

WHAT HAPPENS IF ONE SPOUSE DIES DURING THE DIVORCE?

In 2005, Pennsylvania passed a law allowing one party to continue on with the divorce process, even if the other spouse died during the proceeding, as long as grounds for divorce were established before the decedent's demise. The parties' economic rights will be determined under equitable distribution rather than the Probate Code if grounds for divorce have been established. Likewise, if grounds for divorce are not established at the time of death, the surviving spouse resorts to rights granted by the Probate Code, Retirement Equity Act, and the rights of joint owners to the deceased spouse's estate.

For example, in a divorce under section 3301(c), if both parties have already filed Affidavits of Consent, grounds have been established, and equitable distribution prevails. Likewise, in a divorce under section 3301(d), the case will proceed to equitable distribution if an Affidavit under Section 3301(d) has been filed and served, 20 days have passed, and no Counter-Affidavit has been filed, or the court has determined that the marriage is irretrievably broken, and the parties have been living separate and apart for at least one year, if separated after December 4, 2016, or two years, if separated prior to December 4, 2016, at the time of the filing of the Affidavit.

If the grounds for divorce have not been established, then the divorce action ends and the surviving spouse has those rights he or she would have had, had there never been a divorce action. These include rights provided by the Probate Code, such as the right to take according to decedent's Will, the right to take against the Will, should the decedent have written a Will disinheriting the surviving spouse, those rights provided by the Retirement Equity Act, and the rights of joint owners to the deceased spouse's estate.

One thing to note is that, whether or not grounds for divorce have been established, and regardless of whether economic rights are determined under equitable distribution, the parties will remain married because the law does not allow for the divorce of a decedent. Because the parties remain married, *regardless of grounds for divorce being established*, any item of property that passes by law to a surviving spouse, because they are the surviving spouse, must supersede equitable distribution. This applies to retirement plans such as IRAs and 401(k)s, which are generally governed by ERISA. Also pension plans and life insurance policies typically stipulate that if a spouse is named as a beneficiary, his or her name cannot be removed without his or her consent. Real estate purchased during the marriage is usually titled as "tenancy by the entirety". Real estate owned by tenancy by the entirety is created and governed by common law so it passes outside the Divorce Code and may not be subject to equitable distribution after the death of a spouse.

The inconsistencies in the laws could create a situation in which the surviving spouse ends up with significantly more than half of the deceased spouse's estate. The surviving spouse could receive all of decedent's retirement accounts, life insurance proceeds, and jointly held

property under ERISA and the common law. Additionally, the surviving spouse could be awarded half of the remaining marital estate through equitable distribution.

Therefore, an ill or elderly party to a divorce action should seek to establish the grounds for divorce as quickly as possible. This can be accomplished by having both parties file Affidavits of Consent ninety days after the service of the Complaint in Divorce. If the opposing party is not willing to file an Affidavit, then the party seeking the Probate Code's protections can file an Affidavit under Section 3301(d) once the parties have been living separate and apart for one year (or two years if the parties separated prior to December 4, 2016). Additionally, parties to a divorce action should seek their spouse's permission to remove his or her name as the beneficiary to any life insurance policies, pension plans, and retirement accounts as soon as possible.

As the intersection of divorce and probate has become ever more entwined, it is a very good idea for anyone going through a separation or divorce to also contact an experienced estate attorney to discuss obtaining or updating all testamentary documents, such as a Will, and legal instruments such as a power of attorney, as well as beneficiary designations on insurance and retirement instruments.