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'A Death, a Funeral and the Legal Implications'

Until 2005, when the amendments to the Pennsylvania Divorce Code were enacted, the law relating to death and divorce was straightforward and simple. If one party died prior to a decree in divorce being entered (and prior to all appeals on the divorce having expired), the divorce abated, and it was as though no divorce had ever been filed, as in *Myers v. Myers*, 580 A.2d 384 (Pa. Super. 1990). This was true even if divorce grounds had been established and even if the economic claims had been resolved by a trial court with an appeal pending. The only exception to abatement was if a case was bifurcated, with a divorce decree having been entered and ancillary economic claims having been properly preserved and raised in proceedings and still pending for resolution at the time of the death, as in *Pastuszek v. Pastuszek*, 499 A.2d 1069 (Pa. Super. 1985). In such a scenario, the economic claims were considered vested.

Recognizing the inequitable results that the law was producing, the General Assembly sought to remedy the situation and, in 2005, when the Divorce Code was overhauled, one of the changes provided that "in the event one party dies during the course of the divorce proceedings, no decree of divorce has been entered and grounds have been established as provided in Subsection (g), the parties' economic rights and obligations arising under the marriage shall be determined under this part rather than under 20 Pa.C.S. (relating to decedents, estates and fiduciaries)." In these cases, the executor for the decedent was substituted as a party for the decedent, and the case proceeded.

in order to establish grounds when one party dies during the pendency of the divorce action, one of the following scenarios must be present: (1) Both parties have filed an affidavit of consent ("C" affidavit); (2) one party has filed a "D" affidavit (pertaining to a two-year contested divorce) and no counter affidavit has been filed within 20 days; (3) one party has filed a "D" affidavit and if a counter affidavit has been filed by the opposing party, the court still determines that the marriage is irretrievably broken and the parties have lived separate and apart for two years; and (4) if someone has filed for divorce under fault grounds, the court has held a hearing and has found that fault occurred. (As a side note, very few cases in Pennsylvania proceed under fault grounds and, therefore, there are very few findings of fault by the courts in these cases.)

If grounds have not been established in one of these manners as of the date of death, the divorce case abates, and the parties proceed under the Probate and Estates Code or under rights established by federal laws such as the Employee Retirement Income Security Act or under conventional rights of joint owners to the decedent's interests (in cases of entireties property, for example). Even if a decedent specifically has prepared a will after a divorce has been filed, essentially writing a spouse out of his or her will, and the divorce abates because grounds are not established, the Probate Code permits the surviving spouse to take against the decedent's will, thereby claiming portions of certain categories of assets. For this reason, it is important to take advantage of the Divorce Code amendments of 2005 and establish grounds as required under the code as soon as practical and as soon as the law permits. The applicable statute for establishing grounds is 23 Pa.C.S.A. § 3323(g).

There is an ironic twist to the effects the 2005 Divorce Code amendments have with regard to the ultimate relief sought in divorce cases, however. Despite being able to substitute the executor of the estate for the deceased person and complete the ultimate disposition of marital assets and marital liabilities in cases where grounds have been established, the court cannot and will not grant the underlying relief, comprising the essence of relief requested

in every divorce case — a divorce decree.

In the landmark case of *Yelenic v. Yelenic*, 922 A.2d 935 (Pa. Super. 2007), an Indiana County judge ruled against granting the decree, stating that you cannot divorce a dead man. Attorneys in *Yelenic* (of which I was one) argued that a posthumous decree was needed to protect a property settlement agreement between the parties that the court had approved earlier that week. John Yelenic, who was murdered by his wife's boyfriend (a Pennsylvania State Trooper), had not yet signed the agreement, as he was murdered in his own residence the night before he had told his attorneys he was planning to see a notary to have it signed. However, the judge enforced the posthumous agreement based on the new Divorce Code amendments and on the testimony of the attorneys that their client had planned to sign it the next day and because grounds for divorce had been established.

Nonetheless, the judge refused to issue a decree in divorce. The judge opined that the new Divorce Code provisions (the *Yelenic* case was a groundbreaking case in testing the new code amendments on this issue) were limited to resolution of the parties' economic rights. The amendments did not provide for entry of a divorce following the death of the party.

Lawyers for John Yelenic also argued that based upon the court's equity powers provided for in Section 3323(f), a divorce decree nunc pro tunc could be granted, arguing that the marital settlement agreement included a provision that the parties would cooperate in obtaining a mutual consent divorce pursuant to § 3301(c) of the Divorce Code and that, in fact, both parties had executed (but not yet filed) affidavits of consent and waivers of notice (although grounds were actually established based on a 3301(D) affidavit filed by the husband earlier) and that nunc pro tunc divorces have been granted in other jurisdictions and should have been granted in this case.

The court still refused, citing a 1927 Pennsylvania Common Pleas opinion that quoted an English case: "A man can no more be divorced after he is dead than he can be married or condemned to death. Marriage is the union of two lives which can be dissolved either by death or by process of law, but after it has been dissolved in one of those ways, you cannot dissolve it again; you cannot untie a knot which has already been untied," the judge said.

Since the disposition of the *Yelenic* case, other cases have further interpreted or addressed the interplay between the rights in a divorce case under state law and the rights afforded to beneficiaries under federal law and have had to deal with how to equitably provide for the living spouses in situations where an asset has a marital component subject to distribution but federal law awards the decedent's asset to a named beneficiary other than the spouse, for example certain pensions. In these scenarios, the state divorce judge has no power to overrule or trump the federal law. Case law is slowly interpreting how these matters should be dealt with by the courts and how to use equitable power to compensate. However, the 2005 amendments have not yet been expanded, by statute or by case law, to allow for a posthumous divorce decree. It seems that, as of now, the ultimate relief sought in divorce actions is still elusive.

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