

**Matter of Germain**

2017 NY Slip Op 31762(U)

August 3, 2017

Surrogate's Court, Nassau County

Docket Number: 2017-174

Judge: Margaret C. Reilly

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This opinion is uncorrected and not selected for official publication.

**SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

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**Administration Proceeding, Estate of**

**CHAD JOSEPH GERMAIN,**

**Deceased.**

**DECISION**

**File No. 2017-174**

**Dec. Nos. 33108, 32919**

**File No. 2017-174/A**

**Dec. No. 33109**

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**PRESENT: HON. MARGARET C. REILLY**

The following papers were considered in the preparation of this decision:

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| Petition of Elizabeth J. Germain for Letters of Administration. . . . .      | 1  |
| Waiver, Renunciation and Consent of Michael E. Germain.. . . .               | 2  |
| Objections of Manuela Herrera to Petition of Elizabeth J. Germain . . . . .  | 3  |
| Order to Show Cause of Elizabeth J. Germain Dated March 2, 2017 . . . . .    | 4  |
| Affirmation in Support of Summary Judgment . . . . .                         | 5  |
| Memorandum of Law in Support of Order to Show Cause . . . . .                | 6  |
| Cross-Petition of Manuela Herrera for Letters of Administration .. . . .     | 7  |
| Order to Show Cause of Manuela Herrera Dated March 2, 2017 with Exhibits .   | 8  |
| Affirmation of Counsel in Support of Order to Show Cause. . . . .            | 9  |
| Affirmation in Opposition to Order to Show Cause. . . . .                    | 10 |
| Objections of Elizabeth and Michael Germain to Petition of Manuela Herrera . | 11 |
| Stipulation Dated April 27, 2017 . . . . .                                   | 12 |

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The court has before it the competing petitions of Elizabeth J. Germain, the decedent’s mother, and Manuela Herrera, the decedent’s surviving spouse, each for her own appointment as administrator of the decedent’s estate. Each has also filed objections to the other’s petition. In a stipulation dated April 27, 2017, counsel for both sides consented to the submission of their respective petitions and orders to show cause for decision without oral argument. The dispositive issue for determination is whether the Stipulation of Settlement (hereinafter the Stipulation) entered into by the decedent and Ms. Herrera in their then-

pending divorce action is enforceable despite the fact that the decedent died prior to entry of a divorce decree or judgment. Because the court determines that the Stipulation is enforceable despite the decedent's death, the petition for letters of administration of the decedent's mother is granted and the petition for letters of administration of the surviving spouse is dismissed.

The aforementioned Stipulation was executed and acknowledged by Ms. Herrera on October 27, 2016 and by the decedent on October 28, 2016. The decedent Chad Joseph Germain died on November 18, 2016. Ms. Herrera's attorney argues that because of the death of the decedent prior to the entry of a judgment of divorce, the divorce action abated and the Stipulation executed in contemplation of the divorce is therefore unenforceable. Conversely, Ms. Germain's attorney argues that the Stipulation is enforceable despite the decedent's death prior to entry of the divorce judgment.

It is well settled that when a party to a divorce action dies prior to entry of a final judgment of divorce, the action abates because the marital relationship no longer exists (*Matter of Forgione*, 237 AD2d 438 [2d Dept 1997]). However, the abatement of the divorce action does not necessarily render unenforceable any agreements, including agreements regarding distribution of property rights. For example, in *Ferraioli v Ferraioli*, the court held that a "postnuptial agreement which provides for specific equitable distribution and which meets certain statutory requirements is valid and enforceable" *Ferraioli v Ferraioli* (295 AD2d 268 [1st Dept 2002] [citing DRL § 236 [B] [3] and *Matisoff v Dobi*, 90 NY2d

127, 132 [1997]). So also in *Brower v Brower* (226 AD2d 92, 95 [1997]), the court held that where an agreement is made and intended by the parties to be an independent contract it could be enforced as such. The holding of the Supreme Court, Second Department, in *Passmore v King* (186 AD2d 241 [1992]) does not require a contrary holding. In *Passmore*, the Court held that the cause of action being sought to be enforced was for equitable distribution which, the court held, was extinguished upon the husband's death.

Here, however, a reading of the Stipulation leads to the inescapable conclusion that the parties intended for the Stipulation to be enforceable immediately upon execution. In the opening paragraphs the Stipulation provides, among other things, that “the parties desire to settle the aforesaid action for divorce and all questions relating thereto, and to settle their financial, property and other rights and obligations arising out of the marriage and otherwise.” Paragraph 2 provides that the husband (the decedent) was the sole owner of the marital residence and “shall continue to be the sole owner of the House, free of any right or claim of the Wife.” Paragraph 5 of the Stipulation contains the provisions regarding maintenance and it expressly provides the it “is agreed and understood between the parties that the maintenance provisions contained herein shall not be modified by any court of competent jurisdiction” and that neither could initiate a proceeding for upward or downward modification based on changed circumstances. In addition, the last sentence of Paragraph 9, Mutual Release of General Claims, provides, in part, “[e]ach party waives and renounces all claims or rights to any equitable distribution of any separate or marital property owned by

the other... .”This language clearly indicates the parties’ intent to opt out of equitable distribution which the equitable distribution statute itself clearly allows (*see* DRL § 236 [B] [3] [“an agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded”]).

Paragraph 8 of the Stipulation, Mutual Release of Claims in Estates, provides as follows:

**“8. Mutual Release of Claims in Estates.** Each party shall have the right to dispose of the property of such party by last will and testament in such manner as such party may deem proper in the sole discretion of such party, with the same force and effect as if the other party had died. Each party, individually and for his or her heirs, executors, administrators, successors and assigns, hereby waives, releases and relinquishes any and all claims, rights or interests as a surviving spouse in or to any property, real or personal, which the other party owns or possesses at death, or to which the other party or his or her estate may be entitled. Each party expressly waives all rights which he or she now or may hereafter have pursuant to any provisions of the laws of any state or country which may have jurisdiction over the estate of either party hereto on his or her death, as now or hereafter in effect, to elect to take in contravention of the terms of any will of the other party, whether now or hereafter executed. Each party recognizes that this waiver includes rights that he or she otherwise might have or acquire under New York Estates, Powers and Trusts Law Section 5-1.1-A, any amendment thereof or any successor statute.”

The court notes that the Stipulation also provides, in Paragraph 12, Merger and Survival, that the terms of the Stipulation shall survive and not be merged in any judgment or decree of divorce. This is important because if not merged in the decree, the Stipulation “is an independent contract binding on the parties unless impeached or challenged for some

cause recognized by law” (*Merl v Merl*, 67 NY2d 359, 362 [1986]).

Based on the foregoing, the court grants the motion for summary judgment of Elizabeth J. Germain and finds that the Stipulation is binding and enforceable and that Ms. Herrera expressly relinquished any and all rights she had as a surviving spouse regarding the decedent’s estate.

Accordingly, the petition of Elizabeth Germain is granted and the cross-petition and Order to Show Cause of Manuela Herrera are dismissed.

Settle decree.

Dated: August 3, 2017  
Mineola, New York

**E N T E R :**

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**HON. MARGARET C. REILLY**  
**Judge of the Surrogate’s Court**

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