly refer to the parties’ rights to claim upon each other’s estate, the plain and unambiguous language does not permit us to read the agreement to mean the parties intended to waive rights to each other’s separate property while they were alive, but not after one of them predeceased the other.” Sharpe at *14 (emphasis mine).

In re Sharpe Conflates the Separated Spouse with the Surviving Spouse

I think that the Court of Appeals, by its own admission, conflated two separate issues. One issue is raised in the daily question asked by family law attorneys to their clients: “What do you want to happen in the event of separation?” A second, distinct issue is raised in the daily question asked by estate planning attorneys to their clients: “What do you want to have happen after you die?” The Sharpe opinion neglects a very basic concept: these two questions do not always have the same answer.

Example No. 1, The Second- (or Third-) Timers. We have all counseled couples who are recently married, but it is not the first marriage for one or both of them. If it is a second marriage for one or both parties, maybe one or both of them have children from a prior marriage. In addition, there may be a profound disparity in the gross estates of the spouses. Whether it is “family money” or “new money,” the party with more assets and/or prior children is likely to have asked for a premarital agreement. The second- (or third-) timers’ answer to the family lawyer’s question regarding separation will probably align with the estate planner’s question regarding death. But the family law attorney who doesn’t ask the estate planner’s question (and the estate planner who doesn’t ask the family lawyer’s question) could be drafting premarital agreements or estate planning documents that do not actually reflect the clients’ intent.

Example No.2, The First-Timers. We have all counseled young couples who are planning to or have recently started having children together. More often than not, if it is a first marriage for both parties, there are no children from any prior relationship and there is not a gaping disparity in assets, then the First-Timers probably don’t have a premarital agreement. But whether or not the First-Timers have a premarital agreement, their answer to the family lawyer’s question about separation may very well differ from the estate planner’s question about death. For instance, if one party holds a general power of appointment or will receive their family money outright, then they may say, “I don’t want my family money to be available to my spouse in an equitable distribution claim, but I do want my...
family money to be available for an elective share claim.”

Regardless of the examples above, any couple may answer these questions differently if they are separated versus deceased. Yet the Court of Appeals has said, “[T]he plain and unambiguous language does not permit us to read the agreement to mean the parties intended to waive rights to each other’s separate property while they were alive, but not after one of them had pre-deceased the other.” Sharpe at *14.

In the months since In re Sharpe was published (and brought to my attention by a colleague in the family law section), when reviewing or drafting premarital agreements, that friend and I have started using express carve-out language for those clients who answer the trust and estate question and estate planner question differently. In the provisions expressly regarding the respective estates of the parties and the rights of the surviving spouse, we might say, “The other provisions of this Agreement notwithstanding, the parties expressly reserve the statutory rights of the surviving spouse and opt out of the rule set forth in In re Sharpe.” How will you change your review and/or drafting of premarital agreements for your clients?

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Recent Developments

By the Trusts and Estates Team of Moore & Van Allen PLLC

Lead Development

**Minnesota statute subjecting irrevocable trusts to income taxation based on grantor’s residency found unconstitutional.**

In Fielding v. Comm’r, 916 N.W.2d 323 (Minn. Sup. Ct. July 18, 2018), the Minnesota Supreme Court ruled in a 4-2 decision that Minnesota’s definition of a “resident trust” for income tax purposes as any trust whose grantor was a Minnesota resident when such trust became irrevocable was unconstitutional under the Due Process Clause of the United States Constitution as applied to the four trusts at issue. The trusts in Fielding were established by a grantor who was a Minnesota resident both when the trusts were created and when the trusts ceased to be grantor trusts for income tax purposes (the latter event being the time the trusts became “irrevocable” for Minnesota income tax purposes). The trusts selected Minnesota law as their governing law and were initially funded with stock in an S corporation incorporated in Minnesota. A Minnesota law firm prepared and kept custody of the trust instruments. The primary beneficiary of one of the four trusts was a Minnesota resident, but the primary beneficiaries of the remaining trusts resided elsewhere. The initial trustee of the trusts was domiciled in California, with successor trustees residing in Colorado and Texas; at no time was a Minnesota resident trustee of any of the trusts. The court determined as a threshold matter that Minnesota taxation of the trusts would be permissible under the Due Process Clause if the trusts had a minimum connection with the state of Minnesota, regardless of whether the grantor’s residency by itself met the threshold for such minimum connection, and if the taxation were rationally related to benefits conferred upon the trusts by Minnesota. The court then determined that no such minimum connection existed, finding that (i) the grantor’s residency was not applicable, because the trusts were legal entities separate and apart from the grantor, and the trusts had no dealings with the grantor during the tax year at issue (which was after the year the trusts become irrevocable for Minnesota income tax purposes); (ii) the activities of the Minnesota law firm were not relevant because the firm was an agent of the grantor, not the trusts, and the trust instrument storage was an incidental benefit to the trusts that was in essence a service to the grantor; (iii) the trusts owned no physical property in Minnesota (the stock in the Minnesota corporation being intangible and therefore held by the trustees in the trustees’ places of residency); (iv) contacts by the trusts with Minnesota prior to the tax year at issue were not relevant; and (v) any contacts between the trusts and Minnesota based on owning stock in the Minnesota corporation were too tenuous and were not rationally related to the concept of taxing all of the income of the trusts regardless of such income’s source. Without a minimum connection, the majority found that the Minnesota statute violated the Due Process Clause as applied to the trusts. In contrast, the dissenting justices argued that because the grantor had notice of the state’s criteria for taxing the trusts as Minnesota resident trusts at the time the grantor created the trusts, there was no failure of due process in Minnesota’s taxing the trusts. The dissent also considered the trusts’ selection of Minnesota law and their funding with Minnesota corporate stock (which was liquidated in the tax year at issue) as contributing to the trusts’ minimum connection with Minnesota. The dissent disagreed that only connections in the tax year at issue were relevant but still found that sufficient connections were in place in the tax year at issue. In general, the dissent believed that the trusts did not meet their “heavy burden” of demonstrating that no minimum connection existed, the benefit of the doubt being afforded to the state. Further, since the trusts’ complaint asserted that the Minnesota statute violated the Commerce Clause of the United Constitution in addition to the Due Process Clause, the dissent provided that it did not believe the Minnesota statute placed an undue burden on interstate commerce and thus did not violate the Commerce Clause.

Federal Administrative Developments

**Service issues proposed regulations for pass-through deduction for qualified business income.**