



STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report

Relating to

Equitable Distribution and the Elective Spousal Share

February 7, 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. The court may not make an award concerning the equitable distribution of property on behalf of: a party barred from inheriting under N.J.S. 3B:7-1.1a. or a party convicted of responsible for 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.

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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 killing of a spouse, and not merely an attempt or conspiracy, will disqualify the killer from receiving equitable distribution. Despite criticisms leveled against New Jersey's "slayer's statute", 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), the Commission has elected to reference N.J.S. 3B:7-1.1 in order to maintain consistency. An act of "intentional killing" that would normally bar inheritance under the slayer's statute will still bar an award of equitable distribution if a complaint for divorce had been filed by either the survivor or the decedent. For the sake of uniformity of procedure, the Commission has eliminated the requirement that a party be convicted for an attempt or conspiracy to murder. Instead, a procedure similar to that which is normally performed in probate, determining a survivor's ineligibility for inheritance under N.J.S. 3B:7-1.1, will apply. The court will determine whether a party was "responsible for" a disqualifying act in a civil proceeding rather than being forced to await a criminal conviction.

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*.

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 valid 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.

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

The Commission added references to civil union couples in accordance with *N.J.S. 37:1-31 to 1-33*.

The proposed change to this section makes it consonant with the revisions to 2A:34-23h. With these changes, there is a bright line rule between equitable distribution and the elective spousal share. If a valid complaint for divorce or separation has been filed, equitable distribution occurs. The validity of a complaint is determined by the same standards as under 2A:34-23h., explained in the comment above. Otherwise, the surviving spouse is entitled to an elective share under this section.

3B:5-3. Intestate share of decedent's surviving spouse, partner in a civil union, or domestic partner.

The intestate share of the surviving spouse, partner in a civil union, or domestic partner is:

a. The entire intestate estate if:

(1) No descendant or parent of the decedent survives the decedent; or

(2) All of the decedent's surviving descendants are also descendants of the surviving spouse or domestic partner and there is no other descendant of the surviving spouse or domestic partner who survives the decedent;

b. The first 25% of the intestate estate, but not less than \$50,000.00 nor more than \$200,000.00, plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

c. The first 25% of the intestate estate, but not less than \$50,000.00 nor more than \$200,000.00, plus one-half of the balance of the intestate estate:

(1) If all of the decedent's surviving descendants are also descendants of the surviving spouse or domestic partner and the surviving spouse or domestic partner has one or more surviving descendants who are not descendants of the decedent; or

(2) If one or more of the decedent's surviving descendants is not a descendant of the surviving spouse or domestic partner.

For the purposes of this section, “surviving spouse, partner in a civil union, or domestic partner” shall not include one who has filed a valid complaint or against whom a valid complaint has been filed 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.

“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

The Commission added references to civil union couples in accordance with *N.J.S.* 37:1-31 to 1-33.

The proposed amendments to this section ensure that a surviving spouse will not take under intestacy after having already received a share through equitable distribution—a procedure which can be performed after the death of a party under the proposed revisions to *N.J.S.* 2A:34-23h.