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Fiduciary LITIGATION

But there can be only one: A tale of two spouses

As all estate practitioners know, a surviving spouse has special and preferred status under the law. For example, a surviving spouse has priority over other distributees in intestate administration under Estates, Powers and Trusts Law (EPTL) article 4. The surviving spouse is also given preferred statues to serve as the administrator of an intestate estate under Surrogate's Court Procedure Act article 10.

A surviving spouse also has special protections through the Right of Election under EPTL § 5-1 et seq. and the Exemption for the Benefit of the Family under EPTL § 5-3 et seq. In estate practice, however, our state's laws do not operate in a vacuum. Estate practitioners must also be mindful of federal laws, like the Employee Retirement Income Security Act, which governs private pension funds.

By EDWARD C. RADIN
Daily Record Columnist

This month's decedent was a participant in a qualified pension fund until the time of his death. The surviving spouse and the decedent were married 18 years before his death. As required by ERISA, the fund then began making payments to the surviving spouse. Shortly after the fund began making these payments, another woman informed the fund that she and the decedent had married nearly 40 years before the decedent's second marriage, and the woman said that she and the decedent's marriage was not dissolved by a divorce decree prior to his death.

Accordingly, the woman maintained that she was the real surviving spouse, and thus, that she was entitled to the payments from the fund. Both women provided copies of their marriage certificates to the fund administrator showing that they were married to the decedent. Neither woman, however, produced a divorce decree.

Marriages and divorces are governed by state law. And New York's law could not be clearer, under Domestic Relations Law § 6, "[a] marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living ... ." There is a strong presumption that once a couple is married that the marriage is valid and continuing unless a spouse dies or there is a valid annulment or divorce.

How then does the "second spouse" show that her marriage is valid and that she is the surviving spouse? Fortunately for her, and second (or successive) spouses across the state, New York "recognizes a presumption in favor of the validity of the latest of successive ceremonial marriages," *Steele v. Richardson*, 472 F.2d 49, 51 (2d Cir. 1972). "Where ... two competing putative spouses come forward with proof of their respective marriages, there is a presumption that the second marriage is valid and that the prior marriage was dissolved by death, divorce, or annulment," *Mack v. Brown*, 82 A.D. 133, 140 (2d Dept 2011).

Although we are left with two competing presumptions, the second spouse wins with respect to the strength of the presumptions because the presumption in favor of the validity of the second marriage is stronger than the presumption that the first marriage continued, *Seidel v. Crown Industries*, 132 A.D.2d 729 (3d Dept. 1987).

So how does the first spouse overcome the presumption in favor of the second marriage? Typically, oral testimony alone has little or no probative value, especially where the witness has a financial interest in the dispute, See *Matter of Brown*, 49 A.D.2d 648 (3d Dept. 1975), aff'd 40 N.Y. 2d 938 (1976). Thus, for the first spouse to overcome the presumption favoring the validity of the second marriage, the first spouse should produce a sworn statement from an officer having custody of divorce records stating that a search of the records failed to locate a divorce decree dissolving the first marriage, *Id.*; Mack, 82 A.D.3d at 141 (noting that the first wife failed to "tender any evidence that her ... marriage to the decedent has not been dissolved, which could have been addressed by a search of court records showing no divorce action had been commenced and concluded").

In *Matter of Gomez*, 23 A.D.3d 967 (3d Dept. 2005), two sur-

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viving spouses competed for survivorship benefits from a decedent who died in the 9/11 terrorist attacks. There, the first spouse testified that she and her husband were never divorced and provided proof that court records had been examined in all relevant jurisdictions without finding any divorce decree. She also testified that the decedent continued to provide support to her and their children.

But most importantly, because the second wife relied only on the strength of "her presumption," the court concluded that she failed to "adduce affirmative proof of the invalidity" of the first wife's marriage to the decedent. Likewise, in *Seidel v. Crown Indus.*, 132 A.D.2d 729, the Appellate Division remanded the case back to the administrative law court where the Appellate Division concluded that the first spouse "offered no proof, other than [her own] testimony, that the first marriage was not dissolved before the decedent remarried," and that the first spouse could have overcome the presumption in favor of the second marriage by "a search of court records in the county where decedent resided during the period between the two marriages," *Id.* at 730.

Previous columns focused on the language of wills and trust agreements. But as this month's column demonstrates, estate practitioners must also be mindful that a surviving spouse is also entitled to benefits under private pension plans, which are governed by ERISA. Another thing to be mindful of, however, is that ERISA is oftentimes read in conjunction with state law.

For example, in *Grabois v. Jones*, 77 F.3d 574 (2d Cir. 1996), the Second Circuit sent a certified question to the New York State Court of Appeals on "whether a second spouse whose marriage is void due to the existence of a prior, undissolved marriage, is nonetheless entitled to some portion of her or his spouse's death benefits when the second marriage was the result of a formal ceremony, undertaken in good faith, and the second marriage continued until the spouse's death," *Id.* at 576.

Unfortunately, that question remains unanswered as the New York State Court of Appeals declined to accept the question because of the rarity of the issue, the pro se status of one party who failed to submit a brief, the fact the case was an interpleader action where the plaintiff-pension fund had no interest in the action beyond seeking the court's determination on whom to dispense the benefits, and because the "interplay between federal and state law" interpreting ERISA remains unsettled, and thus, the issue should be resolved by the federal courts.

The two lessons for estate practitioners: (1) never rely on presumptions alone, always produce documentary evidence; and (2) administering an estate properly will also require the consideration of documents other than a will or trust instrument, like private pension plans, that may name beneficiaries.

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