



## **STATE OF NEW JERSEY**

NEW JERSEY LAW REVISION COMMISSION

### **Draft Tentative Report**

Relating to

## **Equitable Distribution and the Elective Spousal Share**

**January 10, 2011**

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the draft tentative report, please inform the Commission so that your approval can be considered along with other comments.

**COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN .**

Please send comments concerning this tentative report or direct any related inquiries, to:

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## Equitable Distribution of Marital Property and the Elective Spousal Share

### Introduction

The Commission commenced a project to revise *N.J.S.* 2A:34-23 and *N.J.S.* 3B:8-1 in response to the Judiciary's invitation to revisit the relevant statutory scheme in *Kay v. Kay*, 200 *N.J.* 551, 554 (2010). The underlying problem in *Kay* and its predecessor, *Carr v. Carr*, 120 *N.J.* 336, 340 (1990), is the "black hole" that exists between the State's divorce laws and probate code. If a party in a divorce proceeding dies prior to a final judgment of divorce, the surviving spouse may be denied any statutory remedy. *Kay*, 200 *N.J.* at 554.

*N.J.S.* 2A:34-23h. allows the court to "effectuate an equitable distribution of the [marital] property" only when a "judgment of divorce . . . is entered". However, a cause of action for divorce abates with the death of either of the parties. *Carr*, 120 *N.J.* at 342. In the "black hole" scenario of *Carr* and *Kay*, the surviving spouse, unable to receive her share of the marital property and disinherited under the decedent's will, chooses to avail herself of the elective spousal share—"one-third of the augmented estate". *N.J.S.* 3B:8-1. However, in a unique deviation from the Uniform Probate Code, *U.P.C.* § 2-202 (2008), New Jersey's probate law includes an important limitation, allowing a spouse to take under the statute only so long as:

at the time of death the decedent and the surviving spouse or domestic partner had not been living separate and apart in different habitations or had not ceased to cohabit as man and wife, either as the result of judgment of divorce from bed and board or *under circumstances which would have given rise to a cause of action* for divorce or nullity of marriage to a decedent prior to his death under the laws of this State. *N.J.S.* 3B:8-1 (emphasis added).

Thus, although still technically married to her decedent husband, the surviving spouse has no claim in probate court.

Lacking any remedy at law, the *Kay* and *Carr* courts relied on their "inherent equitable jurisdiction" to fashion a remedy in the form of a constructive trust, thus granting the appellants relief. *Carr*, 120 *N.J.* at 351. *Kay*, 200 *N.J.* at 552. Nonetheless, the *Kay* decision demonstrates that the New Jersey Supreme Court is hesitant to take this approach except in extreme cases, here involving one party's culpable diversion of marital property. *See Id.* at 553-54. The Commission found only one other example of a New Jersey court relying entirely on equity to prevent the abatement of an action for equitable distribution: where the defendant husband was charged with killing the plaintiff. *Jacobson v. Jacobson*, 146 *N.J.Super.* 491, 496-97 (Ch. Div. 1976).

Otherwise, the New Jersey Judiciary has generally proceeded with equitable distribution after a litigant's death only if the claims had already been substantially adjudicated. *See, e.g., Fulton v. Fulton*, 204 *N.J.Super.* 544 (Ch. Div. 1985) (final judgment of divorce may be entered after plaintiff's death if plaintiff's testimony had already established a cause of action, and the delay in entering judgment is solely attributable to the need to obtain evidence of discharge of child support obligations). *See also Olen v. Melia*, 141 *N.J.Super.* 111 (App. Div. 1976) (death of defendant after rendering of judgment of divorce but before its formal entry does not prevent nunc pro tunc equitable distribution of marital property and award of counsel fees). *Cf. Castonguay v. Castonguay*, 166 *N.J.Super.* 546, 550 (App. Div.

1979) (as distinguished from *Olen*, where “trial never did get under way”, a cause of action for divorce abates at death).

The underlying problem is not limited to the “black hole” described in *Kay* and *Carr*. While some surviving spouses will find themselves disinherited of any share of marital property, others will enjoy a windfall of the entirety of the estate, despite an ongoing divorce proceeding. If a court declines to proceed with equitable distribution, an intestate party to a divorce action may cede all assets to the estranged spouse. *N.J.S.* 3B:5-3a. *Fulton*, 204 *N.J. Super.* at 550. A deceased divorce litigant who holds property in tenancy by the entireties or joint tenancy will encounter a similar problem. See *Ritterman v. Ritterman*, No. A-3720-07, 2009 WL 857244 (N.J. Super. App. Div. 2009). If a final judgment of divorce has not yet been entered, a surviving spouse will also remain the beneficiary of a decedent’s ERISA pension. See *Groh v. Groh*, 288 *N.J. Super.* 321 (Ch. Div. 1995).

Revising *N.J.S.* 2A:34-23 to permit the equitable distribution of marital property before a final judgment of divorce will avoid the unintended consequences posed by intestacy, rights of survivorship, and the elective spousal share. It would not affect the outcome of *Groh*, however, due to the federal preemption of ERISA. *Groh*, 288 *N.J. Super.* at 331.

A survey of matrimonial law practitioners has revealed a widespread preference for a bright line rule avoiding a fact-sensitive determination of whether a dispute has been substantially adjudicated. The practitioners’ general consensus weighs in favor of establishing the date of filing of a complaint as the point at which the court is given the statutory authority to effectuate equitable distribution. This approach would be analogous to (and congruent with) the standard first stated in *Painter v. Painter*: that “the period of acquisition [of marital property subject to equitable distribution] should be deemed to terminate the day the complaint is filed.” 65 *N.J.* 196, 218 (1974).

In *Painter*, the court was asked to address several difficulties posed by the equitable distribution provision of *N.J.S.* 2A:34-23, a subsection which originated in a floor amendment to the Divorce Reform Bill, L. 1971, c. 212. *Id.* at 207. The relevant question, arising from the ambiguity of the statute’s phrase, “during the marriage”, was at what point the marriage would be deemed over for the purpose of distributing marital property. *Id.* at 217. The court acknowledged that a literal reading of the statute would necessitate treating the date of judgment of divorce as determinative, but it dismissed this method, deciding that it would “not be practicable”. *Id.* Likewise, more imprecise standards were considered “unworkable”, such as excluding from equitable distribution any property acquired after a cause of action for divorce had arisen. *Id.* The *Painter* approach, though an early interpretation of *N.J.S.* 2A:34-23h., is still considered “the most practical rule” for its application. *Genovese v. Genovese*, 392 *N.J. Super.* 215, 225 (App. Div. 2007).

Relying on the courts’ approach in applying the analogous issue of *Painter*, the Commission has opted to follow commenters’ advice, and recommends the following revisions to the equitable distribution statute. The Commission also proposes the below revisions to the elective spousal share statute, closing the “black hole” entirely. Merely revising *N.J.S.* 2A:34-23h. while leaving *N.J.S.* 3B:8-1 untouched would still, effectively, “penalize a disinherited spouse who [is estranged and living separately but] has not instituted divorce or annulment proceedings for religious beliefs or in hopes of reconciliation”. Danielle

E. Reed, *Post-Mortem Divorce: Should a Spouse's Statutory Inheritance Rights Depend on Divorce Standards?*, 5 *Seton Hall Legis. J.* 185, 196 (1982).

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**2A:34-23. Alimony, maintenance.**

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h. Except as provided in this subsection, in all actions where a ~~judgment of~~ valid complaint for divorce, dissolution of civil union, divorce from bed and board or legal separation from a partner in a civil union couple is ~~entered~~ filed, the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage or civil union. The court's authority to effectuate an equitable distribution of the property does not abate with the death of either party. However, all such property, real, personal or otherwise, legally or beneficially acquired during the marriage or civil union by either party by way of gift, devise, or intestate succession shall not be subject to equitable distribution, except that interspousal gifts or gifts between partners in a civil union couple shall be subject to equitable distribution.

**Alternative A:** The court may not make an award concerning the equitable distribution of property on behalf of a party convicted of the murder of, or an attempt or conspiracy to murder, the other party.

**Alternative B:** The court may not make an award concerning the equitable distribution of property on behalf of a party convicted of: the murder of the other party, the criminal homicide of the other party that would be murder if not committed in the heat of passion resulting from a reasonable provocation, or an attempt or conspiracy to murder the other party.

**Alternative C:** The court may not make an award concerning the equitable distribution of property on behalf of a party convicted of: the murder of the other party, the homicide of the other party that would be murder if not committed in the heat of passion resulting from a reasonable provocation, the reckless criminal homicide of the other party under circumstances manifesting an extreme indifference to human life, or an attempt or conspiracy to murder the other party.

For the purposes of this subsection, "valid complaint" shall mean a complaint that is not dismissed for: the court's lack of jurisdiction over the subject matter, the court's lack of jurisdiction over the person, insufficiency of process, insufficiency of service of process, or failure to state a claim upon which relief can be granted.

\* \* \*

COMMENT

Forgoing a more comprehensive revision of *N.J.S.* 2A:34-23, the Commission recommends alterations only to subsection h. and leaves the statute's other eight subsections untouched.

The equitable distribution statute does not apply to domestic partnerships. *N.J.S.* 26:8A-10a.(3).

Since the death of a litigant will no longer definitively terminate an action for divorce, language has been added to indicate that the actual murder of a spouse, and not merely an attempt or conspiracy, will disqualify the survivor from receiving equitable distribution. The Commission elected not to use the term “intentional killing” as found in *N.J.S. 3B:7-1.1*—a phrase which has been criticized as ill-defined. See, e.g., Sara M. Gregory, *Paved with Good “Intentions”: The Latent Ambiguities in New Jersey’s Slayer’s Statute*, 62 *Rutgers L. Rev.* 821 (2010). In its stead, the Commission may elect to choose one of three alternatives. Alternative A only establishes murder, as defined in *N.J.S. 2C:11-3*, as a bar to equitable distribution. Alternative B adds “passion/provocation” manslaughter, as defined in *N.J.S. 2C:11-4b.(2)*, addressing the concern that merely a “scintilla of evidence” is required to necessitate a jury charge for this lesser-included offense. *State v. Heslop*, 135 *N.J.* 318, 326-27 (1994). Finding a paramour in bed with one’s spouse may satisfy the statute’s “reasonable provocation” requirement, reducing a potential conviction for murder to manslaughter. See *State v. Franklin*, 184 *N.J.* 516, 522-24 (2005) (defendant, convicted of “passion/provocation” manslaughter, “just lost it” after seeing his wife in bed with another man, causing him to shoot the paramour). Alternative C includes, along with murder, both “passion/provocation” manslaughter and “depraved heart” aggravated manslaughter, as defined in *N.J.S. 2C:11-4a.(1)*. This alternative also encompasses a subset of extremely reckless behavior, in addition to the purposeful and knowing behavior covered by alternatives A and B.

The Commission added the qualifier “valid” to the requirement that a complaint be filed, clarifying that a frivolous complaint does not warrant equitable distribution. This reflects the standard found in the progeny of *Painter*, which treats only “the day a valid complaint for divorce is filed that commences a proceeding culminating in a final judgment of divorce” as the determinative date that marks the end of the period in which marital property can be acquired. *Portner v. Portner*, 93 *N.J.* 215, 225 (1983). However, the death of a litigant prevents the court from judging the validity of a complaint retrospectively, relying on a divorce proceeding’s final outcome. Instead, the Commission relies on the complaint’s ability to overcome the defenses that may be submitted in lieu of an answer. See *R. 4:6-2*.

Staff is considering the interplay between equitable distribution and the intestacy statutes in one respect that has not been addressed above. A case could arise in which a party dies in the midst of a divorce proceeding, an award of equitable distribution is made and the intestate decedent’s portion of the equitable distribution then passes in part to the surviving spouse via intestacy. The language of the statute could be modified to make it clear that no share should pass to the survivor via intestacy. Staff is seeking comment on this issue.

### **3B:8-1. Elective share of surviving spouse or domestic partner of person dying domiciled in this State; conditions.**

If a married person, partner in a civil union, or person in a domestic partnership dies domiciled in this State, ~~on or after May 28, 1980,~~ the surviving spouse, partner in a civil union, or domestic partner has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated, provided that at the time of death ~~neither the decedent and nor the surviving spouse, partner in a civil union, or domestic partner had not been living separate and apart in different habitations or had not ceased to cohabit as man and wife, either as the result of judgment of divorce from bed and board or under circumstances which would have given rise to a cause of action for divorce or nullity of marriage to a decedent prior to his death under the laws of this State. filed a complaint for divorce, dissolution of civil union, termination of domestic partnership, divorce from bed and board, or legal separation from a partner in a civil union.~~

#### COMMENT

The proposed change in this section makes it consonant with the change in 2A:34-23h. With these changes, there is a bright line rule between equitable distribution and the elective spousal share. If a complaint for divorce or separation has been filed, equitable distribution occurs as provided by 2A: 34-23. Otherwise, the surviving spouse is entitled to an elective share under this section. The Commission added references to civil union couples in accordance with *N.J.S. 37:1-31* through 1-33.