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THE EFFECT OF A SEPARATION AGREEMENT
UPON THE SURVIVING SPOUSE'S
RIGHT TO ADMINISTER

*Hewitt v. Shipley*¹

Husband filed a petition in the Orphans' Court of Baltimore City claiming that he had received no notice before letters of administration were granted his brother-in-law, and that he, as surviving spouse, was legally entitled to administer and share in the estate of his deceased wife. The answer denied the right of the husband to notice of the granting of letters because the husband had surrendered all his rights in the estate of the deceased wife by virtue of an agreement of separation between him and her. The pertinent provisions of that separation agreement provided that the husband pay the wife a named sum of money and the costs of a pending divorce proceeding and relinquish claim on certain named property as a fair and just provision for her; that the settlement be in lieu of *all* the property rights of the wife against the husband whether vested, inchoate or anticipated as wife, widow, heir, or next of kin; that "all the property of the wife, both real and personal, now held by her or which shall hereafter come to her, shall be and remain her sole and separate property, free from all the rights of the husband, with full power to her to convey, assign, or deal with the same as if she were single;" and that he would sign the necessary papers. From an order granting the petition, the administrator appealed. The Court of Appeals affirmed the order. *Held*: A separation agreement will not be construed to bar the right of a surviving spouse in the estate of the other, unless it is clearly expressed therein, or necessarily implied therefrom. Therefore the grant of letters to another was improper in this case where there was no express bar and none was necessarily implied.

¹ 169 Md. 221, 181 Atl. 845 (1935).

The Court of Appeals cited as authority for the holding of the instant case a number of earlier Maryland decisions where marriage settlements were held not to bar a husband's rights in the estate of his deceased wife unless the settlement so provided.² The only square decision of the Court of Appeals cited as authority was the case of *Willis v. Jones*³ which held that a written agreement in contemplation of divorce, containing no evidence of an intent on the part of the husband to abandon his rights in his wife's property if there should be no divorce, was not a bar to his right to administer or share in the estate of his deceased wife.

Under the statute⁴ letters of administration are to be granted by the Court at its discretion either to the surviving spouse or one of the children; and, if there be no child,⁵ the surviving spouse is preferred and entitled to notice of the grant of letters before being excluded from the administration.⁶ The same preference is accorded surviving spouses as heirs in the distribution of deceased spouses' estates.⁷ It is evident that our testamentary system has aimed to commit administration to the hands of those most interested in the estate.⁸ The instant case answers the question as to the significance of a separation agreement under this policy.

By a separation agreement substantially the results of a divorce *a mensa et thoro* are attained by the parties without a judicial determination.⁹ The marriage is not dissolved, the husband continues to support the wife, and rights in property are not changed except as provided by the agreement or by the decree. Thus separation alone does not change the status of a wife and it therefore does not of itself deprive the wife of her share in her husband's personal

² *Townshend v. Matthews*, 10 Md. 251 (1856); *Hutchins, et al., v. Dixon, Executor*, 11 Md. 29 (1857); *Moody v. Hall*, 61 Md. 517 (1884). Incidentally the agreements there were found to affect the title to the property beyond life and thus effectuate a bar.

³ 42 Md. 422 (1875).

⁴ Md. Code, Art. 93, Sec. 18.

⁵ Md. Code, Art. 93, Sec. 19.

⁶ Md. Code, Art. 93, Sec. 32.

⁷ Md. Code, Art. 93, Secs. 125, 126, 127.

⁸ *Dalrymple, Admr., et al., v. Gamble*, 66 Md. 298, 7 Atl. 683, 8 Atl. 468 (1886), where a widow who by an ante-nuptial agreement had no interest in her husband's estate was held to have no right to administer. But see *Willis v. Jones*, supra, note 3, where a surviving spouse was held entitled to letters unless he had validly parted with his rights or been lawfully deprived.

⁹ For general validity of separation agreements see Md. Code Supp., Art. 16, Sec. 39A, Acts of 1931, Ch. 220, and *Harrison v. Harrison*, 160 Md. 378, 153 Atl. 58 (1930); *Myers v. Myers*, 153 Md. 44, 137 Atl. 501 (1927); *McFrederick v. McFrederick*, 160 Md. 91, 152 Atl. 818 (1930); *Leary v. Clayton*, 181 Md. 545, 102 Atl. 765 (1917).

estate or her right to administer.¹⁰ This principle has been carried to the extreme point that, since an agreement of separation does not dissolve the marital relations of the parties, the wife is the widow of the deceased husband and is, as such, technically entitled to preference in the right to administer his estate regardless of the question as to her right in the property.¹¹ But it must be remembered that the right of the widow to administer depends on her right to take of the personal estate and therefore the right to inherit is necessarily involved in the application for letters.¹² So, although the marital status is not altered by the agreement of the parties, yet either may contract away his inheritable interests in the other's estate and thereby lose the right to administer.¹³ There is ample authority holding that the right of a spouse to share in or inherit from the estate of the deceased spouse may be barred by a valid separation agreement.¹⁴ That right, however, should not be denied because of a separation agreement unless that purpose be expressed or necessarily inferred from the agreement.¹⁵

In *Girard v. Girard*¹⁶ the wife for a consideration paid by the husband "released all right, title, or interest of any kind, whatsoever, in law or in equity, which she may now have or possess in any and all property of any kind, now owned or hereafter acquired by the husband in his lifetime." The New Mexico Supreme Court held that where a separation agreement does not, by express terms or by necessary implication, provide that she waives, releases, relinquishes, and renounces her right to inherit from him upon his death, intestate and without issue, such rights still remain with and may be enforced by such surviving widow. Courts will go no further than the language of the contract extends and will not deprive either spouse of such rights unless there is a clear and unmistakable intention to barter them away.

In *Smith v. Smith*¹⁷ where the language of the separation agreement gave to the husband the full dominion of his own

¹⁰ Nusz, et al., v. Grove, 27 Md. 391, 400 (1867); Mobley v. Mobley, 149 Md. 401, 408, 131 Atl. 770 (1926).

¹¹ Read v. Howe, 13 Iowa 50 (1862).

¹² 35 A. L. R. 1511 Annotation.

¹³ In re Davis' Estate, 106 Cal. 453, 39 Pac. 756 (1895); Jones v. Lamont, 118 Cal. 499, 50 Pac. 766 (1897); see Dalrymple, Admr., et al., v. Gamble, 66 Md. 298, 7 Atl. 683, 8 Atl. 468 (1886), where ante-nuptial agreement had this effect.

¹⁴ See cases cited in 35 A. L. R. 1505 ff. Annotation; McCubbin v. Patterson, 16 Md. 179 (1860).

¹⁵ Willis v. Jones, supra, note 3; Girard, et al., v. Girard, 29 N. M. 189, 221 Pac. 801, 35 A. L. R. 1493 (1923), both cases cited and approved in the principal case.

¹⁶ Supra, note 15.

¹⁷ 57 Ohio St. 27, 48 N. E. 28, 29 (1897).

property, with power to dispose of it by will or otherwise without the assent of the wife in her lifetime, the Supreme Court of Ohio held the wife's rights under the intestacy laws were not barred when the husband did not dispose of his property. This case was cited along with *Willis v. Jones* as authority in the *Hewitt* case.

It would appear then, from the cases, that in Maryland the law is that a separation agreement as such does not bar the right of a surviving spouse to share in or administer the estate of a deceased spouse unless there is an express release of such rights or an inference to that effect so strong that a construction to the contrary would be unreasonable. But, if the right of inheritance is expressly or by strong implication bartered away by the spouse in the separation agreement, the policy behind the statutes providing for grant of letters of administration will also take away the preference in administration of the decedent's estate.

In the separation agreement in the *Hewitt* case the words used would seem expressly to bar the rights of the wife in the husband's estate since it states the settlement to be in lieu of all the property rights of the wife against the husband, whether vested, inchoate, or anticipated, as wife, widow, heir, or next of kin. But the agreement as to the wife's property is merely that it should be "free from all rights of the husband, with full power to her to convey, assign, or deal with the same as if she were single." It cannot even be inferred from the statement that the husband waived his right to inherit or to administer should the wife predecease him. If here the wife had survived the husband perhaps a different result would have been reached by virtue of the terminology of the wife's waiver of property rights growing out of the marriage. It is arguable, however, that the husband's waiver of rights in his spouse's property is substantially as broad as that of the wife in his, and therefore it is necessarily implied that the husband by separation agreement bartered away the right to share in deceased wife's estate and consequently the right to administer the estate.