

# P E N N S Y L V A N I A LAW WEEKLY

## **Is There Divorce After Death?**

Many questions answered by new amendments to Divorce Code

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On Jan. 31, Gov. Edward G. Rendell with a stroke of the pen changed Pennsylvania divorce law. The new legislation makes several important changes to the Divorce Code (Title 23) and also amends Title 20 — the Decedents, Estates and Fiduciaries Code. Until Jan. 31, if a couple were in the process of divorce, and all of the final economic issues had not been decided, if one person were to have become deceased, the divorce action would have abated. The parties then would have been left in the same position as if neither had ever filed for divorce.

Consider the following hypothetical situation under the law as it was prior to Jan. 31.

A physician involved in a very busy practice was only 45 years old when, suffering from heart disease and waiting for a heart transplant, he suffered a massive heart attack and lapsed into a coma. His wife came to the hospital daily. The cardiologist informed wife that if a transplant were not imminent, husband could be in a coma for a long time. wife had husband's living will, and she and husband's physician discussed his wishes not to be kept artificially alive if he lapsed into a persistent vegetative state. As husband's health diminished, with no immediate hope of a transplant, wife informed the physician that husband would not have wanted to be kept alive and to put "DNR" (do not resuscitate) on his chart.

Husband's partners came in to see him later that day and inquired into his condition. Husband's doctor informed them that husband had a living will, and wife had given the DNR directive earlier that day. The partners looked at the doctor and said, "Are you crazy? They've been involved in a terrible divorce for two years. She'd like nothing better than to see him dead — she would get everything!" The partners reversed the DNR directive based on the fact that husband's living will was drafted six years before, when the parties were happily living as husband and wife. Husband came out of the coma and a heart became available. The transplant was done and today the husband is fully recovered, is practicing medicine again, and has remarried. The Divorce Court was horrified at the testimony and wife received considerably less than she would have received if she hadn't engaged in such malicious behavior.

Now consider the same situation under the amendments. If, at the time of husband's death, this couple were in the middle of a divorce proceeding and the grounds for the divorce had been approved, wife would have received her economic distribution of marital property under the amended Divorce Code and the matter would not have abated. For instance, had both husband and wife filed affidavits of consent under Section 3301(c) of the Divorce Code, establishing

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mutual consent no-fault grounds for divorce, and one party had died, the divorce court would determine the economic rights and obligations of the parties. Under the same circumstances, had one of the parties filed an affidavit under Section 3301(d) of the Divorce Code, citing separation in excess of two years and irretrievable breakdown of the marriage, and had no counter-affidavit been filed, the grounds of no-fault would have been established; the divorce matter therefore would not have abated, and the divorce court would distribute Wife's share of marital assets to her and enter a final divorce decree. Therefore, one significant change, pursuant to the amendments of the Divorce Code which became law on Jan. 31 is if the parties are involved in a divorce and if appropriate consents have been filed prior to final determination of economic issues, and one person dies, the divorce court and not the Orphan's Court will determine the economic issues of the parties and will be able to enter a decree in divorce. Yes, there is divorce after death!

If you thought the pension you worked so hard for was safe, you were wrong. The 2005 amendments have caused upheaval in the world of pensions. The specific type of pension which has been altered by the amendments is the defined benefit retirement plan. This type of plan is actuarially determined as to its final value at the time of retirement of the participant, using variables such as interest rates; work-life of a participant; and certain other retirement factors. At the time of retirement, a participant has a monthly retirement benefit which is generally based on the most recent years of salary prior to retirement. The monthly benefit can be converted in to a lump sum. Prior to the new amendments, the marital portion was determined as of the date of separation. Under the amendments, the marital benefit includes all post-separation enhancements except those direct contributions made by the employee spouse subsequent to separation. One such enhancement could be cost of living increases compounded annually.

There are two methods of distributing a retirement plan. One method is known as the deferred distribution method, whereby the plan will be distributed to the non-employee spouse at a date in the future. Those benefits would include all post-separation enhancements but for direct contributions by the employee spouse. The other distribution method is known as the immediate offset method when the Plan is distributed to the non-employee spouse at the time of final hearing. Under the former Divorce Code, only the value of the marital portion as of the date of separation was considered. The amendments continue to value the marital portion up to the date of distribution, including all post-separation enhancements. Is this new method of valuing a defined benefit retirement plan an inducement to drag out the divorce? Only time will tell.

Previously, during a divorce matter where one person was in a superior financial situation, that person could force the other person to "settle" because the other marital partner did not have the means to keep the marital home going and/or continue to seek economic justice. Now, under the amendments, the Divorce Code provides that the court may at any stage of the proceedings make an order for an interim partial distribution. In practical terms, this new amendment makes it much more difficult for one party to economically "starve" the other party. Now, the lesser able party can seek an interim distribution of marital property. One example would be when the dependent

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party can no longer afford the large marital home and applies to the court for an interim award of that home so that she may sell the home, acquire a smaller home and also have additional monies. An opposite example might be when the person owning a business wishes to sell the business during the course of the divorce, he or she may apply to the Court for an interim distribution of that business so that he or she is free to sell that marital asset before the final hearing.

So you thought that the property which you purchased prior to marriage was your separate property to do with as you pleased during marriage because it was titled in your name only and are marital property. You were wrong. The amendments make it clear that even if property were acquired by either party prior to marriage, the increase in value during marriage of any non-marital property, including inheritances, and including any property acquired in exchange for that non-marital property or inheritance is included. The amendments provide that any property acquired prior to marriage will have its appreciated value measured from the date of marriage to the date of either final separation or trial, whichever date results in a lesser increase.

Furthermore, the amendments provide that any decrease in value of a party's non-marital property will be offset against any increase in the value of his non-marital property. For example, if John purchased pre-marital property at 123 Main Street and that property lost value by the date of final trial, that loss can be offset against John's interest in 456 Oak Street, another parcel of John's pre-marital property which increased in value.

It has taken the General Assembly 25 years from the inception of the Divorce Code to determine these important changes. The best advice which a practitioner can give clients to protect their separate property is to enter into a valid pre-marital agreement, which topic is also treated in the new amendments. As to "til death do us part," even death may not stop a divorce after Jan. 31.

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