IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 83,660

IN RE: ESTATE OF EDGAR R. PUTNAM,

DECEASED.

MARY ANN VIA, as Personal Representative of the Estate of Edgar R. Putnam, deceased, MARY ANN VIA, Individually, PAUL DAVID PUTNAM, JOSEPH EDGAR PUTNAM, RICHARD LEE PUTNAM, RONALD ROY PUTNAM, and ROBERT BLACKBURN,

Petitioners,

v.

MARY RACHEL PUTNAM,

Respondent.

ON REVIEW FROM THE
DISTRICT COURT OF APPEAL
SECOND DISTRICT
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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Attorney for Respondent
Mary Rachel Putnam

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STATEMENT OF THE CASE

Respondent Rachel Putnam was determined to be the pretermitted spouse of Edgar Putnam by order of the trial court on October 14, 1992 (R-617, A-1).

The Petitioners had filed claims in the estate based upon the theory that they are third party beneficiaries of the wills executed by Edgar Putnam and his former wife, Joann Putnam. Objections were filed (R-083, R-085), and independent actions were filed (R-557-567). The cases were consolidated back into the probate division (R-615). Petitioners moved for summary judgment and were granted same on April 30, 1993 (R-830, A-2). That order provided that Petitioners were entitled to preference in appropriation of assets of the estate by virtue of their status as claimants, and that even though Respondent is a pretermitted spouse, she takes nothing because the claims of the residuary beneficiaries amount to the entire estate (R-833, A-4).

The Second District Court of Appeal reversed the lower court, holding, "We believe that the statutes of Florida pertaining to a surviving spouse's elective share or pretermitted share and cases discussing those rights and their predecessor, dower, suggest a strong public policy in favor of protecting a surviving spouse's right to receive an elective or a pretermitted share." Putnam v. Via, 19 FLW 1280 (Fla. 2d DCA 1994).

SUMMARY OF ARGUMENT

Petitioners, the Appellees below, have requested this court to review this case as a matter of discretion based upon Article V, Sec. 3 (b)(3) and Fla. R. App. P. 9.030 (a)(2)(A)(iv). The Supreme Court may decline to review this case, and in so doing will leave the law clear and undisputed: Florida's long standing law supported by public policy reasons favors the interests of the surviving spouse over the interests of residuary beneficiaries.

An analysis of the facts of the instant case as opposed to the facts in the case cited as being in conflict, reveals that any conflict regarding the law is illusory and is further based upon the particular facts of that case. The opinion in Johnson v. Girtman did not conflict with Florida's long standing public policy of preferring the widow's share over both ante nuptial contracts and residuary beneficiaries.

The opinion rendered in Johnson v. Girtman is reconciled with the opinion rendered in Putnam, when all of the pertinent Florida probate law is considered.

ARGUMENT

The Second District Court of Appeal was correct when it stated, "[T]he statutes of Florida pertaining to a surviving spouse's elective share or pretermitted share and cases discussing those rights and their predecessor, dower, suggest a strong public policy in favor of protecting a surviving spouse's right to receive an elective or a pretermitted share." Putnam v. Via, 19 FLW 1280 (Fla. 2d DCA 1994). Any apparent conflict between the decision rendered in Johnson v. Girtman, 542 So.2d 1033 (Fla. 3rd DCA 1989) and Putnam v. Via, 19 FLW 1280 (Fla. 2d DCA 1994) is resolved upon a complete review of both cases.

Factually and legally, the cases differ significantly. In Johnson v. Girtman, the spouse seeking an elective share had signed an agreement waiving his interest in the disputed property. This was a valid waiver under Florida Statute 732.702: "The right of election of a surviving spouse,. . . may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party." The trial court held the waiver to be valid, and this decision was undisturbed on appeal.

In contrast, the mutual wills in Putnam were executed without the knowledge of and prior to the marriage of decedent to respondent, the pretermitted spouse. Florida law has consistently held that the surviving spouse

is not bound to ante nuptial contracts of the deceased spouse. In re Estate of Donner, 364 So.2d 742 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 457 (Fla. 1978), appeal dismissed sub nom. Donner v. Anton, et al., 444 U.S. 958, 100 S.Ct. 442, 62 L.Ed 371 (1979); Tod v. Fuller, 78 So.2d 713 (Fla. 1955).

In Johnson, the disputed property was one parcel of land, in which the surviving spouse had waived his interest in writing. The elective share was not defeated by creditors, since the entire estate was in fact, devised to the spouse and the spouse was not even electing against the will. The surviving spouse was arguing to void the contract. In this case, respondent is asserting the rights of a spouse against the will, regardless of the terms of that will, as she is entitled to do by statute. Fla. Stat. 732.507, Fla. Stat. 732.301.

In contrast, the petitioners, though already undisputed residuary beneficiaries, maintain that they are third party contract beneficiaries of the following paragraph in the will of Edgar Putnam:

> I acknowledge that this is a mutual will made at the same time as my [spouse's] will and each of us have executed this Will with the understanding and agreement that the survivor will not change the manner in which the residuary estate is to be distributed and that neither of us as survivors will do anything to defeat the distribution schedule set forth herein, such as disposing of assets prior to death by way of trust bank accounts, trust agreements, or in any other manner.

Under the terms of the will in this case, petitioners are entitled to the residue of the estate. Respondent would agree. Edgar Putnam did nothing to change the distribution of the residue. Edgar Putnam did not, by marrying Respondent, 'change the manner in which the residuary estate is to be distributed,' nor did he 'defeat the distribution schedule set forth' in the will. He did not change the terms of the mutual will, because marriage does not revoke the previous will. Fla. Stat. 732.507; In re: Suarez's Estate, 198 So.2d 829, 145 Fla. 183 (1940). The will remains valid though the spouse has certain rights

that attach to it prior to the interests of the residuary beneficiaries. Keith v. Culp, 111 So.2d 278 (Fla. 5th DCA 1959). See also In re Estate of Churchwell, 354 So.2d 970 (Fla. 1st DCA 1978); Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936). Further, the majority view is that contracts which discourage or restrain the right to marry are void as against public policy. Shimp v. Huff, infra. Therefore, the trial court erred when it determined that by entering into marriage, Edgar Putnam breached the mutual will.

In contrast, Mrs. Johnson breached the Agreement to Keep Will in Force because she died after making a new will leaving everything to her spouse. Thus, there was a clear breach of the separate contract executed by the decedent. She made a new will in disregard of the contract.

The Johnson decision is in agreement with Florida law which has long held that a separate contract to make a will is enforceable while mutual wills, being ambulatory in nature, do not give rise to contract claims:

> "This court has held that "unlike a will which clearly is ambulatory in nature and therefore may readily be revoked by a competent testator, a contract to make a will may be irrevocable and therefore subject to specific enforcement by the courts." Donner v. Donner, 302 So.2d 452, 455 (Fla. 3d DCA 1974), cert. denied, 314 So.2d 151 (Fla.1975) (emphasis added; citations omitted). Therefore, "[I]f the promisor breaches his agreement to make a devise or not to revoke a will, the beneficiary of the promise or the improperly revoked will may bring an action to enforce the terms of the agreement." Johnson v. Girtman, 542 So.2d 1033, 1035 (Fla. 3d DCA 1989) (citations omitted). See also Sharps v. Sharps, 219 So.2d 735 (Fla. 3d DCA 1969) ("In a contract to make a will, the promisor has the right to change his will, and . . . the right being enforced against the promisor is the contract right, and not the will. . . ."), cert. denied, 225 So.2d 920 (Fla. 1969); In re Shepherd's Estate, 130 So.2d 888 (Fla. 2d DCA 1961) (mutual wills are ambulatory in nature and may be revoked; contract upon which mutual wills are made may be enforced depending upon circumstances); Keith v. Culp, 111 So.2d 278 (Fla. 1st DCA 1959) (same), cert. denied, 114 So.2d 5 (Fla.1959). " Boyle v. Schmitt, 602 So.2d 665 (Fla 3d DCA 1992).

But these cases do not apply here. The Girtmans would not have been in

the court file had they not filed claims in Johnson, because everything was devised to the surviving spouse. Such is not the case here. Petitioners were already residuary beneficiaries before they filed claims. It is the respondent spouse who would not be recognized but for her intervention in the estate. Petitioners here argue for more than that to which they are entitled. They argue that they are creditors, but in fact are only legatees who have perfected their residuary interests. They remain **residuary** beneficiaries only. Donner, supra[1]. Petitioners are therefore entitled to the residue AFTER the pretermitted spouse share. Fla. Stat. 733.805.

There is no conflict with Johnson regarding the preference of the pretermitted spouse. Florida's long standing public policy supports the preference of the pretermitted spouse as a real, and not illusory benefit. The pretermitted share is not a presumption which may be rebutted. Dumas v. Sanford, 413 So.2d 58 (Fla. 5th DCA 1982), review denied, 422 So.2d 843 (Fla. 1982), appeal dismissed, 460 U.S. 1076, 103 S.Ct. 1761, 76 L.Ed.2d 337 (1983). Even apparently harsh results have occurred in Florida because of the courts' adherence to the law's clear terms. In In re Estate of Gaspelin, 542 So.2d 1023, (Fla. 2d DCA 1989), review denied, 547 So.2d 1209 (Fla. 1989); Dumas v. Sanford, supra; Hoffman v. Kohns, 385 So.2d 1064 (Fla. 2d DCA 1980); and In re: Suarez's, Estate, infra; the surviving spouse received the entire estate, to the disappointment of other family members named in the will because there were

---

[1] "Beatrice and Edward Donner must be treated the same as legatees of the estate just as if the decedent made the legacies to them in his will as he had previously contracted to do in the 1959 separation agreement with Beatrice Donner. Surely, these two should not stand in a better position as creditors of the estate when, as here, the decedent failed to do that which he contracted to do. He contracted to make them legatees of the estate and when he failed to do so, both Beatrice and Edward Donner sued for specific performance on the contract. They prevailed in their suit; the judgment was affirmed on appeal. They are accordingly entitled to specific performance on the contract to make a will which in effect puts them in the same category as legatees of the estate." [Citations omitted].

no lineal descendants, so plain is the law and so strong is the public policy surrounding this area of the law in Florida. See. Fla. Stat. 732.102 (1)(a).

After extensive review of all available cases on point from other states, the Supreme Court of Maryland concluded the rights of the surviving spouse are superior for public policy reasons:

> ". . .[T]he public policy surrounding the marriage relationship . . .suggests that the surviving spouse's claim to an elective share should be afforded priority over the claims of beneficiaries of a contract to make a will. Like the majority of courts, we have recognized the well settled principle that contracts which discourage or restrain the right to marry are void as against public policy. [Citation omitted] In executing a will, a testator is presumed to know that a spouse might renounce the will, thus extinguishing or reducing the legacies contained in the will, and if the testator does not provide for this contingency then the beneficiaries under the will might lose the property left them [Citation omitted]. **Thus, we find that the respondents' rights under the contract were limited by the possibility that the survivor might remarry and that the subsequent spouse might elect against the will. Consequently we conclude that their claims under the contract are subordinate to [the surviving spouse's] superior right to receive her elective share."** Shimp v. Huff, 556 A.2d 252 (Md. 1989). [Emphasis added].

But even if a conflict in reasoning is found to exist in Johnson as opposed to Putnam, the statutory scheme in Florida obliges preference of the share of the pretermitted spouse over the share of any residuary beneficiary. Florida Statute 732.507 provides:

> "(1) Neither subsequent marriage nor subsequent marriage and birth or adoption of lineal descendants shall revoke the prior will of any person, but **"the pretermitted child or spouse shall inherit as set forth in ss. 732.301 and 732.302, regardless of the prior will. "** [Emphasis added].

The pretermitted spouse, "shall receive a share in the estate of the testator equal in value to that which the surviving spouse would have received if the testator had died intestate. . ."[Emphasis added] [Fla. Stat. 732.301], which "share . . .is. . .one-half of the intestate estate." Fla. Stat. 732.102. The statute clearly points out that, "The share of the estate that is assigned to

the pretermitted spouse shall be obtained in accordance with s. 733.805." Fla. Stat. 732.301. Under Florida Statute 733.805, the shares of a pretermitted spouse are appropriated from " Property devised to the residuary devisee or devisees.. ." Since the petitioners have only established themselves as residuary devisees, the share of the respondent pretermitted spouse comes from the residue first.

Johnson v. Girtman did not involve nor address these clear statutory provisions regarding the pretermitted spouse, but rather dealt with an elective share argument when the surviving spouse was not even electing against the will. In light of the cases and statutes in Florida, it is evident that the court in Johnson arrived at its decision to achieve a fair result on the narrow facts of that case alone, and that the argument regarding the elective share of the spouse was simply one of four unsuccessful arguments made by the surviving spouse to marshall an interest he had already waived. Therefore, any express and direct conflict among district courts of appeal in Florida on this issue does not exist.

CONCLUSION

There is no express and direct conflict between the Second District's opinion in Putnam with Johnson v. Girtman, in light of ample and long standing case law in Florida. The Supreme Court, in declining to review this case, will leave the law clear and undisputed: Florida's long standing law supported by public policy reasons favors the interests of the pretermitted spouse over the interests of residuary beneficiaries.

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Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing has been furnished by United States Mail to Joseph W. Fleece, III, Attorney for Petitioner Robert Blackburn, P. O. Box 330, St. Petersburg, FL 33731-0330; James H. Richey, Attorney for Petitioners Ronald Roy Putnam, Joseph Edgar Putnam, Paul David Putnam, Richard Lee Putnam and Mary Ann Via, 516 No. Harbor City Blvd., Melbourne, FL 32935; and Mark I. Shames, Esq. Administrator Ad Litem, 535 Central Avenue, Suite 403, St. Petersburg, FL 33701 this 11 day of July, 1994.

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Attorney for Respondent

APPENDIX

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
PROBATE DIVISION
FILE NUMBER 92-1071-ES

IN RE: ESTATE OF EDGAR R. PUTNAM,

DECEASED.

MARY RACHEL PUTNAM,

Petitioner,

v.

MARY ANN VIA, as Personal Representative of the Estate of Edgar R. Putnam, deceased, MARY ANN VIA, Individually, PAUL DAVID PUTNAM, JOSEPH EDGAR PUTNAM, RICHARD LEE PUTNAM, RONALD ROY PUTNAM, and ROBERT BLACKBURN,

Respondents.

ORDER GRANTING SUMMARY JUDGMENT ON PETITION TO DETERMINE SHARE OF PRETERMITTED SPOUSE

This cause came on to be heard upon the Petitioner's Motion for Summary Judgment on Petition to Determine Share of Pretermitted Spouse, the Court having reviewed the file, having heard argument of counsel, and being otherwise advised in the premises, it is thereupon ordered and adjudged that Petitioner is a pretermitted spouse within the meaning of Florida Statute 732.301 (1991).

Done and ordered in Chambers this ___ day of _____, 1992.

CIRCUIT COURT JUDGE

cc: Joseph W. Fleece III, Esq.
James Richey, Esq.
Michael Riemenschneider, Esq.
Mark I. Shames, Esq.
Noble Doss, Esq.
Teresa Cooper Ward, Esq.

TRUE COPY
Original Signed
OCT 14 1992
Thomas E. Penick, Jr.
THOMAS E. PENICK, JR.
Circuit Judge

IN THE CIRCUIT COURT OR PINELLAS COUNTY, FLORIDA
PROBATE DIVISION
FILE NUMBER 92-1071-ES4

IN RE: ESTATE OF

EDGAR R. PUTNAM,

Deceased.

MARY RACHEL PUTNAM,

Petitioner,

vs.

MARY ANN VIA, as Personal Representative of the Estate of Edgar R. Putnam, deceased, MARY ANN VIA, Individually, PAUL DAVID PUTNAM, JOSEPH EDGAR PUTNAM, RICHARD LEE PUTNAM, RONALD ROY PUTNAM, and ROBERT BLACKBURN,

Respondents.

ROBERT L. BLACKBURN,

Plaintiff,

v.

MARY ANN VIA as personal representative of the Estate of Edgar J. Putnam,

Defendant,

_____/

ORDER GRANTING SUMMARY JUDGMENT

THIS CAUSE having come before this court on the Motion for Summary Judgment filed herein by ROBERT L. BLACKBURN and on the Motion for Summary Judgment filed herein by MARY ANN VIA, PAUL DAVID PUTNAM, JOSEPH EDGAR PUTNAM, RICHARD LEE PUTNAM AND RONALD ROY PUTNAM, all pursuant to Rule 1.520 Florida Rules of

Civil Procedure and after considering the pleadings, answers to interrogatories and admissions filed in this cause finds that there is no genuine issue as to any of the following material facts:

1. Edgar J. Putnam, deceased, resided in Pinellas County, Florida at all times relevant to this action until his death on March 13, 1992.

2. Joann G. Putnam, deceased, resided in Pinellas County, Florida at all times relevant to this action until her death on April 9, 1986.

3. On November 15, 1985, Edgar J. Putnam and Joann G. Putnam executed mutual wills containing the following provision:

> I acknowledge that this is a mutual will made at the same time as my husband's Will and each of us have executed this Will with the understanding and agreement that the survivor will not change the manner in which the residuary estate is to be distributed and that neither of us as survivors will do anything to defeat the distribution schedule set forth herein, such as disposing of assets prior to death by way of trust bank accounts, trust agreements, or in any other manner.

4. The mutual wills of Edgar J. Putnam and Joann G. Putnam constituted a binding contractual agreement of which ROBERT L. BLACKBURN, MARY ANN VIA, PAUL DAVID PUTNAM, JOSEPH EDGAR PUTNAM, RICHARD LEE PUTNAM AND RONALD ROY PUTNAM are third party beneficiaries.

5. On April 9, 1986, Joann G. Putnam departed this life without having made any changes or having done anything to defeat the terms of her mutual will.

6. On October 20, 1988, Edgar J. Putnam married Rachel Putnam.

7. On March 20, 1992, the last will and testament of Edgar J. Putnam was admitted to probate in Pinellas County, Florida.

8. Notice of Administration was first published on March 27, 1992.

9. On May 14, 1992, Robert Blackburn filed a claim in the estate based on Edgar J. Putnam's breach of the mutual will.

10. On June 23, 1992, MARY ANN VIA, PAUL DAVID PUTNAM, JOSEPH EDGAR PUTNAM, RICHARD LEE PUTNAM AND RONALD ROY PUTNAM filed a claim in the estate based on Edgar J. Putnam's breach of the mutual will.

11. Objections to the claims were filed, claimants timely filed independent actions in the Circuit Court in Pinellas County, Florida based on breach of contract. Said independent actions were consolidated and transferred back into the probate division.

12. On October 14, 1992, this court entered an order declaring Rachel Putnam to be a pretermitted spouse of Edgar J. Putnam.

13. On January 11, 1993, this court entered an order declaring the residence as homestead property.

14. On September 14, 1992, this court entered an order awarding Rachel Putnam a family allowance.

15. Edgar J. Putnam breached his joint and mutual will that he made with Joann Putnam when he married Rachel Putnam without taking appropriate steps to protect the interests of the third party beneficiaries under said will.

16. Based on the foregoing findings of fact ROBERT L. BLACKBURN, MARY ANN VIA, PAUL DAVID PUTNAM, JOSEPH EDGAR PUTNAM, RICHARD LEE PUTNAM AND RONALD ROY PUTNAM are entitled to a judgment as a matter of law. Therefore, it is

ORDERED AND ADJUDGED that ROBERT L. BLACKBURN, MARY ANN VIA, PAUL DAVID PUTNAM, JOSEPH EDGAR PUTNAM, RICHARD LEE PUTNAM AND RONALD ROY PUTNAM have valid claims against the estate of Edgar J. Putnam based on Edgar J. Putnam's breach of the mutual wills.

IT IS FURTHER ORDERED AND ADJUDGED that the valid claims of ROBERT L. BLACKBURN, MARY ANN VIA, PAUL DAVID PUTNAM, JOSEPH EDGAR PUTNAM, RICHARD LEE PUTNAM AND RONALD ROY PUTNAM are class 7 obligations pursuant to §733.707, Florida Probate Code.

IT IS FURTHER ORDERED AND ADJUDGED that any pretermitted spouse share or elective share that Rachel Putnam may have is subject to the class 7 obligations of this estate.

IT IS FURTHER ORDERED AND ADJUDGED that by virtue of the nature of the claims of the third party beneficiaries they are entitled to the entire estate less any exempt property, family allowance and homestead interests that may pass to Rachel Putnam free from claims of creditors.

DONE AND ORDERED in Chambers, Clearwater, Pinellas County, Florida, this _____ day of _____, 1993.

TRUE COPY
Original Signed
APR 30 1993

_____
CIRCUIT COURT JUDGE
THOMAS E. PENICK, JR.
Circuit Judge

cc: Joseph W. Fleece, III, Esquire
Teresa Cooper Ward, Esquire
Mark I. Shames, Esquire
James L. Reinman, Esquire

COPY

STATE OF FLORIDA :

COUNTY OF PINELLAS : LAST WILL AND TESTAMENT

I, EDGAR R. PUTNAM, a resident of the City of St. Petersburg, said State and County, being of sound and disposing mind and memory, do make this my Last Will and Testament, hereby revoking and annulling all others by me heretofore made.

1. I desire and direct that all of my just debts and expenses be paid by my Personal Representative hereinafter named and appointed.

2. All the rest, residue and remainder of my property, both real and personal, I devise to my wife, JOANN G. PUTNAM.

3. In the event my wife, JOANN G. PUTNAM, does not survive me, or in the event our deaths are simultaneous and there is no clear and convincing evidence as to which predeceased the other, then and in such an event, I devise my estate as follows:

A. Two (2) shares to my wife's son, ROBERT L. BLACKBURN. In the event he does not survive me, his share shall be distributed to his lineal descendants in accordance with the laws of descent and distribution of the State of Florida; and, in the absence of such lineal descendants, this share shall go to my wife's sister, VIRGINIA JERMONT, and if she does not survive me, then to my wife's nieces and nephews who survive me.

B. : Five (5) shares to be equally divided between my children: PAUL D. PUTNAM, JOSEPH E. PUTNAM, MARY ANN VIA, RICHARD L. PUTNAM and RONALD R. PUTNAM. In the event any named beneficiary does not survive me, the share of such deceased beneficiary shall go to his or her lineal descendants in accordance with the laws of descent and distribution of the State of Florida; and, in the absence of such lineal descendants, the share of such deceased shall go to the surviving named beneficiaries hereunder.

4. I acknowledge that this is a mutual Will made at the same time as my wife's Will and each of us have executed this Will

with the understanding and agreement that the survivor will not change the manner in which the residuary estate is to be distributed and that neither of us as survivors will do anything to defeat the distribution schedule set forth herein, such as disposing of assets prior to death by way of trust bank accounts, trust agreements, or in any other manner.

5. I hereby constitute and appoint my wife, JOANN G. PUTNAM, as Personal Representative of my estate, to serve without bond, to have full power and authority to sell any part of my estate, at public or private sale as she deems best and without court order. In the event she should not survive me or if she is unable or unwilling to serve, I constitute and appoint my daughter, MARY ANN VIA, as alternate Personal Representative, to have all the powers, privileges and duties as hereinbefore expressed.

WITNESS my hand and seal this 15th day of November, 1985.

s/ Edgar R. Putnam
EDGAR R. PUTNAM

The foregoing instrument was signed, sealed, declared and published by the Testator, EDGAR R. PUTNAM, as his Last Will and Testament, in the presence of us, the undersigned, who at his special instance and request, attest as witnesses, after said Testator has signed his name thereto, in our presence and in the presence of each other.

s/ Noble A. Doss — 5209 Gulfport Boulevard Gulfport, Florida

s/ Deborah G. Neebar — St. Petersburg, Florida

Section

PART IX. PRODUCTION OF WILLS

PART X. ANATOMICAL GIFTS

PART I. INTESTATE SUCCESSION

732.101. Intestate estate

(1) Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed in the following sections of this code.

(2) The decedent's death is the event that vests the heirs' right to intestate property.

Derivation:

Laws 1975, c. 75-220, § 8.
Laws 1974, c. 74-106, § 1.

Cross References

Killer, right to benefits accruing from death of victim, see § 732.802.

732.102. Share of spouse

(1) The intestate share of the surviving spouse is:

(a) If there is no surviving lineal descendant of the decedent, the entire intestate estate.

(b) If there are surviving lineal descendants of the decedent, all of whom are lineal descendants of the surviving spouse also, the first $20,000 of the intestate estate, plus one-half of the balance of the intestate estate. Property allocated hereunder to the surviving spouse to satisfy the $20,000 shall be valued at the fair market value on the date of the decedent's death.

(c) If there are surviving lineal descendants, one or more of whom are not lineal descendants of the surviving spouse, one-half of the intestate estate.

Derivation:
Laws 1992, c. 92-200, § 12, eff. Oct. 1, 1992.

732.226. Limitations on testamentary disposition

Sections 732.216–732.228 do not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person.

Derivation:
Laws 1992, c. 92-200, § 13.

732.227. Homestead defined

For purposes of ss. 732.216–732.228, the term "homestead" refers property the descent and devise of which is restricted by s. 4(c), Art. I State Constitution.

Derivation:
Laws 1992, c. 92-200, § 14.

732.228. Uniformity of application and construction

Sections 732.216–732.228 are to be so applied and construed as to effectuate their general purpose to make uniform the law with respect to the subject of these sections among those states which enact them.

Derivation:
Laws 1992, c. 92-200, § 15.

PART III. PRETERMITTED SPOUSE AND CHILDREN

732.301. Pretermitted spouse

When a person marries after making a will and the spouse survives the testator, the surviving spouse shall receive a share in the estate of the testator equal in value to that which the surviving spouse would have received if the testator had died intestate, unless:

(1) Provision has been made for, or waived by, the spouse by prenuptial or postnuptial agreement;

(2) The spouse is provided for in the will; or

(3) The will discloses an intention not to make provision for the spouse.

The share of the estate that is assigned to the pretermitted spouse shall be obtained in accordance with s. 733.805.

Derivation:
Laws 1977, c. 77-87, § 9.
Laws 1975, c. 75-220, § 16.
Laws 1974, c. 74-106, § 1.

Cross References

Effect of subsequent marriage, birth, or dissolution of marriage, see § 732.507.

732.505. Revocation by writing

A will or codicil, or any part of either, is revoked:

(1) By a subsequent inconsistent will or codicil, even though the subsequent inconsistent will or codicil does not expressly revoke all previous wills or codicils, but the revocation extends only so far as the inconsistency exists.

(2) By a subsequent written will, codicil, or other writing declaring the revocation, if the same formalities required for the execution of wills are observed in the execution of the will, codicil, or other writing.

Derivation:
Laws 1979, c. 79-400, § 269.
Laws 1977, c. 77-87, § 13.
Laws 1975, c. 75-220, § 23.
Laws 1974, c. 74-106, § 1.

Cross References

Burden of proof in will contests, see § 733.107.
Discovery of later will, see § 733.208.

732.506. Revocation by act

A will or codicil is revoked by the testator, or some other person in his presence and at his direction, by burning, tearing, canceling, defacing, obliterating, or destroying it with the intent, and for the purpose, of revocation.

Derivation:
Laws 1975, c. 75-220, § 23.
Laws 1974, c. 74-106, § 1.

Cross References

Burden of proof in will contests, see § 733.107.

732.507. Effect of subsequent marriage, birth, or dissolution of marriage

(1) Neither subsequent marriage nor subsequent marriage and birth or adoption of lineal descendants shall revoke the prior will of any person, but the pretermitted child or spouse shall inherit as set forth in ss. 732.301 and 732.302, regardless of the prior will.

(2) Any provisions of a will executed by a married person, which provision affects the spouse of that person, shall become void upon the divorce of that person or upon the dissolution or annulment of the marriage. After the dissolution, divorce, or annulment, any such will shall be administered and construed as if the former spouse had died at the time of the dissolution, divorce, or annulment of the marriage, unless the will or the dissolution or divorce judgment expressly provides otherwise.

Derivation:
Laws 1990, c. 90-23, § 3.
Laws 1975, c. 75-220, § 24.
Laws 1974, c. 74-106, § 1.

Cross References

Pretermitted children, see § 732.302.
Pretermitted spouse, see § 732.301.
Unborn persons, when bound by others, see § 731.303.

PART VII. CONTRACTUAL ARRANGEMENTS RELATING TO DEATH

732.701. Agreements concerning succession

(1) No agreement to make a will, to give a devise, not to revoke a will, not to revoke a devise, not to make a will, or not to make a devise shall be binding or enforceable unless the agreement is in writing and signed by the agreeing party in the presence of two attesting witnesses.

(2) The execution of a joint will or mutual wills neither creates a presumption of a contract to make a will nor creates a presumption of a contract not to revoke the will or wills.

Derivation:

Laws 1975, c. 75-220, § 39.
Laws 1974, c. 74-106, § 1.

Cross References

Attestation of wills, see § 732.502.
Revocation of wills, see §§ 732.505, 732.506.

732.702. Waiver of right to elect and of other rights

(1) The right of election of a surviving spouse, the rights of the surviving spouse as intestate successor or as a pretermitted spouse, and the rights of the surviving spouse to homestead, exempt property, and family allowance, or any of them, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party. Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead property, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to either from the other by intestate succession or by the provisions of any will executed before the waiver or property settlement.

(2) Each spouse shall make a fair disclosure to the other of his or her estate if the agreement, contract, or waiver is executed after marriage. No disclosure shall be required for an agreement, contract, or waiver executed before marriage.

(3) No consideration other than the execution of the agreement, contract, or waiver shall be necessary to its validity, whether executed before or after marriage.

Derivation:

Laws 1977, c. 77-87, § 14.
Laws 1975, c. 75-220, § 39.
Laws 1974, c. 74-106, § 1.

Cross References

Disclaimer of interest in probate proceedings, see § 732.801.
Notice of waiver, see § 731.302.

conditioned on the making of due contribution for the payment of devises, family allowance, estate and inheritance taxes, claims, elective share of the spouse, charges, expenses of administration, and equalization in case of advancements, plus any interest on them.

Derivation:

Laws 1979, c. 79-400, § 272.
Laws 1977, c. 77-174, § 1.
Laws 1977, c. 77-87, § 37.
Laws 1975, c. 75-220, § 86.
Laws 1974, c. 74-106, § 1.

Cross References

Proceedings for payment of legacies or distributive interest, see Probate Rule 5.380.

733.803. Encumbered property; liability for payment

The specific devisee of any encumbered property shall be entitled to have the encumbrance on devised property paid at the expense of the residue of the estate only when the will shows such an intent. A general direction in the will to pay debts does not show such an intent.

Derivation:

Laws 1975, c. 75-220, § 86.
Laws 1974, c. 74-106, § 1.

733.805. Order in which assets are appropriated

(1) If a testator makes provision by his will, or designates the funds or property to be used, for the payment of debts, estate and inheritance taxes, family allowance, exempt property, elective share charges, expenses of administration, and devises, they shall be paid out of the funds or from the property or proceeds as provided by the will so far as sufficient. If no provision is made or any fund designated, or if it is insufficient, the property of the estate shall be used for such purposes, except as otherwise provided in s. 733.817 with respect to estate, inheritance, and other death taxes, and to raise the shares of a pretermitted spouse and children, in the following order:

(a) Property not disposed of by the will.

(b) Property devised to the residuary devisee or devisees.

(c) Property not specifically or demonstratively devised.

(d) Property specifically or demonstratively devised.

(2) Demonstrative devises shall be classed as general devises upon the failure or insufficiency of funds or property out of which payment should be made, to the extent of the insufficiency. Devises to the decedent's surviving spouse, given in satisfaction of, or instead of, the surviving spouse's statutory rights in the estate, shall not abate until other devises of the same class are exhausted. Devises given for a valuable consideration shall abate with other devises of the same class only to the extent of the excess over the amount of value of the consideration until all others of the same class are exhausted. Except as herein provided, devises shall abate equally and ratably and without preference or priority as between real and personal property. When property that has been specifically devised or charged with a devise is sold or taken by the personal representative, other devisees shall contribute according to their

respective interests to the devisee whose devise has been sold or taken, and before distribution the court shall determine the amounts of the respective contributions, and they shall be paid or withheld before distribution is made.

Derivation:
Laws 1977, c. 77-174, § 1.
Laws 1975, c. 75-220, § 88.
Laws 1974, c. 74-106, § 1.

Cross References

Accessions, change in securities, see § 732.605.
Ademption by satisfaction, see § 732.609.

733.806. Advancement

If a person dies intestate as to all his estate, property that he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir. The property advanced shall be valued at the time the heir came into possession or enjoyment of the property or at the time of the death of the decedent, whichever first occurs. If the recipient of the property does not survive the decedent, the property shall not be taken into account in computing the intestate share to be received by the recipient's descendants unless the declaration or acknowledgment provides otherwise.

Derivation:
Laws 1975, c. 75-220, § 89.
Laws 1974, c. 74-106, § 1.

Cross References

Ademption by satisfaction, see § 732.609.
Valuation, see § 733.810.

733.808. Death benefits; disposition of proceeds

(1) Death benefits of any kind, including, but not limited to, proceeds of:

(a) An individual life insurance policy;

(b) A group life insurance policy;

(c) An employees' trust or under a contract purchased by an employees' trust forming part of a pension, stock-bonus, or profit-sharing plan;

(d) An annuity or endowment contract; and

(e) A health and accident policy,

may be made payable to the trustee under a trust agreement or declaration of trust in existence at the time of the death of the insured, employee, or annuitant. The death benefits shall be held and disposed of by the trustee in accordance with the terms of the trust as they appear in writing on the date of the death of the insured, employee, or annuitant. It shall not be necessary to the validity of the trust agreement or declaration of trust, whether revocable or irrevocable, that it have a trust corpus other than the right of the trustee to receive death benefits.

(2) Death benefits of any kind, including, but not limited to, proceeds of:

retrieved from Boyd's body. Four cartridge cases were found at the scene of the crime. These articles were sent to the Federal Bureau of Investigation for examination. The laboratory report of the Bureau, received in evidence, disclosed that the bullets in Boyd's body were fired from the barrel of the pistol found in Woods' residence. The cartridge cases found at the scene of the crime were fired in the pistol. The bullets recovered from Boyd's body and the cartridge cases found at the scene of the crime were "components of ammunition" like those comprising the cartridges in the magazine and ammunition box found in Woods' residence. The report continued:

> The ... pistol functioned normally when test fired in the Laboratory. The trigger pull ... was measured to be approximately five pounds, which is considered normal for a firearm of this type. The ... magazine [found in Woods' residence] is manufactured for this type of pistol. [It] and [the magazine in the pistol] will each hold nine cartridges.

The report of the Federal Bureau of Investigation supplied evidence legally sufficient to show that a handgun was used to kill Boyd. We conclude that the evidence showed directly, or supported rational inferences, from which the trial judge could properly be convinced beyond a reasonable doubt that Woods was guilty of using a handgun in the commission of the felony of murder.

Woods has not prevailed on any of his contentions. We, therefore, affirm the judgments of the Circuit Court for Anne Arundel County.[12]

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED;

COSTS TO BE PAID BY APPELLANT.

315 Md. 624

Lisa Mae SHIMP

v.

Mary Virginia HUFF and Wallace R. Huff, Personal Representatives of the Estate of Lester Shimp et al.

No. 71, Sept. Term, 1988.

Court of Appeals of Maryland.

April 11, 1989.

Surviving spouse sued for declaratory judgment that she was entitled to both a family allowance and an elective share of testator's estate. The Circuit Court, Washington County, John P. Corderman, J., entered judgment in favor of defendants, and surviving spouse appealed. The Court of Appeals, Murphy, C.J., held that: (1) surviving spouse's elective rights were superior, as matter of public policy, to claims arising out of will executed by testator pursuant to valid contract to make will, and (2) spouse's claim for family allowance was also entitled to priority.

Vacated and remanded.

12. On 9 February 1988 in the Circuit Court for Anne Arundel County, Donald A. Dare pleaded guilty to the first degree murder and the attempted murder of Michael Boyd. The court found him guilty of those offenses and sentenced him to life imprisonment on the murder conviction and to a concurrent sentence of life imprisonment with all but 5 years suspended on the attempted murder conviction. Six related charges were not prossed.

On 4 February 1988, Jody Boyd was found guilty at a court trial in the Circuit Court for Anne Arundel County of the first degree murder of Michael Boyd, the attempted murder of him, and conspiracy to murder him. She was sentenced to life imprisonment without the possibility of parole on the murder conviction and to concurrent life sentences on the other convictions. On review of the sentences, the panel struck the parole provision. On appeal, the Court of Special Appeals affirmed the judgments. *Boyd v. State*, 79 Md.App. 53, 555 A.2d 535, (1989).

As to James Hayes, the State, in exchange for his testimony, agreed not to oppose his being tried as a juvenile.

1. Wills ⇐802(1)

Surviving spouse's elective rights were superior, as matter of public policy, to claims arising out of will executed by testator pursuant to valid contract to make will with prior spouse.

2. Wills ⇐1

Right to make will is purely statutory and can be limited by statute.

3. Wills ⇐785.5(1)

Surviving spouse's elective rights are personal to surviving spouse, and cannot be waived by unilateral acts of others, including those of testator. Code, Estates and Trusts, § 3-204.

4. Contracts ⇐111

Contracts which discourage or restrain right to marry are void as against public policy.

5. Executors and Administrators ⇐182

Surviving spouse's right to family allowance was superior, under priority statute, to claims arising out of will executed by testator pursuant to valid contract to make will with prior spouse. Code, Estates and Trusts, §§ 3-201, 8-105.

6. Executors and Administrators ⇐182

Surviving spouse's claim for family allowance is to be accorded priority over claims of both ordinary contract creditors and legatees under will. Code, Estates and Trusts, §§ 3-201, 8-105.

7. Executors and Administrators ⇐182

Clause in will, providing that bequests were to be made only after payment of "all just debts and funeral expenses," accorded priority to surviving spouse's claim for family allowance.

Susan Rhodes Nicholson (Ralph H. France, II, on brief), Hagerstown, for appellant.

Omer T. Kaylor, Jr. (Kaylor & Wantz, on brief), Hagerstown, for appellee.

Argued before MURPHY, C.J., and ELDRIDGE, COLE, RODOWSKY, McAULIFFE, ADKINS and BLACKWELL, JJ.

MURPHY, Chief Judge.

In his treatise, *The Law of Wills*, § 34 at 69 (3rd ed. 1947), George W. Thompson warns that "[a]s a general rule, joint wills are not regarded with much favor by the courts, and are ... apt to invite litigation." The joint will of Lester and Clara Shimp has fulfilled Thompson's prediction by causing this Court for a second time to resolve conflicts arising from that will. In *Shimp v. Shimp*, 287 Md. 372, 412 A.2d 1228 (1980) (*Shimp I*), we addressed the issue of whether Lester and Clara's joint will could operate as a binding contract and thereby limit the survivor's right to dispose of property by a testamentary plan which differed from that contained in the joint will. In the present case, the issue is whether Lester Shimp's second wife, upon his death, is entitled to receive an elective share and a family allowance under Maryland Code (1974, 1988 Cum.Supp.) § 3-203 and § 3-201 of the Estates and Trusts Article when Lester had previously contracted, by virtue of a joint will with his first wife, to will his entire estate to others.

Sections 3-203 and 3-201 of the Estates and Trusts Article are codified under Subtitle 2 of Title 3, which is entitled: "Family Allowance and Statutory Share of Surviving Spouse." As to the latter, § 3-203(a) provides that "[i]nstead of property left to him by will, the surviving spouse may elect to take a one-third share of the net estate if there is also a surviving issue, or a one-half share of the net estate if there is no surviving issue." As to the family allowance, § 3-201 provides in part, that a surviving spouse is entitled to "an allowance of $2000 for his personal use." [1]

I.

Lester Shimp married his first wife, Clara, in 1941. At the time of their mar-

1. Unless otherwise indicated, all section references are to the Estates and Trusts Article of the Code.

riage, neither Lester nor Clara possessed any property of consequence. Subsequently, in 1954, they acquired a farm which they sold in 1973; thereafter they bought a home. Lester and Clara took title to both the farm and the home as tenants by the entireties.

On May 8, 1974, in Washington County, the couple executed an instrument titled "Last Will and Testament of Clara V. Shimp and Lester Shimp." It stated in relevant part:

> WE, CLARA V. SHIMP AND LESTER SHIMP, of Washington County, Maryland, being of sound and disposing mind, memory and understanding, and capable of making a valid deed and contract, do make, publish and declare this to be our Last Will and Testament, hereby revoking all other Wills and Codicils by each of us made.
>
> After the payment of all just debts and funeral expenses, we dispose of our estate and property as follows:
>
> ITEM I. A. MUTUAL BEQUEST—We mutually give to whichever of us shall be the survivor the entire estate of which we may respectfully own at our death.
>
> B. SURVIVOR'S BEQUEST—The survivor of us gives the entire estate of his or her property which he or she may own at death as follows:
>
> 1) Unto James Shimp, if he is living at the death of the survivor of us, the sum of One Thousand ($1,000.00) Dollars.
>
> 2) Unto Emma Plotner, if living at the death of the survivor of us, the sum of One Thousand ($1,000.00) Dollars.
>
> 3) Unto Mary Virginia Huff and Betty Jane Moats all household goods and machinery to do with as they desire. This bequest is made unto them due to the care that they have given us.
>
> 4) All of the rest and residue of the estate of the survivor is hereby devised unto Mary Virginia Huff, Betty Jane Moats, Paul R. Mijanovich and Ruth C. Thomas to be divided equally among them. In the event of the death of any of said persons, their children shall inherit the share to which the parent would have been entitled, if living.
>
> . . . . .
>
> ITEM III. We, the Testators, do hereby declare that it is our purpose to dispose of our property in accordance with a common plan. The reciprocal and other gifts made herein are in fulfillment of this purpose and in consideration of each of us waiving the right, during our joint lives, to alter, amend or revoke this Will in whole or in part, by Codicil or otherwise, without notice to the other, or under any circumstances after the death of the first of us to die. Unless mutually agreed upon, this Last Will and Testament is an irrevocable act and may not be changed.

Clara died in 1975 in Washington County. At the time of her death she did not own property solely in her name and possessed no probate estate. Lester did not offer the will for probate following his wife's death. He did, however, file a petition in the Circuit Court for Washington County seeking declaratory relief and requesting the right to execute a new last will and testament. The court found that the will was revocable, but that the contract under which the will was executed might be specifically enforced in equity or damages recovered upon it at law. Lester appealed to the Court of Special Appeals, *see Shimp v. Shimp*, 43 Md.App. 67, 402 A.2d 1324 (1979), and ultimately, by writ of certiorari, the case came before us.

In *Shimp I*, we found that the Shimps had executed their joint will pursuant to and in accordance with a valid, binding contract. 287 Md. at 387, 412 A.2d 1228. We held that Lester was "entitled to a declaratory decree stating that he may revoke his will but that an enforceable contract was entered into between him and his wife.... [and that] [a]t his death it may be specifically enforced in equity or damages may be recovered upon it at law." *Id.* at 388, 412 A.2d 1228. Thereafter, Lester did not execute another will or otherwise disturb the testamentary plan set forth in the joint will.

On April 4, 1985, in Washington County, Lester married Lisa Mae; they remained married until his death on January 11, 1986. Lester was not survived by any children.

Following Lester's death, Clara and Lester's joint will was admitted to probate in Washington County. Mary Virginia Huff and Wallace R. Huff were appointed Personal Representatives of the Estate on January 30, 1986. Lisa Mae and Lester had not entered into any marital agreement waiving Lisa Mae's marital rights, and she sought payment of a family allowance and filed an election for her statutory share of Lester's estate. On June 4, 1986, the Personal Representatives declined to pay Lisa Mae either her family allowance or her elective share. On July 10, 1986, Lisa Mae filed suit for a declaratory judgment in the Circuit Court for Washington County, requesting that the court pass an order that she was entitled to both a family allowance and an elective share of Lester's estate.

The court (Corderman, J.) framed the issue before it as "whether, under Estates and Trusts Article 3-203, the plaintiff has a right to an elective share of an estate previously devised under a valid contract." While noting the absence of Maryland cases addressing this specific issue, the court, nevertheless, found precedent in decisions of this Court regarding the relationship between dower interests and contractual obligations. It observed that under rules pertaining to dower rights, a widow, absent fraud, has no dower rights or interest in lands disposed of prior to marriage. The court placed emphasis upon the early case of *Cowman v. Hall*, 3 G. & J. 398 (Md.1831). It said that this case established the principle that a widow is not entitled to dower in land for which her husband was only a trustee by virtue of his having made a contract with his mother prior to the marriage to dispose of the land by will. After drawing an analogy between dower rights and a claim for an elective share, the court applied the principles concerning dower to the present case. It found that because Lester, before his marriage to Lisa Mae, had entered into a binding contract to devise all of his estate, he was not seized of an estate of inheritance at the time of his second marriage, but rather was merely a trustee of that estate. Because a widow is entitled to no part of her husband's estate except that of which he dies seized or possessed, the court concluded that since Lester was merely a trustee for the property, there was no estate from which Lisa Mae could take an elective share. Similarly, the court found that Lisa Mae could not claim a family allowance because there were no estate assets from which the allowance could be paid. Lisa Mae appealed to the Court of Special Appeals; we granted certiorari prior to a decision by that court to resolve the important issues raised in the case.

II.

In *Shimp I*, we focused upon the issue of whether Lester and Clara entered into a binding contract when they executed a joint will and the effect of that contract on Lester's ability to alter the testamentary plan contained in that joint will. We reviewed the law pertaining to contracts to make a will. We noted that both courts and commentators have tended to blend the will and contract components of an instrument, as a result of which they have found that wills—which are by their nature ambulatory—are in some instances irrevocable, and that contracts, which by their nature trigger liability upon breach, are rescindable in some cases. 287 Md. at 377-78, 412 A.2d 1228. We indicated that *Moats v. Schoch & Berry*, 24 Md.App. 453, 332 A.2d 43 (1975) set forth the correct principles of law regarding the contractual nature of a joint will, namely, that a joint will may be revoked in the manner provided by statute; that a subsequent validly executed will shall be admitted to probate; but that "'the contract upon which the prior will was executed, upon proof of its validity, may be specifically enforced in equity, or damages recovered upon it at law.'" 287 Md. at 381, 412 A.2d 1228, *quoting*, 24 Md.App. at 465, 332 A.2d 43. Thus, we determined that the central issue in *Shimp I* was not the revocability of the will, but whether Lester entered into a binding con-

tract with his wife to devise property according to a stated plan. 287 Md. at 381, 412 A.2d 1228.

Citing Bertel Sparks' treatise, *Contracts to Make Wills* (1956), we noted that while the mere presence of either joint or mutual wills does not raise any presumption that they were executed in pursuance of a contract, a contract to devise may be established where there is clear and convincing proof. *Id.* at 381, 383, 412 A.2d 1228. In examining Lester and Clara's joint will, we found that the terms of the contract were clear and unambiguous. *Id.* at 383, 412 A.2d 1228. We indicated that consideration sufficient to prove the existence of a contract might be established by each testator having agreed "by the joint will or other contract to make a particular testamentary disposition in return for a like promise from the other testator." *Id.* at 386, 412 A.2d 1228. We determined that adequate consideration existed in *Shimp I* because the parties had stated in their will that they made both the reciprocal and third party bequests in exchange for each other's agreement to waive the right to change the will. *Id.* at 387, 412 A.2d 1228. Thus, we found that the evidence in the case established that a valid contract existed and that this contract was the basis for the making of the joint will. *Id.* at 387, 412 A.2d 1228. We concluded that Lester was "entitled to a declaratory decree stating that he may revoke his will but that an enforceable contract was entered into between him and his wife.... [and that] [a]t his death it may be specifically enforced in equity or damages may be recovered upon it at law." *Id.* at 388, 412 A.2d 1228.

While *Shimp I* focused primarily upon the effect of the joint will and contract upon Lester's ability to alter the testamentary plan contained therein, we considered the contract's possible effect upon the rights of any future wife of Lester's; we said:

> It may be if Shimp remarries that his then wife may be placed in a disadvantageous position by the contract with the first wife. If by reason of a prior marriage he was under a burdensome requirement to pay a substantial sum to a prior wife by way of alimony and for support of minor children, the second wife might regard herself as in a disadvantageous position. However, as Dean Evans so forcefully stated, "A woman who marries a spouse after the latter has so bound himself by contract undertakes the marriage constrained by all obligations then existing. No legislative purpose has been discovered by the courts which should avoid in this way existing rights and duties." 287 Md. at 388, 412 A.2d 1228, *quoting*, 33 Ky.L.J. at 86.

The Personal Representatives contend that this statement in *Shimp I* is determinative of the issue raised in the present case. They argue that we were "not speaking primarily about alimony" but rather indicated that Lester's "prior contractual obligations could preclude recovery by a subsequent spouse to that portion of the estate covered in the contract." Our statement, however, makes no reference to a surviving spouse's claim for an elective share in an estate which by contract must be devised to others, and thus cannot reasonably be interpreted to bar a subsequent spouse's claim.

The Personal Representatives also argue that *Cowman v. Hall, supra*, is dispositive of the issues raised in this case. As earlier observed, the circuit court found that *Cowman* established that a widow is not entitled to dower in land to which her husband held title only as a trustee at the time of the marriage when he had previously made an agreement to dispose of the property by will. We think the circuit court misread *Cowman*.[2] In that case, the contract which the husband executed was not one to make a will devising the property but was a contract to convey the property by deed. Specifically, Richard Hall, entered into a

2. This misreading may be the result of the circuit court having relied on Annotation, *Dower or Curtesy in Property Subject at Time of Marriage to Contract for Disposition by Sale or Will*, 8 A.L.R.3d 569 (1966), which mistakenly characterizes the *Cowman* case as one involving a contract to make a will. *See* 8 A.L.R.3d at 579.

contract with his mother, Martha Hall, on January 14, 1789, by which Martha agreed to convey to Richard certain lands previously owned by her husband, Edward Hall, Sr. In consideration for this conveyance, Richard agreed " 'to convey to her, the said Martha Hall, or to her heirs or to such of the younger children, brothers or sisters to the said Richard, as she shall from time to time direct and appoint,.... [t]he same conveyance to be made either in separate deeds or otherwise ... according to the directions of the said Martha,.... [a]nd if no such direction in her life-time, then agreeably to such disposition as she shall make thereof, amongst the said children, by her last will and testament.' " 8 G. & J. at 401. By virtue of this contract, Richard received a fee simple interest in the property, but his interest was subject to a power of appointment exercisable by Martha by deed during her life or by will at her death in favor of Richard's brothers and sisters.

Subsequent to the execution of this contract, Richard married Sarah. On July 13, 1807, Martha executed a deed, exercising her power of appointment in favor of Richard's younger brothers, Edward Hall, Jr., Thomas Hall, and John Hall, and Richard Hall executed deeds conveying the property in accordance with his mother's directions. Richard died in January 1823, and on August 11, 1826, Sarah, his widow, claimed dower rights in the land previously owned by her husband.

The Court found that by executing the January 14, 1789 contract and by performing her obligations under this agreement, Martha became "entitled herself to a conveyance, in pursuance of the agreement, whenever she might choose to require it." These facts, coupled with the fact that Martha remained in actual possession of the property following the execution of the contract, indicated to the Court that Martha was entitled to the beneficial interest in the property, while Richard "became in equity a trustee for his mother, of all the lands embraced by th[e] agreement." *Id.* at 404–05.

Having determined the interests of Richard and Martha under the agreement, the Court next addressed Sarah's claim for dower in the property. It noted that ordinarily "[a] widow is not dowable in equity of lands, which were held by her husband in the character of a trustee." *Id.* at 405. The Court found that because Richard had entered into the contract with his mother prior to his marriage, he held the lands in which Sarah claimed dower merely as a trustee. Consequently, the Court held that, as Richard's widow, Sarah was "not entitled to dower in any of the lands embraced ... [by the agreement], and of which her husband was at the time of their marriage and afterwards seized only as a trustee." *Id.* at 406.

Cowman thus involved a contract to convey property by deed and not a contract to devise property by will. It, therefore, differs substantially from the present case. Under a contract to make a will devising property, the right to convey property by will is not absolute. As this Court has often recognized "the right of a person to transfer property upon his death to others, or the right of a person to receive property by will or inheritance, is not a natural right but a privilege granted by the State." *Safe Dep. & Tr. Co. v. Bouse*, 181 Md. 351, 355, 29 A.2d 906 (1943). Thus, the transferee's rights under a contract to make a will may be limited by statutes, which require the decedent to pay, *inter alia*, taxes, administration fees, and funeral expenses, before satisfying any bequests made in the will. The likelihood that a contract beneficiary's interest will be reduced is even greater where there is a contract to devise an entire estate because before such a contract can be fulfilled the estate must be reduced by the payment of the obligations set forth by statute. While in *Cowman* the contract beneficiaries enjoyed the full range of rights afforded transferees under a contract for an inter vivos conveyance, rights accruing under the contract to make a will may be limited by statutes affecting a decedent's ability to convey property under the will.

III.

While we have not previously addressed the issue of a surviving spouse's right to

take an elective share in conflict with claims under a contract to convey by will, courts in other jurisdictions have examined the issue under varying factual situations. *See, e.g., Owens v. McNally*, 113 Cal. 444, 45 P. 710 (1896); *In Re Estate of Donner*, 364 So.2d 742 (Fla.Dist.Ct.App.1978); *In Re Estate of Donner*, 364 So.2d 753 (Fla.Dist. Ct.App.1978), *cert. denied*, 373 So.2d 457 (Fla.), *appeal dismissed sub nom.* 444 U.S. 958, 100 S.Ct. 442, 62 L.Ed.2d 371 (1979); *Bedal v. Johnson*, 37 Idaho 359, 218 P. 641 (1923); *Dillon v. Gray*, 87 Kan. 129, 123 P. 878 (1912); *Wides v. Wides' Ex'r*, 299 Ky. 103, 184 S.W.2d 579 (1944); *Rubenstein v. Mueller*, 19 N.Y.2d 228, 225 N.E.2d 540, 278 N.Y.S.2d 845 (1967); *In Re Estate of Dunham*, 36 A.D.2d 467, 320 N.Y.S.2d 951 (1971); *In Re Tanenbaum's Estate*, 258 A.D. 285, 16 N.Y.S.2d 507 (1939), *reh'g and appeal denied*, 258 A.D. 1054, 17 N.Y.S.2d 1021 (1940); *Gall v. Gall*, 64 Hun. 600, 19 N.Y.S. 332 (N.Y.Sup.Ct.1892); *In Re Erstein's Estate*, 205 Misc. 924, 129 N.Y.S.2d 316 (N.Y.Surr.Ct.1954); *In Re Lewis' Will*, 4 Misc.2d 937, 123 N.Y.S.2d 859 (N.Y. Surr.Ct.1953); *In Re Hoyt's Estate*, 174 Misc. 512, 21 N.Y.S.2d 107 (N.Y.Surr.Ct. 1940); *Patecky v. Friend*, 220 Or. 612, 350 P.2d 170 (1960); *In Re Estate of Beeruk*, 429 Pa. 415, 241 A.2d 755 (1968); *Budde v. Pierce*, 135 Vt. 152, 375 A.2d 984 (1977); *Fields v. Fields*, 137 Wash. 592, 243 P. 869 (1926); *In Re Arland's Estate*, 131 Wash. 297, 230 P. 157 (1924); *In Re McLean's Estate*, 219 Wis. 222, 262 N.W. 707 (1935); *see also* B. Sparks, *Contracts to Make Wills* 167–78 (1956); Lilly, *Will Contracts: Contract Rights in Conflict With Spousal Rights*, 20 Tulsa L.J. 197 (1984).

In a number of these cases one spouse, after entering into a divorce or separation agreement which requires that spouse to leave part or all of the estate to the first spouse, remarries and then dies. *See, e.g., Donner, supra; Wides, supra; Tanenbaum, supra; Dunham, supra; Erstein, supra; Hoyt, supra; Lewis, supra; Budde, supra.* In other cases, the decedent has contracted to make a will leaving property to children or other relatives. *See, e.g., Rubenstein, supra; Patecky, supra; Arland, supra.* Still other cases have arisen where the decedent had remarried after entering into an agreement to will property in exchange for services, *see, e.g., Owens, supra*, or for forbearance from legal action, *see, e.g., McLean, supra*, or to facilitate an adoption, *see, e.g., Bedal, supra; Fields, supra.* In some cases, the decedent has executed a will conforming to the contract, while in others he has breached the contract by executing a nonconforming will or by dying intestate.[3]

A.

The majority of these cases arise from the decedent having breached a contract to devise property by executing a nonconforming will or by dying intestate. In these cases, the claimants under the contract generally proceed on a theory of specific performance.[4] While the rights of beneficiaries of a contract vest after the contract is made, nevertheless, where suit is brought for specific performance of the

3. A conflict between contract beneficiaries and a surviving spouse claiming an elective share also may arise where the decedent executed a will conforming to the contract, but the will was subsequently revoked by operation of law when the decedent married. *See, e.g., In Re Estate of Stewart*, 69 Cal.2d 296, 70 Cal.Rptr. 545, 444 P.2d 337 (1968) (*en banc*); *Simpson v. Dodge*, 220 Ga. 705, 141 S.E.2d 532 (1965); *Wides, supra*. While in the present case we do not face the issue of Lester's will being revoked by operation of law, courts have suggested that such a revocation will have little practical effect because regardless of whether the will is effective or revoked, the court must still deal with the contract's effect upon the rights of the surviving spouse. *See Wides, supra*, 184 S.W.2d at 582 (noting that if the decedent "had made a will in accordance with that contract ... ordinarily it should be held to have been revoked by his subsequent marriage to the appellant, [and] we would be at the same starting point, namely, the question of whether the contract is enforceable to the exclusion of the widow's statutory share").

4. It should be noted that the court cannot grant the claimants actual specific performance because the promisor is dead, and thus cannot be compelled to perform. Instead, the court treats those individuals who hold the property as trustee and compels them to convey it to the claimants in satisfaction of the contract. *See* Lilly, *supra*, at 222.

contract, "the after-acquired rights of third parties are equitable considerations to be regarded in adjudicating the questions." *Owens, supra*, 45 P. at 713. In determining whether to award specific performance to contract beneficiaries, courts have considered several different factors, including whether the surviving spouse had notice of the contract prior to the marriage, *see, e.g., Patecky, supra*, 350 P.2d at 175, the length of the marriage and the natural affection shared between the decedent and the surviving spouse, *see, e.g., Arland, supra*, 230 P.2d at 158, whether the surviving spouse would be deprived of the entire estate by enforcement of the contract, *see, e.g., Wides, supra*, 184 S.W.2d at 584, and the public policy concerning the marriage relationship and the rights of surviving spouses, *see, e.g., Wides, supra*, 184 S.W.2d at 584; *Budde, supra*, 375 A.2d at 986–87. In a great many cases consideration of these factors has led the court to determine that the superior equities were with the surviving spouse, *see, e.g., Owens, supra*, 45 P. at 713; *Bedal, supra*, 218 P. at 649; *Wides, supra*, 184 S.W.2d at 584; *Patecky, supra*, 350 P.2d at 177; *Fields, supra*, 243 P. at 371–72; *Arland's Estate, supra*, 230 P. at 159, while in other cases it has not, *see, e.g., Dillon, supra*, 123 P. at 880.

B.

In those cases where the decedent has executed a will conforming to the contract, the claimants cannot seek specific performance, and courts, therefore, do not use equitable powers in resolving these cases.[5] Instead, courts have analyzed the conflicting claims by characterizing the competing claimants as either creditors or legatees and evaluating their claims under the applicable priority rules. In a number of cases involving divorce settlements, the courts have found that where the decedent executes a will, which conforms to the terms of a contract, the beneficiaries take as legatees under the will and not as contract creditors. *See, e.g., Donner, supra*, 364 So.2d at 755; *Dunham, supra*, 320 N.Y.S.2d at 954; *Tanenbaum, supra*, 16 N.Y.S.2d at 510; *Lewis, supra*, 123 N.Y.S.2d at 862–63; *Hoyt, supra*, 21 N.Y.S.2d at 111. Consequently, because the applicable statutes give a higher priority to a surviving spouse's elective share than to testamentary bequests, the courts upheld the surviving spouse's claim over the claims of the contract beneficiaries. As the court explained in *In Re Hoyt's Estate*

> ... [we] hold that the claimants are not creditors under paragraph seventh of the separation agreement, but that the agreement merely created an enforceable obligation to make a testamentary provision for the benefit of the first wife of the testator and his children after her death. The testator performed that agreement. He undertook to do no more. The status of the claimants is therefore that of legatees or beneficiaries under the will. As such legatees or beneficiaries they take subject to the operation of the statutes relating to testamentary dispositions, including the right of the surviving widow to take her intestate share under Section 18 of the Decedent Estate Law. Their rights are also subordinate to all true creditors of the estate. The widow of the testator is therefore entitled to a one-third share of the net estate. The respective interests of the claimants as legatees or beneficiaries must be satisfied out of the balance. 21 N.Y.S.2d at 111.

At least one court, however, has suggested that analyzing the competing claims under the applicable priority statutes should be limited to cases involving divorce settlement agreements. In *Rubenstein, supra*, which involved an ordinary contract to devise property[6] rather than a separation

5. As noted in Lilly's article on will contracts, where the will conforms to the contract, the contract beneficiaries do not make a claim for specific performance in equity but rather raise any claims in probate proceedings. Thus, as the author notes, "[i]n case of a *conforming* will, equitable discretion does not come into play, and beneficiaries' full recovery will depend solely upon the priorities accorded to spousal right by the protective statutes." Lilly, *supra*, at 226.

6. In *Rubenstein, supra*, the decedent and his first wife executed a joint will, whereby the survivor agreed to leave the entire estate to

agreement, the court distinguished those cases involving marital separation agreements, under which husbands covenanted to make a will, noting that different equitable considerations control in the two situations. The court explained:

> Separation agreements are usually attended by a present division of any jointly held property, and any provision for a future legacy is usually but an incident to the over-all settlement to be made with respect to the husband's individual property and his obligation of support. In the case of the joint will, however, this instrument typically represents the sole attempt by the signatories to effect a distribution of their collective property in a fashion agreeable to both. Most importantly, in those separation agreements there was no irrevocable obligation concerning the collective property. The husband did not ... become sole owner of jointly owned property by virtue of surviving the former wife. As the divorced husband's property after the agreement remains his own individual property, to which he holds beneficial as well as legal title, his widow's right of election may be asserted against such assets. 225 N.E.2d at 544, 278 N.Y.S.2d at 850.

Thus, the court suggests that in these cases whether the surviving spouse's claim is given priority does not depend upon whether the contract beneficiaries are characterized as contract creditors or legatees. Instead the court reasoned that this priority is based upon the decedent having held both the legal and beneficial title to the property completely independent of the first spouse as a result of the property division effectuated by the separation agreement—a division which does not occur when one spouse acquires rights in the property pursuant to a joint will.

Courts have cited other reasons for rejecting the practice of categorizing contract beneficiaries as legatees where the decedent has executed a conforming will. These courts acknowledge that technically the contract beneficiary becomes a creditor of the estate only after the decedent breaches the contract by dying intestate or executing a nonconforming will; and that where the decedent executes a conforming will the contract beneficiaries take as legatees under the will. Nevertheless, they note that this analysis leads to the anomalous result that the contract beneficiaries are in a better position where the decedent breaches the contract than where the decedent fully and properly performs in accordance with it. *See In Re Erstein's Estate*, *supra*, 129 N.Y.S.2d at 821 ("[i]t would be anomalous if the rights of the promisees would be substantially greater in the case of intestacy than they would be had the testator left a will which carried out his promise").

C.

Other courts have suggested that the resolution of the conflict between the surviving spouse's rights and the rights of contract beneficiaries may be based upon public policy underlying wills statutes. Some courts have held that the right of election is personal to the surviving spouse and cannot be waived or otherwise defeated by the acts of the deceased spouse. *See Donner*, *supra*, 864 So.2d at 751-52; *see also Rubenstein*, *supra*, 225 N.E.2d at 545, 278 N.Y.S.2d at 851 (Bergan, J., dissenting) ("[t]he election is a 'personal right' in a surviving spouse against all wills whenever and however executed"). As the court explained in *Donner*, *supra*,

> ... [dower] is a personal right which may be exercised only by the widow. [citation omitted] Upon vesting at the death of the spouse, dower is not subject to, affected by, or altered by the acts of the husband, including, but not limited to, contracts which he may have entered into without the wife's actual knowledge

relatives. Like this Court in *Shimp I*, the court found that a contract existed between the decedent and his first wife based upon the joint will, rather than from any independent instrument. *See Rubenstein v. Mueller*, 47 Misc.2d 830, 263 N.Y.S.2d 349, 352-53 (N.Y.Sup.Ct.1965), *aff'd* 26 A.D.2d 619, 272 N.Y.S.2d 725 (N.Y.App.Div.), *aff'd* 19 N.Y.2d, 228, 225 N.E.2d 540, 278 N.Y.S.2d 845 (1967).

> or consent.... we conclude that Larna cannot be deprived of any portion of her dower as a result of the unilateral action of her husband in contracting away that right in a property settlement agreement. It cannot be contracted away without her consent.... That right may only be taken away or modified by her voluntary consent, by her own action or by statute. 364 So.2d at 751-52.

Other courts have upheld the surviving spouse's right to claim an elective share over the claims of contract beneficiaries by relying upon the general principle that the right to will property is not absolute, but instead is a privilege afforded the decedent by the State. Under these cases, the State may impose limitations on that privilege, including the condition that all bequests are subject to the surviving spouse's right to claim an elective share. As the court noted in *Erstein's Estate, supra*, the statutory provision for a surving spouse's elective share limits the power of the decedent to dispose of property by will and "[n]o third-party agreement can bestow upon him authority which the State withheld from him." 129 N.Y.S.2d at 323. Consequently, in executing a contract to make a will rather than a contract to make an inter vivos conveyance, a creditor or contract beneficiary must realize that the right to compensation under the contract may be limited by the restrictions which the State may place upon the ability to devise property. As the court explained, "[a] creditor may make such agreement with his debtor as he chooses but whenever the settlement agreement touches upon a bequest or devise by either of them, both parties must recognize that, just as the power to make a will is subject to conditions and restrictions, so, too, is a contract to make a will." *Id. See also Budde, supra*, 375 A.2d at 986 (noting that a "[r]eview of the historical development of the rights of homestead and dower presently set out in ... [Vermont statutes], clearly reveals a consistent intent on behalf of the Legislature to preserve those rights in their entirety for the preservation of the surviving spouse.... [and] [t]hese rights are of such paramount importance that they are regarded as restraints upon the exercise of another fundamental right—that of testamentary disposition [and thus] [i]t is beyond dispute that any effort to will away such rights must of necessity fail").

Other courts have relied upon the public policy surrounding the marriage relationship as the basis for upholding the surviving spouse's claim to an elective share over the claims of contract beneficiaries. These courts cite the general principle that "contracts in restraint of marriage are void as against public policy, while anything which tends to prevent marriage, or to disturb the marriage state, is viewed by the law with suspicion and disfavor." *Owens, supra*, 45 P. at 713. *See also Bedal, supra*, 218 P. at 648 (indicating that a contract to devise property to a third party could be characterized as a contract in restraint of marriage; and that "inasmuch as the contract for sole heirship would deprive any children subsequently born of their natural rights of inheritance, and would likewise deprive the parents of their right to dispose of property by gift or devise to subsequently born or adopted children, or to a spouse of either on a subsequent marriage, such a type of contract offends against the common instincts of natural loyalty, affection, and duty, and is therefore contrary to the public good and welfare"). They characterize contracts which require a decedent to devise his entire estate to a third party as being contracts which might restrain or discourage marriage. Therefore, to prevent having these contracts declared void as against public policy, courts have construed the contract to imply that when entering into the agreement the parties contemplated that the testator might remarry. For example, in *Owens v. McNally, supra*, the decedent promised his niece that if she would accompany him to California and live with and care for him, he would leave a will devising her all of the property which he might own at his death. The niece performed her obligations under the contract, living with and caring for the uncle until his marriage several years later. The uncle subsequently died intestate, and the niece sued for specific performance of

the contract. The court denied the niece's claim for specific performance, noting that recovery was limited to a claim for quantum meruit. In so ruling, the court also cited the significant interest of the surviving spouse in receiving a share of her husband's estate. The court stated that

> ... while this contract was not void, as against public policy, at the time it was entered into, it must be held that the parties to it contracted in view of the fact that a subsequent marriage by Lawrence McNally might be consummated, and that the effect of this marriage would be to compel a court of equity, in justice to the widow or children, to deny specific performance. Or, viewed in another way, it must have been within the contemplation of the parties that Lawrence McNally might marry; for the contract could not have been designed as a restraint upon his marriage, or it would be void. If it was within their contemplation, and the contract embraced the taking of the deceased's entire estate to the exclusion of any future wife or child, then we have no hesitation in saying that the contract was void as against public policy. The only permissible conclusion, is, therefore, that the parties contracted in contemplation of that event. 45 P. at 718.

See also Gall, supra, 19 N.Y.S. at 835 (where the decedent had married after entering into a contract to will his entire estate to a nephew, the court found the "[t]he parties, whatever their original understanding could never have contemplated a restriction upon the decedent's right to marry or to provide for his children in case such marriage was fruitful. Nor could they have contemplated the taking, by the plaintiff, of the decedent's entire estate, to the exclusion of any such future wife or child.... [for] [i]f such an agreement had been made, it certainly would have been against public policy, and void. Whatever agreement was made was necessarily subject to such possibilities, and was limited by implication accordingly"); *Patecky, supra*, 350 P.2d at 177 (where the decedent had executed a joint will with his first wife leaving their property upon the death of the survivor to their daughter and the husband remarried and executed a second will which left a substantial portion of the estate to his second wife, the court found that "[m]arriage being a natural and desirable relationship in the eyes of the law, it may be said that the possibility of remarriage of either Samuel or Emma [the decedent's first wife] was within their contemplation when the contract was made and became a part thereof. At least, it may not be assumed that they intended an agreement in restraint of marriage"); Sparks, *supra*, at 175–76 (noting that where a decedent has entered into a contract to will his entire estate, it is reasonable to subject the contract to "the implied contingency that the promisor might later marry and thereby subject his estate to a claim of dower in his wife" or to construe the contract as bestowing a claim "for all or a fractional part of what remains after the marital rights of any surviving spouse have been provided for").

IV.

[1] This case does not present a claim for specific performance because Lester performed his obligation under the contract and died leaving a will which conformed to the contract. Thus, we need not consider whether the superior equities lie with the Personal Representatives or with Lisa Mae.

Because Lester died leaving a will which conformed to the contract, we might consider drawing an analogy between the present case and the divorce cases, wherein courts found that where the decedent died leaving a conforming will, the contract beneficiaries were more properly characterized as legatees rather than contract creditors. Under this approach, we would find the respondents to be legatees under Lester's will whose interest in the estate, like the interest of any other legatee under any will, is subject to the abatement procedure outlined in § 3–208 of the Estates and Trusts Article.[7] Under this procedure Lisa

7. Section 3–208(b) provides in relevant part that "[i]f there is an election to take an intestate share, contribution to the payment of it shall be prorated among all legatees."

Mae's elective share would have priority over the respondents' claims and their share of the estate would be abated. Nevertheless, we acknowledge, as the court did in *Erstein's Estate, supra*, that this method of resolving the issue of priority leads to the anomalous result that the contract beneficiaries' rights would be greater where the contract is breached than where the testator performs in accordance with its terms. Consequently, we decline to adopt this theory as the controlling law in this case.

[2, 3] Instead, we find the question of priorities between a surviving spouse and beneficiaries under a contract to make a will should be resolved based upon the public policy which surrounds the marriage relationship and which underlies the elective share statute. As we noted previously, "the right of a person to transfer property upon his death to others ... is not a natural right but a privilege granted by the State." *Safe Dep. & Tr. Co., supra*, 181 Md. at 355, 29 A.2d 906. Furthermore, "[t]he right to make a will is a purely statutory right," which the State may limit by statute. *Johns v. Hodges*, 62 Md. 525, 539 (1884). The Legislature on several occasions has limited this right by enacting restrictions such as those contained in § 3-203, which grants a surviving spouse the right to receive an elective share of a decedent's estate, regardless of the provisions contained in the decedent's will. In addition, § 3-204 suggests that the right to receive the elective share is a personal right, which cannot be waived by the unilateral acts of others, including the actions of the deceased spouse.[8] These statutes and principles of law suggest that there is a strong public policy in favor of protecting the surviving spouse's right to receive an elective share. This Court on other occasions has recognized the strong public policy interest in protecting the surviving spouse's elective share from the unilateral acts of a deceased spouse. For example, in a number of cases this Court has declared transfers in fraud of marital rights to be void. *See, e.g., Mushaw v. Mushaw*, 183 Md. 511, 39 A.2d 465 (1944). *See also* Sykes, *Inter Vivos Transfers in Violation of the Rights of Surviving Spouses*, 10 Md.L.Rev. 1 (1949). We have indicated that this doctrine also applies to transfers made prior to the marriage. *Collins v. Collins*, 98 Md. 473, 484, 57 A. 597 (1904).

[4] In addition to the public policy underlying these statutes, the public policy surrounding the marriage relationship also suggests that the surviving spouse's claim to an elective share should be afforded priority over the claims of beneficiaries of a contract to make a will. Like the majority of other courts, we have recognized the well settled principle that contracts which discourage or restrain the right to marry are void as against public policy. *Bostick v. Blades*, 59 Md. 231, 232-33 (1883). In executing a will, a testator is presumed to know that a spouse might renounce the will, thus extinguishing or reducing legacies contained in the will, and if the testator does not provide for this contingency then the beneficiaries under the will might lose the property left them. *Webster v. Scott*, 182 Md. 118, 121, 32 A.2d 475 (1943); *see also Mercantile Trust Co. v. Schloss*, 165 Md. 18, 27-28, 166 A. 599 (1933). Thus, we find that the respondents' rights under the contract were limited by the possibility that the survivor might remarry and that the subsequent spouse might elect against the will. Consequently, we conclude that their claims under the contract are subordinate to Lisa Mae's superior right to receive her elective share.

V.

[5, 6] Finally, we address the issue of whether Lisa Mae is entitled to a $2000 family allowance under § 3-201. The respondents argue that she is not so entitled because the contractual obligation owed to them exhausted Lester's entire estate and thus there was no estate from which the family allowance could be paid. The circuit court adopted the respondents' interpretation of the law when it found that under

8. Specifically, § 3-204 provides that "[t]he right of election of the surviving spouse is personal to him. It is not transferable and cannot be exercised subsequent to his death."

§ 3-201 there must be an estate from which the allowance can be paid and that in the present case because "there was no remaining estate after the 1974 contractual transfer.... [t]he plaintiff's request for a family allowance" must be denied. A careful reading of the statutes, as well as the case law, pertaining to the widow's allowance indicates that the respondents' argument is without merit and that the circuit court was incorrect in upholding this contention. Unlike § 3-203, § 3-201 does not indicate that the family allowance is derived from the net estate. Instead, § 8-105, which directs the order of payment of debts and claims when an estate lacks sufficient assets to pay all claims, suggests that the family allowance is to receive priority over the claims of creditors and legatees.[9] Section 8-105 indicates that fees to the register, administration expenses, funeral expenses, compensation for the personal representative, payment for legal services, and payment of commissions for real estate brokers enjoy priority over the family allowance, but that the family allowance takes precedence over taxes, medical expenses, rent owed by the decedent, wages for services performed for the decedent, old age assistance claims, and "all other claims." In addition, Maryland Code (1988) § 7-203(b) of the Tax-General Article [formerly § 3-201(b) of the Estates and Trusts Article] exempts the family allowance from the Maryland Inheritance Tax. We find that § 3-201 and § 8-105 indicate that a claim for a family allowance is to be accorded priority over the claims of both ordinary contract creditors and legatees under a will.[10] *See, e.g., Park v. Minton*, 229 Ga. 765, 194 S.E.2d 465, 467 (1972) (holding that a statute, providing for a year's support for the surviving spouse, indicated that the support obligation "is among the necessary expenses of administration and is to be preferred before all other debts except those provided by statute" and thus where the husband had entered into a contract to will property to his first wife's relatives, his second wife's claim for support was superior to legacies given in his will in fulfillment of the contract); *Matter of Estate of Harper*, 138 Ill.App.3d 571, 93 Ill.Dec. 194, 195, 486 N.E.2d 295, 296 (1985) (finding that where testator had executed a joint will to convey all of the survivor's property to certain relatives of the testator and his first wife, the testator's second wife's claim to a support award, as provided for by statute, took priority over the claims of the beneficiaries under the joint will); *Kinne v. Kinne*, 27 Wash.App. 158, 617 P.2d 442, 445 (1980) (finding that where the testator had entered into a property settlement with his first wife in which he obligated his estate to pay his first wife $200 per month, the testator's second wife's claim for a family allowance took precedence over all other claims, including those of the first wife, because "[t]o hold otherwise would conflict with the legislature's intent to exempt such awards from *all* claims for the payment of any debt of the deceased, with specific exceptions not claimed here"); *see also* Lilly, *supra*, 217-18.

The respondents' claim upon the estate of Lester Shimp must be characterized as being either that of a general creditor or of a legatee under the will. Under § 8-105, the family allowance receives priority over the claims of both contract creditors and legatees. Therefore, while the respondents' claim is more properly characterized as being that of a legatee, rather than that of a creditor, regardless of which characterization is used, Lisa Mae's claim for a family allowance takes precedence over the respondents' claim. Therefore, Lisa Mae is entitled to receive the family allowance provided for in § 3-201.

[7] In addition, the will executed by Lester and Clara Shimp suggests that the testators intended that those claims specifi-

9. Contrary to the circuit court's finding that "the order of payment outlined in § 8-105 ... is not germane to this case," we find that § 8-105 is an important indication of the Legislature's intent with respect to the priority which is to be accorded a claim for a family allowance.

10. By ordinary contract creditors we mean those who are not specifically described in § 8-105(a)(1)-(10).

cally described in § 8-105(a) be paid prior to the distributions to the respondents, as provided for in Item I.B. (1)-(4) of the will. Specifically, the will directs that the bequests contained in Items I.A. and I.B. be made "[a]fter the payment of all just debts and funeral expenses ..." In *Matter of Estate of Harper*, the court, construing similar language,[11] found that "[t]he agreement between the testators clearly provided for the claims against the estate to be paid.... [and that] [t]he directive to pay all claims was a direction to pay a surviving spouse's award." 93 Ill.Dec. at 195, 486 N.E.2d at 296. Accordingly, we find that Lester and Clara Shimp's direction that all just debts be paid prior to the bequests included any claim for a family allowance and thus that under the will itself, Lisa Mae's claim for a family allowance takes precedence over the bequests made to the respondents.

In so ruling, we reject the respondents' argument that, as a result of Lester having contracted to will his entire estate, no estate existed upon his death, from which Lisa Mae's claim for a family allowance could be paid. This argument, carried to its logical extreme and applied to the other claims listed in § 8-105, would allow a testator, merely by entering into a contract to will his entire estate, to avoid all his debts including the cost of administration, funeral expenses, and taxes. This anomaly was precisely the sort of situation which § 8-105 was designed to avoid, and we, therefore, find that the respondents' argument is completely without merit. *See Wides, supra*, 184 S.W.2d at 582 (rejecting the claim of a beneficiary, under a contract to will the entire estate, that there was no estate from which a widow's elective share could be paid, noting that "[n]o claim would, of course, be made that the decedent' debts and cost of administration should not be first deducted nor that any lien existing upon the property should not be recognized"); *In Re Kidd's Estate*, 188 N.Y. 274, 80 N.E. 924, 924-25 (1907) (rejecting a contract beneficiary's claim that where the testator had entered into a contract to will his entire estate to her there was no estate from which the estate tax obligation could be paid).

We thus conclude that Lisa Mae Shimp is entitled to receive an elective share under § 3-203 and a family allowance under § 3-201.

JUDGMENT VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR WASHINGTON COUNTY FOR ENTRY OF A DECLARATORY JUDGMENT CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEES.

11. In *Harper*, the testators' joint will provided that prior to the payment of bequests "all of our just debts and funeral expenses should be paid."

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MARY RACHEL PUTNAM,

Appellant,

v.

MARY ANN VIA, as Personal Representative of the Estate of Edgar R. Putnam, deceased, MARY ANN VIA, individually, PAUL DAVID PUTNAM, JOSEPH EDGAR PUTNAM, RICHARD LEE PUTNAM, RONALD ROY PUTNAM, and ROBERT BLACKBURN,

Appellees.

Case No. 93-01780

Opinion filed June 10, 1994.

Appeal from the Circuit Court for Pinellas County; Thomas E. Penick, Jr., Judge.

Teresa Cooper Ward, St. Petersburg, for Appellant.

Michael R. Riemenschneider and James H. Richey of Reinman, Harrell, Graham, Mitchell & Wattwood, P.A., Melbourne, for Appellees Mary Ann Via, Paul David Putnam, Joseph Edgar Putnam, Richard Lee Putnam and Ronald Roy Putnam.

Joseph W. Fleece, III, of Belcher, Fleece & Eckert, St. Petersburg, for Appellee Robert Blackburn.

DANAHY, Judge.

In this case on the one hand there is a surviving spouse who has been declared to be a pretermitted spouse entitled to an intestate share in her husband's estate. On the other

hand there are the decedent's five children and stepson who are the residuary legatees named in the decedent's mutual will made in agreement with the decedent's first wife, Joann, whose death ended that first marriage. The decedent's second wife and surviving spouse, Rachel, is the appellant and the residuary legatees under the mutual will are the appellees.

If the appellees receive the residuary estate, Rachel will receive nothing except family allowance and any exempt property that may pass to her free from claims of creditors. The trial court entered an order granting summary judgment in favor of the appellees. We reverse.

On November 15, 1985, the decedent, Edgar Putnam, and his wife, Joann Putnam, executed mutual wills which each contained the following provision:

> I acknowledge that this is a mutual will made at the same time as my [spouse's] Will and each of us have executed this Will with the understanding and agreement that the survivor will not change the manner in which the residuary estate is to be distributed and that neither of us as survivors will do anything to defeat the distribution schedule set forth herein, such as disposing of assets prior to death by way of trust bank accounts, trust agreements, or in any other manner.

Each will devised that spouse's entire estate to the survivor. Each will provided that the survivor devised his or her estate to the appellees.

After Joann Putnam's death, Edgar Putnam married Rachel. The mutual will he had executed with his former wife, Joann, was admitted to probate upon his death. The appellees then filed claims against Edgar's estate based on Edgar's alleged

breach of the mutual will. After objections to the claims were filed, the appellees filed independent actions based on breach of contract. These independent actions were consolidated and transferred back to the probate proceedings. Thereafter the trial court entered an order declaring Rachel to be the pretermitted spouse of Edgar Putnam.

On April 30, 1993, the trial court entered the summary judgment from which Rachel appeals. In that summary judgment the trial court found that Edgar Putnam breached his mutual will when he married Rachel without taking appropriate steps to protect the interests of the appellees. The trial court concluded that the appellees have valid claims against Edgar's estate based on Edgar's breach of the mutual wills. The trial court's most significant holding was that the claims of the appellees were class 7 obligations under section 733.707, Florida Statutes (1991)[1], and that Rachel's intestate share as a pretermitted spouse is subject to those class 7 obligations. The trial court then concluded that by virtue of the nature of the claims of the appellees they are entitled to Edgar's entire estate less any exempt property, family allowance or homestead interests that may pass to Rachel free from claims of creditors.

No party has cited to us, nor have we found, any Florida case addressing the situation presented here. However, there are two decisions of the third district court of appeal which bear on the issue of a surviving spouse's position as

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[1] Under the current statute the class is numbered Class 8. § 733.707, Fla. Stat. (1993).

opposed to the rights of persons under an antenuptial contract of the decedent. The first of these cases is In re Estate of Donner, 364 So. 2d 742 (Fla. 3d DCA 1978), cert. denied, 373 So. 2d 457 (Fla. 1979). In Donner, Sam Donner and his second wife, Ruth, entered into an agreement in connection with the dissolution of their marriage in 1972. That agreement provided that Sam would leave Ruth a $1,000,000 bequest in his will and obligated him to enter into an antenuptial agreement with any future woman he might marry in which his future wife would waive her dower to the extent it might interfere with Ruth's bequest.

Sam Donner married Larna on December 22, 1972. He executed a codicil to his will thereafter which made his wife, Larna, his sole residuary beneficiary. After Sam's death, Larna chose not to take under the will and filed her election to take dower. The trial court ruled that Ruth was entitled to her $1,000,000 bequest out of the proceeds of the estate and, should Larna's election to take dower diminish the assets of the estate to the extent that Ruth would not receive the full amount of her bequest, then the trial court imposed an equitable lien on Larna's dower claim to the extent of any deficiency.

The third district court of appeal reversed. The court held that upon vesting at the death of the spouse, dower is not subject to, affected by, or altered by the acts of the husband, including, but not limited to, contracts which he may have entered into without the wife's actual knowledge or consent. The court concluded that Larna could not be deprived of any portion of her dower as a result of the unilateral action of her

husband in contracting away that right in a property settlement agreement with another.

In 1989, without citing Donner, the third district court of appeal appeared to reach a contrary result in the case of Johnson v. Girtman, 542 So. 2d 1033 (Fla. 3d DCA 1989). In that case the dispute concerned a valuable property interest of a deceased wife and whether her surviving husband's elective share could be applied to that property. The deceased wife's siblings and their children claimed that the property was subject to an agreement among them and the decedent's parents, J.D. and Kate Girtman, who originally conveyed the property in 1946 to their six children pursuant to an agreement in which their children promised to devise their respective shares of the property to their children and, if they had none, to their siblings. Katherine Girtman had not yet married Lee Johnson when she signed this agreement. In 1957, after Katherine and Lee married, the grantees and their spouses wrote a letter to J.D. Girtman acknowledging the agreement. Lee Johnson signed that letter.

In 1983 Katherine died childless, leaving Lee Johnson as her surviving spouse. Her will named her husband as sole beneficiary of her estate. In support of his contention that he was entitled to the Girtman real estate interest devised to him by his wife, Lee Johnson argued that the original agreement among the Girtmans and the 1957 letter constituted an impermissible attempt to circumvent the spouse's elective share. The third district concluded that Lee Johnson's contention failed because the elective share statute requires that all claims against the

estate be deducted prior to calculating an elective share. The court found that the Girtman family agreement gave rise to a valid claim which must be satisfied prior to determining Lee Johnson's elective share. Thus the contractual claim effectively eliminated from Katherine's estate any interest in the Girtman parcel and Lee Johnson was not entitled to an elective share in that property.

The appellees rely on the Johnson case in support of the trial court's decision in their favor. While we believe there are significant differences between the facts in Johnson and the facts in the instant case, we have to agree with the appellees that the analysis of the court in Johnson and its conclusion do indeed support the appellees' position. Nevertheless, we choose not to follow the Johnson analysis in this case.

On the same day that the third district court of appeal issued its opinion in Johnson, the highest court of Maryland issued its opinion in Shimp v. Huff, 315 Md. 624, 556 A.2d 252 (1989). The facts in that case are identical to the facts in the case before us. As the Maryland court stated, the issue in that case was whether Lester Shimp's second wife, upon his death, was entitled to receive an elective share in Lester's estate when Lester had previously contracted, by virtue of a joint will with his first wife, to will his entire estate to others. In a prior proceeding, the court had found that Lester and his first wife executed their joint will pursuant to and in accordance with a valid and binding contract. Thereafter, Lester did not execute another will or otherwise disturb the testamentary plan set forth in the joint will.

Lester's first wife, Clara, died in 1975. On April 4, 1985, Lester married Lisa Mae; they remained married until his death on January 11, 1987. Lester was not survived by any children. Following Lester's death, the joint will of Clara and Lester was admitted to probate. Lisa Mae filed an election for a statutory share of Lester's estate. Thereafter she filed suit for a declaratory judgment requesting that the court enter an order that she was entitled to an elective share of Lester's estate. She was opposed in that proceeding by the personal representatives of Lester's estate. The trial court found that because Lester, before his marriage to Lisa Mae, had entered into a binding contract to devise all of his estate to others, he was not seized of an estate of inheritance at the time of his second marriage, but rather was merely a trustee of that estate. Because a widow is entitled to no part of her husband's estate except that of which he dies seized or possessed, the trial court concluded that since Lester was merely a trustee for the property, there was no estate from which Lisa Mae could take an elective share.

The Maryland court reversed the trial court's determination. It said that while it had not previously addressed the issue of a surviving spouse's right to take an elective share in conflict with claims under a contract to convey by will, courts in other jurisdictions have examined the issue under varying factual situations. Among the many cases then cited, the court cited In re Estate of Donner. The court pointed out that various rationales and various conclusions are reflected in the cases

from other jurisdictions. It recognized that if legatees under a prior mutual will were given the status of claimants against the estate, their claims would prevail over the surviving spouse's elective share. But the court rejected that analysis. It found the question of priorities between a surviving spouse and beneficiaries under a contract to make a will should be resolved based on the public policy which surrounds the marriage relationship and which underlies the elective share statute. After reviewing Maryland decisions and Maryland statutory law, the court said that those statutes and principles of law suggest that there is a strong public policy in favor of protecting the surviving spouse's right to receive an elective share. The court concluded that the beneficiaries' rights under the contract between Lester and Clara were limited by the possibility that the survivor might remarry and that the subsequent spouse might elect against the will. Consequently, the court concluded that their claims under the contract were subordinate to Lisa Mae's superior right to receive her elective share.

We reach the same conclusion in this case, based on the same reasoning. We believe that the statutes of Florida pertaining to a surviving spouse's elective share or pretermitted share and cases discussing those rights and their predecessor, dower, suggest a strong public policy in favor of protecting a surviving spouse's right to receive an elective share or a pretermitted share. See In re Suarez's Estate, 145 Fla. 183, 198 So. 829 (1940); Donner. We believe this strong public policy requires that the surviving spouse's elective share or

pretermitted share be given priority over rights arising under an antenuptial contract of the deceased spouse.

For the foregoing reasons, we reverse with directions that summary judgment be entered in favor of the appellant reflecting her entitlement to an intestate share as pretermitted spouse. We recognize that our holding here conflicts with the rule applied in Johnson v. Girtman.

Reversed and remanded with directions.

RYDER, A.C.J., and ALTENBERND, J., Concur.