

Death & Divorce

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Historically speaking, a divorce action would abate as though it never existed if either party died during the pendency of the proceedings if there had not been a divorce decree issued by the trial court in a bifurcated matter. In 2005, however, the Divorce Code of 1980 was amended to provide that the divorce action, specifically, the equitable distribution proceedings could continue to move forward even if one of the parties died while those proceedings were pending so long as certain conditions existed. Specifically, § 3323(d.1) of the Divorce Code of 1980 provides as follows:

(d.1) Death of a party. – In the event one party dies during the court of 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). *See* 23 Pa. C.S. § 3323 (d.1).

Based on this Comment following this subsection, the primary focus behind this change to the Divorce Code of 1980 was to address the inability to advise a husband or wife client on the advantages (or disadvantages) pursuing bifurcation¹ and, quite often, the inequity that results from the death of a party prior to the entry of a final decree in divorce.

In order for the equitable distribution proceedings to continue, grounds for divorce must be established on the record. Section 3323(g) provides that grounds for divorce may be established as follows:

(g) Grounds established. – For purposes of subsections (c.1) and (d.1), grounds [for divorce] are established as follows:

- (1) In the case of an action for divorce under section 3301(a) or (b) (relating to grounds for divorce), the court adopts a report of the master or makes its own findings that grounds for divorce exist.²

¹ Bifurcation enables parties to separate the divorce action from the equitable distribution proceedings such that a final decree in divorce is issued by the trial court while the equitable distribution proceedings remain pending for resolution at a later date in time. Bifurcation is addressed in section 3323(c.1) of the Divorce Code of 1980 and sets forth the circumstances in which bifurcation may occur in a divorce action.

² Section 3301(a) sets forth fault grounds for divorce that a party may pursue to have a divorce decree entered due to one party's fault. In general, a party pursuing a fault ground for divorce needs to establish that the party committed the "fault" whether it's adultery, indignities or otherwise and that he or she is the "innocent and injured spouse." For the most part, most people no longer pursue fault-based divorces due, in part, to the time and

- (2) In the case of an action for divorce under section 3301(c), both parties have filed affidavits of consent.³
- (3) In the case of an action for divorce under section 3301(d), an affidavit has been filed and no counter-affidavit has been filed or, if a counter-affidavit has been filed denying the affidavit's averments, the court determines that the marriage is irretrievably broken and the parties have lived separate and apart for at least two years at the time of the filing of the affidavit. *See* 23 Pa. C.S. § 3323(g).⁴

The above methods provide the only basis for grounds for divorce to be established to prevent the abatement of a divorce action and the continuation of the equitable distribution proceedings following the untimely death of a party.

In a recent case, the Superior Court examined the above statutory changes to the Divorce Code of 1980 and the manner in which grounds for divorce may be established to prevent the abatement of a divorce action. *See Gerow v. Gerow*, 2008 Pa. Super. 277 (Pa. Super. Ct. filed December 4, 2008). In *Gerow*, husband filed a Complaint in Divorce, which was served on December 26, 2001. No activity occurred on the parties' divorce for more than four (4) years and after husband received a Notice of Proposed Termination, husband filed a Praecipe to evidence his intention to proceed with the divorce and a Motion for Appointment of a Master. On August 7, 2006, a special master was appointed. *See Gerow, supra*.

While the above activity was occurring on the divorce, husband suffered a heart attack in July 2006 and lapsed into a coma. Thereafter, on August 18, 2006, to keep the divorce action active, wife filed a Petition for Appointment of a Guardian Ad Litem arguing that she should be

expense involved as well as the enactment of no-fault divorce provisions. *See* 23 Pa. C.S. § 3301(a). Section 3301(b) provides that a trial court may grant a spouse a divorce when insanity or mental disorder has resulted in the confinement of the other spouse for a period of eighteen (18) months preceding the filing of a Complaint for Divorce and there is no reasonable prospect that the spouse will be released from inpatient care for the eighteen (18) months following the commencement of the action as certified by the superintendent of the care facility. *See* 23 Pa. C.S. § 3301(b).

³ Section 3301(c) is a no-fault basis for divorce and provides the trial court with the authority to enter a final decree in divorce upon the filing of affidavits of consent by both parties after ninety (90) days from the date of service of the Complaint in Divorce have elapsed. *See* 23 Pa. C.S. § 3301(c).

⁴ Section 3301(d) is also a no-fault basis for divorce and provides the trial court with the authority to enter a final decree in divorce where one spouse has filed an affidavit alleging that the marriage is irretrievably broken and the parties have lived separate and apart for a period of two (2) years or more and the other spouse either did not file a counter-affidavit or, if a counter-affidavit was filed, did not deny those allegations. If the allegations set forth in the spouse's § 3301(d) affidavit are denied, the trial court shall hold a hearing to determine if the marriage is irretrievably broken and that the parties have lived separate and apart for a period of two (2) or more years. If the trial court concludes there is a reasonable prospect of reconciliation, the trial court shall continue the divorce action and require the parties to attend counseling as provided by § 3302 of the Divorce Code, as amended. Once the trial court determines that the marriage is, in fact, irretrievably broken and the parties have lived apart for a period of two (2) or more years, a final decree in divorce may be issued. *See* 23 Pa. C.S. § 3301(d).

appointed as husband's guardian ad litem in order to be authorized to execute an affidavit of consent on husband's behalf and resolve the economic issues. Wife withdrew this petition on September 19, 2006 as husband was then deceased and the petition was moot. More than a year later, on September 21, 2007, the executrix of husband's estate, Amy Hutchinson, filed a Motion to Substitute Personal Representative and to Determine Economic Rights of the Parties. The purpose of this petition was to effectuate husband's wishes as set forth in his will. On December 6, 2007 after consideration of briefs filed by the parties, the trial court denied the executrix' Motion to Substitute Personal Representative and to Determine Economic Rights of the Parties. A timely appeal followed.

On appeal, husband's executrix argued that the trial court had the authority to hold a hearing after husband's death to determine if grounds for divorce could be established pursuant to 23 Pa. C.S. § 3323(g) in order for the equitable distribution proceedings to go forward. Concluding that the trial court properly denied husband's executrix' Motion, the Superior Court stated, in pertinent part:

In general, the death of a spouse during the pendency of a divorce proceeding abates the divorce action and any and all claims for equitable distribution. When the divorce action is abated by the death of one of the spouses prior to the entry of a divorce decree, economic claims are also abated prior to the entry of a decree by the death of one of the spouses. However, 23 Pa. C.S. § 3323(d.1) creates an exception *when grounds for divorce have already been established, such that the parties' economic rights are determined under equitable distribution principles rather than elective share provisions of the Probate Code. See Gerow, supra.* (internal citations omitted) (emphasis supplied).

Based on the above, the Superior Court concluded that the trial court's actions were appropriate and also quoted the trial court's reasoning as follows:

Husband cannot meet his burden to establish the grounds for divorce. There have been no findings by a master that we could adopt. We have never presided over a hearing between the parties, so we cannot make our own findings of fact. We cannot make credibility determinations about fault grounds based on conversations with friends and e-mails. We also do not believe Wife, if called as of cross, would establish the grounds for Husband under the circumstances of this case. It is therefore irrelevant that the estate would be waiving the Dead Man's Rule to make Wife competent to testify. *See Gerow, supra.* (quoting the trial court's opinion).

Thus, the *Gerow* case clearly establishes that the provisions of section 3323(g) set forth the only means by which a party may establish that grounds for divorce exist such that the equitable distribution proceedings could move forward in the event either party would pass away during the pendency of the proceedings.

Despite the enactment of §§ 3323(d.1) and 3323(g), inequities may still result if one party dies during the pendency of a divorce action and grounds for divorce cannot be established. If grounds for divorce cannot be established prior to the death of a party, the surviving spouse may still be in a position to inherit or receive a greater portion of the deceased spouse's estate (his or her elective share) than he or she otherwise would have received in equitable distribution. Consider this example:

Husband and Wife are estranged and separated from one another. Husband has filed for divorce but unexpectedly dies during a car accident or due to natural causes before grounds for divorce can be established on the record. The majority of the parties' assets are in joint names including the real estate, bank accounts, vehicles, investment accounts and so on and so forth. Because grounds for divorce had not been established on the record prior to Husband's untimely death in accordance with § 3323(g), the divorce action abates and Wife will likely receive everything because the assets are in joint names as the equitable distribution issues will abate along with the divorce action. Wife would not have received everything if grounds for divorce had been established and Husband's estate could have moved forward with the resolution of the equitable distribution proceedings. The inequity stems from the fact that these spouses were estranged and Husband would not have wanted Wife to inherit everything but there is nothing that can be done after his death to alter this outcome.

Thus, it may be prudent in many cases to ensure that grounds for divorce may be established as expeditiously as possible taking into consideration all relevant issues and circumstances pertaining to the parties. This is especially true for those spouses who may have health problems or are older and wish to make estate plans.