

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

Richard Merli v. Donna Merli

Merli v. Merli, No. 4D21-1888, 2022 WL 57846 (Fla. 4th DCA Jan. 5, 2022) · No. 4D21-1888

SUMMARY

A partial marital settlement agreement that does not explicitly waive spousal rights and fails to resolve all disputes (such as alimony) is not a “complete property settlement” under Fla. Stat. § 732.702(1) and therefore does not waive a surviving spouse’s intestate rights. When a spouse dies during a pending divorce, the dissolution action abates and the marriage is terminated by death, not by final judgment, preserving the surviving spouse’s inheritance rights. The Fourth District affirmed the probate court’s appointment of the surviving wife as personal representative and rejected the decedent’s brother’s claim that the partial agreement constituted a waiver.

CASE DETAILS

COURT	District Court of Appeal of the State of Florida, Fourth District
WRITING FOR THE COURT	Harper, Bradley (Associate Judge); Ciklin; Artau
JURISDICTION	Florida
DOCKET	4D21-1888
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the probate court's order granting final summary judgment in favor of Appellee Donna Merli, which recognized the wife's intestate spousal rights and appointed her as personal representative.
STANDARD OF REVIEW	de novo
PRECEDENTIAL VALUE	published
PARTIES	Richard Merli v. Donna Merli

TOPICS

- probate
- family law
- summary judgment
- civil procedure

PRACTICE AREAS

- Probate
- Family Law
- Estates and Trusts

QUESTIONS PRESENTED

1. Whether the partial marital settlement agreement was a complete property settlement that constituted a waiver of spousal intestate rights under section 732.702, Florida Statutes.
2. Whether language in the partial marital settlement agreement was equivalent to a waiver of spousal rights.
3. Whether the probate court erred in striking the decedent's divorce attorney's affidavit.

HOLDINGS

1. A partial marital settlement agreement that does not clearly, specifically, and explicitly settle all matters of dispute between the parties is not a 'complete property settlement' within the meaning of section 732.702(1), Florida Statutes, and does not operate as a waiver of intestate spousal rights.
2. General language in a partial marital settlement agreement that does not explicitly waive 'all rights' or equivalent language does not satisfy the waiver requirement of section 732.702(1).
3. Because the partial settlement agreement's unambiguous language does not waive intestate spousal rights, the attorney's affidavit cannot create a waiver; any error in striking the affidavit is harmless.

KEY QUOTATIONS

“The dissolution of marriage action terminated with the death of the husband and the dissolution judge should have dismissed the case upon the wife's motion.”

“[T]he decedent's death left the wife in '[t]he legal position of one whose marriage was terminated by death, and not by a final judgment.’”

“Parol evidence is inadmissible to contradict, vary, or modify terms which are unambiguously contained within a written agreement.”

FACTUAL BACKGROUND

The decedent died intestate while his dissolution of marriage proceeding with the wife was pending. Before his death, the decedent and the wife entered into a partial marital settlement agreement that divided certain marital assets and liabilities but specifically excluded alimony and a portion of the decedent's pension benefits. The agreement provided for the sale of the marital home but did not change the spouses' ownership interest. The family court adopted the partial agreement but had not entered a final dissolution judgment at the time of the husband's death.

PROCEDURAL HISTORY

The decedent died intestate while his dissolution of marriage proceeding with the wife was pending. Before his death, the decedent entered into a partial marital settlement agreement with the wife. The family court entered an order adopting the partial agreement but had not entered a final judgment of dissolution at the time of the husband's death. The brother petitioned the probate court to serve as personal representative; the wife counter-petitioned. The probate court granted summary judgment for the wife, finding no waiver of spousal rights. The brother appealed.

DISPOSITION

affirmed

CASES CITED

- Chipman v. Chipman, 975 So. 2d 603 (Fla. 4th DCA 2008)
- Marlowe v. Brown, 944 So. 2d 1036 (Fla. 4th DCA 2006)
- Snow v. Mathews, 190 So. 2d 50 (Fla. 4th DCA 1966)
- Prime Homes, Inc. v. Pine Lake, LLC, 84 So. 3d 1147 (Fla. 4th DCA 2012)

OPINION

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT
RICHARD MERLI, Appellant, v. DONNA MERLI, Appellee. No. 4D21-1888 [January 5, 2022]
Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Mily Rodriguez Powell, Judge; L.T. Case No. PRC19- 5226. Jerome R. Schechter of Jerome R. Schechter, P.A., Fort Lauderdale, and Danielle Greenberg of Danielle Greenberg, PA, Fort Lauderdale, for appellant.

Sean Gregory Perkins and Zachary A. Hudson of Morgan & Morgan, P.A., West Palm Beach, for appellee. H ARPER, BRADLEY, Associate Judge. Appellant Richard Merli (the decedent's brother) appeals from the probate court's order granting final summary judgment in favor of Appellee Donna Merli (the decedent's wife), which recognized the wife's intestate spousal rights and appointed the wife as personal representative of the decedent's estate.

Appellant argues the probate court erred in three respects: (1) by finding the decedent's and the wife's partial marital settlement agreement was not a complete property settlement pursuant to section 732.702, Florida Statutes (2019); (2) alternatively, by failing to deem language in the partial marital settlement agreement to be equivalent to a waiver of spousal rights; and (3) by finding the decedent's divorce attorney's affidavit to be invalid because it was improperly notarized.

We conclude that all of the brother's arguments lack merit. After providing a brief procedural history, we will address each argument in turn. 2 Procedural History The decedent died intestate while his dissolution of marriage proceeding with the wife was pending.

Before his death, the decedent entered into a partial marital settlement agreement with the wife. The partial marital settlement agreement divided certain marital assets and liabilities, but specifically excluded alimony and a portion of the decedent's pension benefits. Also, the partial marital settlement agreement provided for the sale of the marital home, but did not contain an agreement to change the spouses' ownership interest in the marital home.

The family court entered an order adopting the partial marital settlement agreement. However, at the time of the husband's death, the family court had not entered a final judgment of dissolution of marriage. The brother petitioned the probate court to serve as personal representative of the decedent's estate.

The brother contended he had standing as the decedent's brother and heir-at-law, and requested the probate court to enforce the partial marital settlement agreement as binding and find that the marital home was owned as a tenancy in common between the decedent and the wife.

The wife counter-petitioned to serve as personal representative on the basis that she was the decedent's surviving spouse and sole beneficiary of the decedent's estate. The wife later moved for final summary judgment on her counter-petition, arguing, in part, that the couple's marriage had never been dissolved and that the family court had dismissed the dissolution proceeding upon the decedent's death.

After a hearing, the probate court entered an order granting the wife's summary judgment motion and appointing the wife as personal representative of the decedent's estate. The probate court found the partial marital settlement agreement did not contain any language which could constitute a waiver of spousal rights pursuant to section 732.702(1), Florida Statutes (2019).

The brother timely filed a notice of appeal. Analysis Our standard of review is de novo. See *Chipman v. Chipman*, 975 So. 2d 603, 607 (Fla. 4th DCA 2008) (a postnuptial agreement, like any other contract, is subject to de novo review).

We conclude the probate court properly found the partial marital settlement agreement did not contain any language which could constitute a waiver of spousal rights pursuant to section 732.702(1), Florida Statutes (2019). Section 732.702 requires a spouse's explicit waiver of intestate rights: (1) The rights of a surviving spouse to an elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate or any of those rights, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses.

The requirement of witnesses shall be applicable only to contracts, agreements, or waivers signed by Florida residents after the effective date of this law.... Unless the waiver 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, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate, by the waiving party in the property of the other and a renunciation by the waiving party of all benefits that would otherwise pass to the

waiving party from the other by intestate succession or by the provisions of any will executed before the written contract, agreement, or waiver.

(2) Each spouse shall make a fair disclosure to the other of that spouse's estate if the agreement, contract, or waiver is executed after 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. § 732.702(1-3), Fla. Stat. (2019). Pursuant to the plain language of section 732.702 and the partial marital settlement agreement, neither the decedent nor the wife explicitly waived their right to an elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, or preference as personal representative.

4 The brother relies on the phrase “complete property settlement” in section 732.702(1), and on *Snow v. Mathews*, 190 So. 2d 50 (Fla. 4th DCA 1966), to conclude the couple's alleged “complete settlement” was evidence of spousal waiver.

The brother's reliance on *Snow* is misplaced for three reasons. First, the subject marital settlement is not a complete settlement as it did not clearly, specifically and explicitly settle all matters of dispute between the parties.

Second, *Snow* did not address a surviving spouse's waiver of intestate rights pursuant to section 732.702(1). Third, in *Snow*, the married couple's separation agreement – which included all of their jointly owned property and the marital home – was detailed, specific, and explicitly provided, “[U]pon the execution of this agreement each of the parties shall be tenants in common’... in the described properties, and the agreement shall be binding upon their heirs and personal representatives.” *Id.* at 51.

Here, the dissolution proceeding remained pending at the time of the decedent's death. Thus, when the decedent died, the family court properly dismissed the dissolution proceeding without entering a final judgment. See *Marlowe v. Brown*, 944 So. 2d 1036, 1039-40 (Fla. 4th DCA 2006) (“The dissolution of marriage action terminated with the death of the husband and the dissolution judge should have dismissed the case upon the wife's motion.”) (citations omitted).

As a result, the decedent's death left the wife in “[t]he legal position of one whose marriage was terminated by death, and not by a final judgment.” *Marlowe*, 944 So. 2d at 1040. The partial settlement agreement's terms do not amount to a binding final decree.

Moreover, nothing in the subject partial settlement agreement evinces an intent by either party to waive their intestate rights. Lastly, we find no need to reach the brother's argument that the decedent's attorney's affidavit was improperly stricken, because the partial settlement agreement's unambiguous language does not waive intestate spousal rights. See *Prime Homes, Inc. v. Pine Lake, LLC*, 84 So.

3d 1147, 1152 (Fla. 4th DCA 2012) (“Parol evidence is inadmissible to contradict, vary, or modify terms which are unambiguously contained within a written agreement.”). Accordingly, we affirm the probate court’s order granting final summary judgment which recognized the wife’s intestate spousal rights and appointed the wife as personal representative of the decedent’s estate 5 Affirmed.

C IKLIN and ARTAU, JJ., concur. * * * Not final until disposition of timely filed motion for rehearing.