

Does a Matrimonial Action Abate Upon the Death of a Party?

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As a general rule, the death of one party during the pendency of a divorce action causes the action to abate because the marital relationship between the parties sought to be dissolved no longer exists. *See Cornell v. Cornell*, 7 NY2d 164, (N.Y. 1959), motion to amend remittitur granted, 7 NY2d 987 (N.Y. 1960). The rationale for this rule is that the cause of action for a divorce is personal to a party. *See Peterson v. Goldberg*, 180 AD2d 260 (2nd Dept. 1992).

Once an action abates by reason of death, in general, the court will be divested of jurisdiction to determine any claims for ancillary financial relief, such as those for equitable distribution, support and counsel fees. As a consequence, the abatement of a divorce action may have severe financial consequences for the surviving spouse, or may lead to a windfall, depending on the circumstances. Therefore, on occasion, where the financial stakes are high between the surviving spouse and the decedent's estate, the issue of whether an action has abated as a matter of law has been litigated.

For example, in *Sperber v. Schwartz*, 139 AD2d 640 (2nd Dept. 1988), the Appellate Division, Second Department, affirmed an order that dismissed a cause of action for equitable distribution brought in Surrogate's Court by the administrator of the estate of the decedent-wife, who had been found murdered in the marital residence during the pendency of a divorce action. The

Appellate Division found that the Surrogate Court properly dismissed the cause of action for equitable distribution. The court held that because the decedent died prior to a resolution of her action for a divorce, the action abated, thus precluding the maintenance of her related statutory claim for equitable distribution.

The Exceptions

There are certain exceptions to the general rule that a divorce action abates upon the death of one of the parties. One such exception exists where a divorce has been granted to one of the parties but a party dies prior to entry of the actual judgment of divorce. Under these circumstances, the entry of the judgment may be considered a “ministerial act” and the judgment entered *nunc pro tunc*. See *Cornell v. Cornell, supra*. For example, in *McKibben v. Jenkin*, 41 AD3d 795 (2nd Dept. 2007), the Appellate Division affirmed an order that denied the husband’s motion to abate his divorce action on the ground that the defendant wife died before entry of the judgment of divorce.

In that case, the parties had resolved certain issues by stipulation and the remaining contested issues were referred to a Judicial Hearing Officer for determination. After trial, the Judicial Hearing Office issued a written decision, which included a provision that the husband would buy out the wife’s interest in the parties’ marital home. Thereafter, but prior to the husband’s purchase of the wife’s interest in the residence and before the submission of a proposed judgment of divorce to the court, the wife died unexpectedly. Apparently, title to the marital residence was held as tenants by the entirety; therefore, the husband, as a surviving spouse, stood to receive sole title to the marital residence if the action abated, in contrast to having to pay for the wife’s interest in the residence if the ruling of the Judicial Hearing Officer was reduced to judgment.

In affirming the denial of the husband’s application to abate the action, the appellate court held that where there is a final adjudication as to the marital relationship, the failure of the prevailing party to submit proposed findings and a proposed judgment of divorce before the death of one of

the parties will not impair the ability of the court to issue such a decree *nunc pro tunc* despite the intervening death of one of the parties, as such action is merely ministerial in nature.

The court in *McKibben* also noted that even if the husband's claim that the valuation of the marital residence was not finally determined or was erroneously made was true, it would have no bearing on the marital status of the parties, which was adjudicated to conclusion and remained unchallenged. Thus, according to the holding in *McKibben*, the determinative factor in whether a matrimonial action abates upon the death of the parties is not whether all financial issues in the action have been resolved, but whether there has been an adjudication that has changed the parties' marital status. In accordance with the foregoing, it has also been held that claims for ancillary financial relief in a matrimonial action survive when a party dies after a divorce has been granted, but prior to the judgment of divorce actually being entered.

For example, in *Estate of Agliata*, 222 AD2d 1025(4th Dept. 1995), the Appellate Division, Fourth Department, affirmed an order which held that the wife's claims for equitable distribution survived the husband's death during the pendency of the action. In *Agliata*, the Supreme Court had issued a decision granting a judgment of divorce to the husband. However, the husband died prior to the entry of the judgment of divorce and before the court rendered a decision on equitable distribution. The Appellate Division held that because the Supreme Court had granted a divorce during the lifetime of the husband, the action did not abate and the right to equitable distribution survived the husband's death.

A similar conclusion was reached by the Appellate Division, Second Department, in *Peterson v. Goldberg*, *supra*. In *Peterson*, the wife filed an action for divorce and ancillary relief in New York after the husband obtained an *ex parte* divorce in Florida, which did not address any of the financial issues arising out of the parties' marriage. After the New York Supreme Court converted the wife's divorce action to one for equitable distribution, the wife died. Thereafter, the husband sought dismissal of the wife's equitable distribution suit on the basis that the action had purportedly abated upon the wife's death. The Appellate Division, in affirming the lower court's denial of the husband's application, held that the wife's cause of action for equitable

distribution following the entry of foreign judgment of divorce did not abate upon her death. The Appellate Division stated that, unlike a cause of action for a divorce, which is personal to a party and which thus abates on the death of a party ‘ because death terminates the marital relationship ‘ a cause of action for equitable distribution following a foreign judgment of divorce vests upon the entry of the foreign judgment, under Domestic Relations Law ‘ 236(B)(5)(a), just as it would upon entry of a divorce judgment in New York State.

Consequently, if a party dies in possession of a vested right to equitable distribution, and that right has been asserted during the party’s lifetime in an action in a court of this state, that right survives the party’s death and may be asserted by the decedent’s estate. The issue of whether the right to financial relief survives the death of one of the parties after an adjudication of the parties’ marital status was also addressed by the New York Supreme Court in Nassau County , in *John G. v. Lois G.*, 11 Misc.3d 1060(A). In *John G. v. Lois G.*, the Supreme Court, after a trial on the grounds for divorce, dismissed the husband’s claim seeking a divorce. Thereafter, certain ancillary issues were resolved by the parties by stipulation. After the wife’s death, at issue was whether the Supreme Court had the authority to enforce claims for ancillary relief, including certain financial obligations under the parties’ stipulation. The court held that the death of a matrimonial litigant subsequent to the adjudication of marital status, whether a divorce is granted or not, does not abate the action to the extent that there are ancillary property issues before the court. It stated that, although the court lacks jurisdiction to equitably distribute the marital estate in a case where a claim for divorce has been denied, it retains jurisdiction subsequent to the death of a litigant to determine certain claims for ancillary relief. According to the court in *John G. v. Lois G.* ‘ these claims include issues of title to property pursuant to Domestic Relations Law section 234, as well as certain rights accrued prior to the death of the party, such as claims for temporary support arrears, necessities, interim counsel fees, and child support and maintenance retroactive to the initial demand for such relief.

As noted by the court in *Peterson v Goldberg, supra*, courts in other jurisdictions that have addressed the issue have also held that claims for ancillary financial relief do not abate following

the death of a party where a judgment of divorce has been granted to one of the parties. For example, in *Pastuszek v. Pastuszek*, 346 Pa.Super. 416, 499 A2d 1069, the wife died after a judgment of divorce had been issued but before any judicial determination could be made as to issues of equitable distribution. The Superior Court of Pennsylvania held that where a divorce decree is entered and the court retains jurisdiction over ancillary matters previously raised by the parties, the death of one of the parties prior to determination of ancillary matters does not abate the action.

The Exception to the Exception

Notwithstanding the foregoing line of cases, there are situations where courts have held that a matrimonial action does abate upon the death of a party, even after a judicial determination granting a divorce to one of the parties. For example, in *Flaherty v. Lynch*, 292 AD2d 340 (2nd Dept. 2002), the court held that the action abated, even though there had been a judicial determination terminating the marital relationship. In that case, the parties entered into an oral stipulation of settlement on the record in open court and a divorce was granted. However, entry of the judgment of divorce was expressly made subject to the trial court's confirmation of certain conditions of the settlement, which called for, among other things, the wife's establishment of a trust fund for the parties' daughter, as well as certain other financial provisions of the settlement. The wife died before the conditions of the settlement were met.

The Appellate Division affirmed the husband's motion to abate the action, finding that the wife would not have been entitled to have the judgment of divorce entered while she was living. Therefore, the judgment of divorce could not be entered *nunc pro tunc* and the action abated, notwithstanding the fact that the trial court had granted a divorce to one of the parties.

In *Briggs v. Briggs*, 181 Misc. 2d 197(Sup. Ct. 1999), the parties entered into a settlement agreement and then appeared before a referee for an inquest on the issue of grounds. At the conclusion of the proceeding, the referee indicated that he would issue a report recommending that a Supreme Court justice sign a judgment of divorce granting a divorce to the wife. Before

the judgment was granted the husband died. Thereafter, a representative of the husband's estate brought an application seeking to have a judgment of divorce executed and also seeking an order compelling the wife to comply with certain provisions of the parties' settlement agreement, the terms of which were to be incorporated in the judgment. The court denied the application, holding that under the circumstances, the execution of the judgment of divorce did not constitute a mere "ministerial act" because, notwithstanding the parties' settlement agreement, the referee was not vested with the power to make determination upon the issue of the grounds for divorce. Therefore, the court concluded that the action abated upon the husband's death.

Conclusion

As a general rule, a matrimonial action abates upon the death of one of the parties prior to the entry of judgment. However, under certain circumstances, such as where entry of the judgment of divorce is determined to be merely a ministerial act ' including situations where there has been an adjudication terminating the marital relationship ' the judgment of divorce may be entered *nunc pro tunc* and the court will retain jurisdiction to determine the financial rights and obligations of the surviving spouse relative to the estate of surviving spouse.

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