

THE PRACTITIONER

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Till Death Do Us Part

Agreements to Provide for Ex-Spouse or Children in Testamentary Documents

It is not uncommon for parties to a marital dissolution to set forth in their judgment of dissolution of marriage a provision that requires one or both spouses to leave an estate portion to the other party or, more commonly to the parties' children, upon the testator's death. As the 2d District California Court of Appeal recently pointed out in *Marriage of Edwards*, 95 Daily Journal D.A.R. 12657 (Sept. 19, 1995), this type of provision may not be enforceable until the death of the party who has been ordered to provide for his children or ex-spouse in a testamentary document.

In *Edwards*, both parties to the divorce were ordered pursuant to the judgment of dissolution of marriage to leave 50 percent of each of their net estates to their children living at the time of the parties' respective deaths. The judgment required both parties to "maintain in effect until his death, a will, codicil, trust or amendment to a trust, as appropriate," providing for distribution to their children. *Id.* at 12657-58.

Several years after the divorce was final, the husband filed a post-judgment motion to reduce his spousal support. In a statement setting forth his assets, he indicated that he had IRA accounts worth \$1,045,130, and a home and an automobile held in joint tenancy with his second wife.

When the husband and his counsel refused to disclose the beneficiaries of the IRA accounts, the wife and her counsel filed an order to show cause asking the court to compel the husband to provide proof that he was in compliance with that portion of the judgment requiring him to dispose half to his assets to his children upon his death.

Moreover, the wife asked the court to order the husband, if not in compliance, to execute any documents required for him to be in compliance with the judgment and for an order restraining the husband from transferring assets in violation of the terms of the judgment.

The wife requested the husband to produce "[a]ll documents and writings showing how and in what way [the husband] has provided for the disposition of his property at his death including, but not limited to, [the husband's] Will, Trust, Agreements, Deeds and documents showing the beneficiaries of his IRA accounts, whether held by himself, banks or other financial institutions." *Id.* at 12658.

When the husband refused to provide these documents, the wife filed a motion to compel. The trial court suggested a compromise solution in which the court could review the documents in camera and then inform the wife whether the husband was in compliance.

After the court inspected the documents, it determined the husband was "probably in compliance, under the terms of the trust, and the IRA agreements." The court, however, would go no further and would not make a finding whether the terms of the dissolution judgment in question were enforceable "at this time," and denied the compliance relief requested by the wife. *Id.*

The Court of Appeal affirmed the trial court's refusal to currently enforce the dissolution judgment. A court cannot compel a person to make a will, the appeals court opined, and since a promisor has his entire lifetime to comply with an agreement to provide for another upon death, no breach of that agreement can occur until the death of the promisor.

In reaching its holding, the court relied

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upon Probate Code Section 150, which provides for the validity of contracts to make a will. Nevertheless, courts have interpreted this provision to impose a constructive trust on property left to others in violation of the contract (quasi-specific performance), and held that ordinarily the contract cannot be enforced until after the promisor's death. See *Ludwicks v. Guerin*, 57 Cal.2d 127, 130 (1961); *Goldstein v. Hoffman*, 213 Cal.App.2d 803, 812 (1963).

The husband's agreement to leave 50 percent of his assets to his children upon his death did not mean he relinquished the right to use and dispose of this property for his own benefit during his lifetime, as long as purpose was not to defeat the contract. *Westbrock v. Superior Court*, 176 Cal.App.3d 703, 712 (1986).

Additionally, since the agreement did not identify specific property, "there is no way of knowing what [the husband's] 'net estate' will be, and any attempt to speculate ... is fraught with complexities that need not be addressed now." *Id.* at 12659.

Citing *Mitchell v. Marklund*, 238 Cal.App.2d 398, 400 (1965), the court mentioned the similarity of the marital agreement in that case to

the one at issue in *Edwards*. In *Mitchell*, the husband died leaving all his assets to his second wife and excluded the children entirely. The court, however, refused to impose a constructive trust on various grounds. The children argued on appeal that the grounds referred to by the trial court were inapplicable because the agreement had been incorporated into the dissolution judgment.

Rejecting the children's argument, the court stated: "The agreement to make wills cannot acquire the status of a judgment by the physical incorporation of the property settlement agreement in which it is embodied into the interlocutory decree of divorce for the reason that it is beyond the power of a court ... [to] compel the making of a will." *Id.* at 402-04.

The *Edwards* court also determined that the fact that the agreement was incorporated into the marital dissolution judgment did not entitle the wife to any "greater right to relief." It commented that former Civil Code Section 4380, now Family Code Section 290, only authorized enforcement methods "as the court in its discretion determines necessary." *Id.*

In fact, the court noted that neither the settlement agreement of the parties nor the dissolution judgment restrained disposal of any particular properties by the husband. Furthermore, neither document required subsequent disclosures, any type of periodic audit or any mandate that the court or a third party monitor the husband's assets.

From its comments, it is clear that the court was providing counsel representing future "Mrs. Edwards" with possible solutions to the problems presented in that case.

The dissolution judgment could have required the husband not to dispose of certain assets and provided remedies, in addition to contempt of court, for such disposal. It also could have mandated that the husband disclose, on a quarterly, semiannual or annual basis, the value and nature of his assets. The judgment could have affirmatively given the wife the ability to audit the husband from time to time so she could be assured that the assets were always available and would be there upon the husband's death.

Another possible way to avoid the result in *Edwards* would be to provide in the settlement agreement and dissolution judgment a condition requiring the parties to establish an irrevocable living trust into which the property the children will receive as beneficiaries is placed. The agreement and judgment should also set forth the terms of the trust as well as the identity of the trustee.

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