

Comment,
**THE IMPACT OF THE DEATH OF A PARTY
TO A DISSOLUTION PROCEEDING ON A
COURT'S JURISDICTION OVER PROPERTY
RIGHTS**

I. Introduction

This article is a survey of the effect that the death of a party to a dissolution action has on a court's jurisdiction over property rights. Though there are variations and exceptions, the death of a party has two effects, generally stated, abatement over all issues, or abatement just over the dissolution. The majority of states follow the rule that the death of a party marks an abatement of the court's jurisdiction over the dissolution proceeding and incidental issues, including property rights; where the minority view the death to mark an abatement of jurisdiction over the dissolution itself but the court retains jurisdiction over incidental issues, including property rights.

II. The Majority View

When a party to a dissolution action dies before the entry of a decree, the marriage terminates as a matter of law. The court divests of jurisdiction over the matter,¹ including any property rights, as they are incidental to a final decree of dissolution.²

A. Case Synopses

Alabama

In *Adams*, a party to a divorce proceeding died before judgment, but following the submission of all issues and conclusion of the trial. The court held that the death of a party to a divorce action abates that action. In the circumstances of this case, however, where all issues had been submitted to the court, the court

¹ See *In re Marriage of Lawrence*, 687 P.2d 1026 (Mont. 1984), citing *Larson v. Larson*, 235 N.W.2d 906, 909 (S.D. 1975).

² See *Johnson v. Johnson*, 653 N.E.2d 512, 516 (Ind. Ct. App. 1995); *Brown v. Brown*, 2001 WL 1856 (N.C. 2000).

held such a death did not abate the court's jurisdiction. (States with similar exceptions to the rule of abatement include Florida, Minnesota, Mississippi, Missouri, Nevada, and Ohio below).

Arizona

In *Van Emmerik*, a party to the dissolution died before the resolution of any of the issues. The Arizona Court of Appeals held that it was an error for the trial court to retain jurisdiction. In so holding, the court noted that jurisdiction may only be retained where a rendition of judgment is issued before the death of the party and to, therefore, enter a final decree nunc pro tunc.³

Arkansas

In *Cook*, the court held that where a divorce proceeding is not fully and formally ended and a party to the proceeding dies, the court loses jurisdiction as to property matters.⁴ In its holding the court noted that both a docket entry pursuant to Rule 79(a) and a separate document setting forth a final decree pursuant to Rule 58 must be made.⁵

Colorado

In *Marriage of Connell*, the court recognized that in Colorado a "court's power to issue orders relative to property. . . is merely incidental to the primary object of dissolving the parties' marital status."⁶ The court further explains that judicial action is necessary to dissolve a marriage, even when the parties have "amicably resolved all issues pertaining to the dissolution."⁷ In addition, under Colorado law "a decree of dissolution or legal separation is not final until it has been signed and entered in the court register of actions."⁸ The court further noted that "[i]t necessarily follows under this statutory framework that if either spouse dies prior to the entry of a valid decree, the marriage is

³ See *Van Emmerik v. Colosi*, 972 P.2d 1034 (Ariz. Ct. App. 1998).

⁴ See *Cook v. Lobianco*, 648 S.W.2d 808, 810 (Ark. Ct. App. 1983).

⁵ See *id.*

⁶ In re *Marriage of Connell*, 870 P.2d 632, 633 (Colo. Ct. App. 1994).

⁷ *Id.* at 633.

⁸ *Id.* at 634.

terminated as a matter of law and the trial court is divested of jurisdiction to proceed further in the dissolution.”⁹

Delaware

In *Villarroel*, the court recognized precedent that a “division of marital property can take place only in the context of the granting of a divorce.”¹⁰ As such, the court held that the family court’s jurisdiction to equitably divide marital property is lost with the abatement of the divorce proceeding.¹¹

District of Columbia

In *Wesley*, the court held that where a party to a divorce proceeding dies before the divorce is final, the “finality” requisite of District of Columbia Code Annotated § 16-409 (1944) is not achieved and the court retains no jurisdiction to allocate property.¹²

Florida

In *MacLeod*, the District Court held that the trial court is “thereafter deprived of jurisdiction to enter a final judgment,”¹³ upon the death of a spouse during a pending dissolution. The trial court’s jurisdiction expires “because death, by operation of law, has already terminated the marriage.”¹⁴ In its recognition that the court does lose jurisdiction, the court explained that “where a final judgment of dissolution has been entered before the death of a given spouse, a trial court retains jurisdiction to determine property rights after the spouse’s death,”¹⁵ drawing a distinction between the two scenarios. Further, in *Becker*, the court held that

[o]nce a court of record has jurisdiction of the cause and the parties and all the evidence has been presented, the cause is then ripe for

⁹ Connell, 870 P.2d at 632.

¹⁰ *Villarroel v. Villarroel*, 562 A.2d 1180, 1182 (Del. Super. Ct. 1989), quoting *Angelli [sic] v. Sherway*, 560 A.2d 1028, 1036 (Del. 1989).

¹¹ See *Villarroel*, 562 A.2d at 1183.

¹² See *Wesley v. Brown*, 196 F.2d 859, 860 (D.C. Cir. 1951).

¹³ *MacLeod v. Hoff*, 654 So.2d 1250, 1251 (Fla. Dist. Ct. App. 1995).

¹⁴ *Id.* at 1250.

¹⁵ *Id.* at 1250.

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judgment and the court is not thereafter deprived, by the death of a party, of its inherent power to render a decision or judgment and may do so in the interest of justice by a judgment nunc pro tunc as of the time of submission.¹⁶

(States with similar exceptions to the rule of abatement include Alabama, Minnesota, Mississippi, Missouri, Nevada, and Ohio).

Georgia

Georgia courts recognize that a party to a divorce proceeding may bring a "Stokes claim," which is a claim for equitable division of property as a part of a divorce proceeding.¹⁷ In *Brooks*, the court acknowledged that in such an action it has the authority, as it arises from a marital relation and divorce, to make such a distribution. The court also recognized that where one of the parties dies before there is a final adjudication there is, in effect, no divorce and therefore, there can be no equitable division of property.¹⁸

Hawaii

In *Labayog*, the issue was whether a family court's reservation of jurisdiction to cause a party to comply with a divorce decree terminates upon the death of one of the parties. The Appellate Court recognized precedent, which held that

where the divorce decree reserves the matter of the final division of the parties' property for further hearing and decision and a party dies before the hearing, the division should be effected in accord with the divorce statute rather than in accord with the Probate Code and the dower statute.¹⁹

As the family court reserved jurisdiction over such division, it was charged with dividing the property involved.²⁰ Absent such a reservation, the court would have lost jurisdiction and the probate code and dower statute would have determined property division.

¹⁶ *Becker v. King*, 307 So.2d 855 (Fla. Dist. Ct. App. 1975).

¹⁷ *See Owens v. Owens*, 286 S.E.2d 25, 26 (Ga. 1982).

¹⁸ *See Segars v. Brooks*, 284 S.E.2d 13, 14 (Ga. 1981).

¹⁹ *Labayog v. Labayog*, 927 P.2d 420, 441 (Haw. Ct. App. 1996).

²⁰ *See id.*

Illinois

In *Brandon*, the court recognized that where a formal order is entered finding the grounds for dissolution proven, the court would retain jurisdiction over the proceedings.²¹ The court interpreted Illinois Revised Statute (1983) chapter 40, part 401(3), which reads in pertinent part, “[t]he death of a party subsequent to entry of a judgment for dissolution, but before judgment on reserved issues shall not abate the proceedings,”²² as meaning a judgment for dissolution must be entered for the court to maintain jurisdiction over such proceedings. In this case, the Appellate Court overturned the trial court’s decision that where no judgment had been entered, it maintained jurisdiction over the proceeding, including the distribution of property.²³

Indiana

In *Johnson*, the court decided that where a party to a dissolution proceeding dies before judgment, the court does not retain jurisdiction over the action for the purpose of resolving property matters between the parties and their successors in interest.²⁴ Interpreting Indiana Code § 31-1-11.5-11, the court noted that a property settlement is “part and parcel” of the final dissolution decree and once the marriage is ended by death, there can be no final dissolution decree if there has not been a rendition of judgment.²⁵

Iowa

In *Estate of Peck*, one of the parties to a divorce proceeding died before judgment and that party’s estate argued that the court should maintain jurisdiction to distribute the property involved.²⁶ The court followed the majority rule, holding that when a party to a dissolution action dies before the entry of a decree, the marriage is terminated as a matter of law.²⁷ The State Su-

²¹ See *Brandon v. Caisse*, 496 N.E.2d 755, 756 (Ill. App. Ct. 1986).

²² *Id.* at 756.

²³ See *id.*

²⁴ See *Johnson*, 653 N.E.2d at 512.

²⁵ See *id.*

²⁶ See *In re Estate of Peck*, 497 N.W.2d 889 (Iowa 1993).

²⁷ See *Id.* at 891.

preme Court supported the decision, stating that nothing remained for the court to dissolve. Therefore, the court's jurisdiction divests of taking action on any matters such as property distribution, which are incidental to the primary object changing the status of the parties.²⁸

Kansas

In *Marriage of S. Wilson*, the Appellate Court upheld the trial court holding that where a party to a divorce dies before the issuance of a journal entry and decree of divorce, the divorce decree is ineffective.²⁹ Further, although the appellant argued that the division of property and marital status of the parties are two aspects of a divorce action that are divisible, the court held that "if there is no divorce, there is no division of marital property."³⁰

Maine

In *Panter*, a party to a dissolution proceeding died during the pendency of an appeal.³¹ The Appellate Court held that "[t]he power of the court to determine property rights is dependent upon the granting of a divorce to one of the parties."³² The case was remanded with instructions to dismiss the cause because the entire action abated with the death of the party.³³

Maryland

In *Corte*, a party to a dissolution died five days before the signing of the divorce decree.³⁴ The court held that even though a proposed decree and affidavit had been submitted before death, Maryland's Code (1957), Article 93 § 329, which establishes a surviving spouse's share of a deceased spouse's estate, governed the property division.³⁵ As there was no divorce, the surviving

²⁸ Peck, 497 N.W.2d at 889.

²⁹ See *Matter of Marriage of Wilson*, 768 P.2d 835 (Kan. Ct. App. 1989).

³⁰ *Id.* at 837.

³¹ See *Panter v. Panter*, 499 A.2d 1233 (Me. 1985).

³² *Id.*

³³ See *id.* at 1233.

³⁴ See *Corte v. Cucchiara*, 261 A.2d 775 (Md. 1970).

³⁵ See *id.* at 777.

spouse is still entitled to all the marital rights of and in the marital property.³⁶ The court further reasoned that a Maryland decree is not effective unless reduced to writing, signed by the judge, and filed for record.³⁷

Massachusetts

In Massachusetts, a divorce does not become final until ninety days³⁸ following the entry of a decree nisi and if objections are filed during that time, the divorce does not become final until judicial disposition of the objections.³⁹ In *Diggs*, a decree nisi was entered, the libellee filed objections, and the libellant died, all within the six-month period.⁴⁰ The court found that the decree nisi does not dissolve the marriage and the death of either party prior to the divorce becoming absolute puts an end to the divorce proceeding; “There can be no divorce unless both parties are alive at the time it is granted.”⁴¹ Further, in *Amendola*, the Appellate Court held that “[i]f the divorce action was properly dismissed because of the wife’s death, the husband retains the property; if the divorce became absolute, the wife’s heirs (children by a prior marriage) take the parcel.”⁴²

Minnesota

In *Tikalsky*, a judgment of divorce was entered after the death of one of the parties to the proceeding. The court recognized that in some cases no judgment may be entered after the death of one of the parties, such as where the marital status is terminated by death and other matters are only incidental to the action.⁴³ Further, the court held that where it has been determined that all the issues have been presented, and all that remains is for the clerk to enter the judgment in the judgment

³⁶ See *id.* at 776.

³⁷ See *id.* at 777.

³⁸ Mass. Ann. Laws ch. 208, § 21 (2000).

³⁹ See *Diggs v. Diggs*, 196 N.E. 858, 859 (Mass. 1935).

⁴⁰ See *id.* Mass. Ann. Laws ch. 208, § 21 (1934) was amended in 1984, changing the time period from six months to ninety days.

⁴¹ *Diggs*, 196 N.E. at 860.

⁴² *Karp v. Amendola*, 549 N.E.2d 113, 114 (Mass. App. Ct. 1990).

⁴³ See *Tikalsky v. Tikalsky*, 208 N.W. 180 (Minn. 1926).

book, the judgment may be entered nunc pro tunc.⁴⁴ (States with similar exceptions to the rule of abatement include Alabama, Florida, Mississippi, Missouri, Nevada, and Ohio).

Mississippi

In *White*, all issues were submitted, litigated, and decided before the death of one of the parties to the dissolution.⁴⁵ The court interpreted Mississippi Code Annotated, § 11-7-25, which provides in pertinent part: “[w]here either party shall die between verdict and judgment, such death need not be suggested in abatement, but judgment may be entered as if both parties were living.”⁴⁶ The court held, as this statute requires, where the death of one of the parties to a dissolution proceeding occurs after the formal decision, an order entering judgment of divorce nunc pro tunc may be made (including property disputes).⁴⁷ Thus, where death occurs before such determination, the court has no jurisdiction over the matter. (States with similar exceptions to the rule of abatement include Alabama, Florida, Minnesota, Missouri, Nevada, and Ohio).

Missouri

In *Linzenni*, the court recognized that its “jurisdiction abates in a dissolution of marriage action where one of the parties dies while the case is pending.”⁴⁸ Further, the court noted, “under the policy of our dissolution of marriage act, the doctrine of abatement is inapplicable where a dissolution of marriage has been ordered prior to the death of a party, even though the order may be partial, interlocutory or not a final judgment resolving all issues in the case.”⁴⁹ Thus, where there is no order of dissolution before the death of a party, the court loses its jurisdiction. (States with similar exceptions to the rule of abatement include Alabama, Florida, Minnesota, Mississippi, Nevada, and Ohio).

⁴⁴ *See id.*

⁴⁵ *See White v. Smith*, 645 So.2d 875 (Miss. 1994).

⁴⁶ *Id.* at 881.

⁴⁷ *See id.* at 881-82.

⁴⁸ *Linzenni v. Hoffman*, 937 S.W.2d 723, 726 (Mo. 1997).

⁴⁹ *Id.*

Montana

In *In re Marriage of Lawrence*, the court considered the issue of “whether the death of a party to a dissolution proceeding before the entry of a decree abates the action, in a case where significant property rights will be affected by the decree, or lack thereof.”⁵⁰ The court found that “the judicial power is ended when a party dies before the entry of a decree.”⁵¹ As this was a case of first impression, the court looked to a Michigan decision for the proposition that “[t]his rule applies even when the disposition of significant property rights will be determined by the entry of a decree, or lack thereof.”⁵² The court ultimately held that “an action to dissolution of marriage abates upon the death of either party prior to the entry of decree, and at that time the trial court loses jurisdiction to determine incidental issues such as the disposition of property rights.”⁵³

Nebraska

Howsden involved a motion to vacate and set aside a decree of dissolution for fraud.⁵⁴ The court noted the general rule: an action for dissolution of marriage abates upon the death of one of the parties and is not subject to revival.⁵⁵ The theory behind this rule is that the death of one of the parties destroys the subject matter, and that “matters of alimony and property rights are only incidental to the main object of the action.”⁵⁶

Nevada

In *Koester*, the court analyzed the effect of Nevada Revised Statute § 17.140 on the common law rule that all issues in a lawsuit are arrested by the death of a party to the proceeding.⁵⁷ The court explained that under Nevada Revised Statute § 17.140 a

⁵⁰ See *Lawrence*, 687 P.2d at 1027-28 (Mont. 1984).

⁵¹ See *id.* at 1027.

⁵² *Id.*, quoting *Tiedman v. Tiedman*, 255 N.W.2d 632, 634-35 (Mich. 1977).

⁵³ *Id.* at 1028.

⁵⁴ See *Howsden v. Rolenc*, 360 N.W.2d 680 (Neb. 1985).

⁵⁵ *Id.* at 681, citing *Williams v. Williams*, 19 N.W.2d 630 (1945).

⁵⁶ See *id.* at 681.

⁵⁷ See *Koester v. Admn. of Estate of Koester*, 693 P.2d 569, 571-72 (Nev. 1985).

final divorce decree may be entered following the death of one of the parties so long as the death occurred after a decision of all issues of fact had been entered.⁵⁸ The court further explained that where a party dies before a final decree the court may not issue an order or judgment against or for a deceased party unless a personal representative is substituted pursuant to Nevada Rules of Civil Procedure 25(a).⁵⁹ Therefore, where there are no decisions on the issues of fact entered before the death of a party, the court loses its jurisdiction. (States with similar exceptions to the rule of abatement include Alabama, Florida, Minnesota, Mississippi, Missouri, and Ohio).

New Hampshire

In *Coulter*, the court reversed a decision entering a divorce decree nunc pro tunc following the death of one of the parties.⁶⁰ The court held that because New Hampshire Statutes Annotated § 458.7 (a) and (b) combine requiring the court to refer parties to a counseling agency “before or during a hearing” when “there is a likelihood for rehabilitation of the marriage relationship,” a divorce will not be decreed “until the possibilities of reconciliation have been explored and have failed.”⁶¹ This hearing is necessary to ensure that grounds for divorce exist as well as to ensure that the possibility of reconciliation has been explored.⁶² The court may enter a divorce decree only following the completion of this hearing; to hold otherwise and allow a nunc pro tunc decision before a divorce hearing, “would result in the States [sic] abdicating any role in the regulation of divorce.”⁶³ (Note the similarities between this case and Florida, Mississippi, Missouri, and Nevada. Allowing a nunc pro tunc decision following resolution of all issues submitted to the court.)

⁵⁸ See *id.* at 572.

⁵⁹ See *id.*

⁶⁰ See *Coulter v. Coulter*, 550 A.2d 112 (N.H. 1988).

⁶¹ *Id.* at 115, quoting N.H. Rev. Stat. Ann. § 458:7-b (emphasis added).

⁶² *Id.* at 115, quoting *Woodruff v. Woodruff*, 320 A.2d 661, 663 (N.H. 1974).

⁶³ *Id.* at 112.

New Mexico

In *Rivera*, the issue was whether a trial court may allow the estate of a party to a divorce, who died during the proceeding, to be substituted for the deceased party to allow the court to enter a divorce decree and divide the property nunc pro tunc.⁶⁴ The court held that the trial court is without jurisdiction to enter a decree nunc pro tunc when the deceased dies before the entry of a divorce decree.⁶⁵

New York

In *Sperber*, the court considered whether the temporary administrator of a decedent's estate could petition the court to obtain equitable distribution of the marital property in a pending dissolution action.⁶⁶ The court found the cause of action for equitable distribution was properly dismissed, recognizing that "[i]t is well settled that where one party to a divorce action dies prior to the rendering of a judicial determination which dissolves or terminates the marriage, the action abates inasmuch as the marital relationship between the parties no longer exists."⁶⁷ Further, the court found that where it is undisputed that the deceased died before resolution of the action, the action abates precluding any claims for maintenance or related statutory claims for equitable distribution.⁶⁸

North Dakota

In *Thorson*, a party to a divorce died during the pendency of the proceeding. The trial court held that the estate could not maintain the action on behalf of the decedent.⁶⁹ The decision was affirmed, holding that marriage is a relationship personal to the parties and, under North Dakota Central Code § 14-05-01, a marriage is dissolved by the death of one of the parties.⁷⁰ Upon such a death, there is no longer a marriage to dissolve with a

⁶⁴ See State ex rel. *Rivera v. Conway*, 741 P.2d 1381 (N.M. 1987).

⁶⁵ See *id.* at 1382.

⁶⁶ See *Sperber v. Schwartz*, 139 A.D.2d 640 (N.Y. App. Div. 1988).

⁶⁷ *Id.* at 641.

⁶⁸ See *id.*

⁶⁹ See *Thorson v. Thorson*, 541 N.W.2d 692 (N.D. 1996).

⁷⁰ See *id.* at 695.

judgment decreeing divorce; when granting the divorce, the court will make an equitable distribution of real and personal property and such a distribution is incidental to the judgment of divorce.⁷¹ However, when ended by death and not divorce, the marriage is no longer recognized as a marriage capable of legal dissolution, and, therefore, no issue of property distribution remains before the court.⁷²

Ohio

In *Leskovyansky*, no issues had been decided before the death of one of the parties and the court held that the judge lacked jurisdiction to proceed.⁷³ Further, the court recognized that “if a party in a divorce action dies following a decree determining property rights and granting a divorce, but before the journalization of the decree, the action does not abate upon the party’s death.”⁷⁴ (States with similar exceptions to the rule of abatement include Alabama, Florida, Minnesota, Mississippi, Missouri, and Nevada).

Oklahoma

In *Marzette*, where a party to a divorce proceeding died before entry of a final judgment, the court had no jurisdiction to enter the decree, including any division of property.⁷⁵

Oregon

In *Daywalt*, the parties entered into a property settlement agreement, but before issuance of the final decree incorporating that settlement, one of the parties died.⁷⁶ The court held that because the agreement did not contemplate death of a party before the granting of the divorce, there was no agreement, the

⁷¹ See *id.* at 696.

⁷² See *id.*

⁷³ See *State ex rel. Litty v. Leskovyansky*, 671 N.E.2d 236, 239 (Ohio 1996).

⁷⁴ *Id.*

⁷⁵ See *Marzette v. Marzette*, 882 P.2d 578, 579-80 (Okla. Ct. App. 1994).

⁷⁶ See *Daywalt v. Bertrand*, 500 P.2d 484 (Or. Ct. App. 1972).

court lost jurisdiction over the proceeding, and statutory rights determined property division.⁷⁷

Pennsylvania

In *Estate of H. Pinkerton*, the court recognized that upon the death of either party before a decree of divorce the action abates.⁷⁸ Further, the court noted, “because a divorce action is abated by the death of one of the parties prior to the entry of a decree, economic claims are also abated.”⁷⁹ Further, “once a final divorce decree has been entered, the right of a subsequently deceased spouse to the distribution of marital property and other economic claims, where these matters have been properly put in issue before the death of the spouse, is vested.”⁸⁰

Rhode Island

In *Centazzo*, before the court entered a final judgment, but after issuance of an interlocutory judgment with a property distribution, after the nisi period had elapsed, and after the plaintiff had moved for final judgment, the plaintiff died.⁸¹ The court held that a divorce action abates on the death of one of the spouses and that with the abatement of the divorce petition, the action with respect to the division of property abates as well.⁸²

South Dakota

In *Larson*, following the trial, but before any opinion, decision or memorandum dissolving the marriage, one of the parties died.⁸³ The court held that

[t]he bond uniting man and woman as husband and wife is a personal one and our law provides that it is terminated in only two ways — death or divorce. (SDCL 25-4-1). Death having come in advance of any judicial decree the bond was thereby severed. Thereafter there

⁷⁷ See *id.* at 486.

⁷⁸ See *Estate of Pinkerton v. Pinkerton*, 646 A.2d 1184 (Pa. Super. Ct. 1994).

⁷⁹ *Id.* at 1185.

⁸⁰ *Id.* at 1184.

⁸¹ See *Centazzo v. Centazzo*, 556 A.2d 560, 561 (R.I. 1989).

⁸² See *id.*

⁸³ See *Larson v. Larson*, 235 N.W.2d 906 (S.D. 1975).

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was no bond upon which the decree could work. The law in this state is as it is in many others: in a suit for divorce where the *death* of one of the parties to the suit occurs *before a decree of divorce* has been issued *the action abates and the jurisdiction of the court to proceed with the action or to make further determination of property rights, alimony, costs or attorney's fees is terminated.*⁸⁴

Tennessee

In *Steele*, the court recognized that no judgment is effective or recognized as entered until signed by the judge and filed with the clerk of the court.⁸⁵ The court held that where no judgment is entered before the death of one of the parties to the proceeding, all proceedings occurring after the death of the deceased are vacated and the suit is abated.⁸⁶

Texas

In *Palomino*, a party to a divorce died before the rendition of the judgment.⁸⁷ The court recognized the following:

The general rule in Texas is that a cause of action for divorce is purely personal and becomes moot and abates upon the death of either spouse. The death of a party abates the divorce action and its incidental inquiries of property rights and custody. The proper procedural disposition of a divorce action when one of the parties dies is dismissal. However, when a trial court has rendered judgment on the merits, . . .the cause cannot be dismissed.⁸⁸

As such, the court held until judgment on the merits is rendered, a death of the party abates the cause and it must be dismissed.⁸⁹ Further, if judgment is rendered, the cause does not abate upon the death of a party.⁹⁰

Utah

In *Farrell*, the court held that when the death of a party occurs after the entry of a divorce decree but before the decree is

⁸⁴ *Id.* (emphasis added)

⁸⁵ *See Steele v. Steele*, 757 S.W.2d 340, 344 (Tenn. Ct. App. 1988).

⁸⁶ *See id.* at 342.

⁸⁷ *See Palomino v. Palomino*, 960 S.W.2d 899 (Tex. App. 1998).

⁸⁸ *Id.* at 900.

⁸⁹ *See id.* at 901.

⁹⁰ *See id.*

final, the decree becomes ineffective.⁹¹ Further, the court recognized that “when the death of one or both parties to a divorce action occurs during the pendency of the action, the action itself abates and their status, including their property rights, reverts to what it had been before the action was filed.”⁹²

Vermont

In *Woods*, the court held that where the period for appeal has not expired and one of the parties to the proceeding dies, the divorce abates.⁹³ This case does not explicitly address whether a Vermont court would apply similar logic if a party died during the pendency of the original action. It does seem to follow, however, that the original case would hold such an action to abate as well.

Virginia

In *Griffin*, the court found that Virginia had no legislation providing for survival or revival of a divorce or equitable distribution action following the death of one of the parties.⁹⁴ As such, the court held that the death of a party during the proceeding divests a trial court of jurisdiction to determine the parties' rights.⁹⁵ However, a year later the Virginia Supreme Court reversed the Appellate Court in *Griffin* regarding the Court's jurisdiction over an escrow account which the trial court had created upon sale of marital property; created, “until further order of the court.”⁹⁶ The Supreme Court found that although the divorce suit abates upon the husband's death, the court would retain in rem jurisdiction over any property specifically created by the Court.⁹⁷

⁹¹ See *Farrell v. Porter*, 830 P.2d 299, 301 (Utah Ct. App. 1992), citing *Daly v. Daly*, 533 P.2d 884 (Utah 1975).

⁹² *Id.* citing *Nelson v. Davis*, 592 P.2d 594 (Utah 1979).

⁹³ See *Woods v. Woods*, 641 A.2d 363, 364 (Vt. 1994).

⁹⁴ See *Griffin v. Sprouse*, 448 S.E.2d 152, 154 (Va. Ct. App. 1994).

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.* at 773.

Washington

In *Marriage of Himes*, in affirming the trial court's decision the court held that the distribution of property is incidental, and "it is clearly incontestable that upon the death of either party, *whether before or after the decree*, the subject of the controversy is eliminated."⁹⁸

Wisconsin

In *Socha*, the court found a cause of action for divorce terminates upon the death of either party and, as such, Wisconsin's statutory provisions governing such rights determine division of marital property.⁹⁹

III. The Minority View

The death of a party to a dissolution of marriage marks the end of the proceeding as to the divorce itself, however, incidental claims such as property rights survive the death.

A divorce action seeks relief that is equitable in nature, it is a fundamental principle of equity jurisprudence that once jurisdiction is acquired equity will do complete justice.¹⁰⁰ Equity recognizes that a pending suit does not abate if the cause of action survives.¹⁰¹ Courts have noted that to compel the surviving party to a divorce proceeding to seek relief outside the divorce by invoking the harsh common law rule of abatement complies neither with equitable principles nor with sound common sense.¹⁰² The minority courts acknowledge that the disposition of a marital estate survives as equitable distribution and can only be effected at final disposition of the divorce proceeding.

⁹⁸ In re *Marriage of Himes*, 965 P.2d 1087, 1093 (Wash. 1998). (emphasis added).

⁹⁹ See *Socha v. Socha*, 555 N.W.2d 152, 154-55 (Wis. Ct. App. 1996).

¹⁰⁰ See *Perlstein v. Perlstein*, 217 A.2d 481, 483 (Conn. 1966).

¹⁰¹ See *id.*

¹⁰² See *id.*

A. Case Synopses

Alaska

Alaska Statute § 09.15.040 (Michie 1994) holds that the death of a party to a divorce action, during the proceeding, would not deprive the court of jurisdiction to decide the issues submitted. The statute reads in pertinent part: “In case of the death or disability of a party to an action, the court may at any time within two years after the death or disability, on motion, allow the action to be continued by or against that party’s personal representative or successor in interest.”¹⁰³

California

In *In re Marriage of Mallory*, the court held that after the death of a party to a divorce action, the trial court was empowered to enter a judgment nunc pro tunc with respect to all issues. The issues to be determined include the marital status if submitted to the court for decision before the party’s death, and notwithstanding the general rule that the death of a party abates an action for termination of the marital status.¹⁰⁴ The trial in *Mallory* was in October 1987 with final written arguments submitted to the court for decision in January 1988. On April 25, 1988, the husband was found dead in his home at 8:50 a.m. That same day, at 3 p.m., the trial court entered an order dissolving the marriage and distributing the property.¹⁰⁵ The Appellate Court concluded that in a marital dissolution action the trial court has the power to enter a judgment on all substantive issues submitted for final decision before the death of a party.¹⁰⁶ Therefore, as long as the issues are submitted before death, the court may maintain jurisdiction.

Connecticut

In *Perlstein*, the plaintiff sought to annul a marriage, but died before full disposition of the case.¹⁰⁷ The court determined

¹⁰³ ALASKA STAT. § 09.15.040 (Michie 1994).

¹⁰⁴ See *In re Marriage of Mallory*, 64 Cal.Rptr.2d 667, 673 (Cal. Ct. App. 1997).

¹⁰⁵ See *id.* at 668-69.

¹⁰⁶ See *id.* at 674.

¹⁰⁷ See *Perlstein*, 217 A.2d at 482.

that the common law rule of abatement upon the death of either a sole plaintiff or defendant was changed by Connecticut General Statutes Annotated § 52-599 (1991).¹⁰⁸ The statute precludes abatement “except in those situations where the purpose or object of the action would be defeated or rendered useless by the death of any party.”¹⁰⁹ The court further provided that because the widow could claim a right to decedent’s estate, the case could continue with the executor or administrator standing in behalf of decedent.¹¹⁰

Idaho

In *Milbourn*, the court noted that “a simple action for divorce is extinguished by the death of one of the parties. On the other hand, if the issues in the action expressly involve property rights, the action is not extinguished by death so far as that issue is concerned, but survives.”¹¹¹

Kentucky

In *Snyder*, the court held that Kentucky Statute § 395.278 and CR 2 5.01 combine to require that when a litigant dies, any action pending with respect to the decedent must be “revived against that decedent’s administration and the administrator must be substituted as the real party in interest before the action can proceed.”¹¹²

Louisiana

In footnote three of *Larocca*, the court recognized Louisiana Supreme Court precedent that holds a divorce proceeding with an incidental property action does not abate upon the death of a party to the proceeding.¹¹³ The court reasoned “[i]n the instant case, as in the ones discussed above, there exists a substantial property interest that distinguishes it from simply a divorce ac-

¹⁰⁸ *See id.*

¹⁰⁹ *Id.* at 481.

¹¹⁰ *See id.* at 483.

¹¹¹ *Milbourn v. Milbourn*, 384 P.2d 476, 478 (Idaho 1963), *quoting* *Weisgerber v. Prescher*, 37 Idaho 653 (Idaho 1923).

¹¹² *Snyder v. Snyder*, 769 S.W.2d 70, 72 (Ky. Ct. App. 1989).

¹¹³ *See Larocca v. Larocca*, 606 So.2d 53, 55 (La. Ct. App. 1992).

tion without an incidental claim affecting property rights.”¹¹⁴ As such, a divorce proceeding with an incidental claim effecting property rights survives the death of a party to the proceeding.

Michigan

In *Listh*, the court held that where property rights are involved, a divorce survives the death of one of the parties.¹¹⁵

New Jersey

In *Groh*, the court held that a divorce action survives the death of a party under certain circumstances.¹¹⁶ The court recognized that the disposition of the marital estate survives because “equitable distribution can only be effected at final disposition of a divorce action.”¹¹⁷ The court explained that Rule 4:34-1(b) provides that a successor or representative may stand in behalf of a decedent.¹¹⁸

North Carolina

In *Elmore*, the court held that “[i]t is true that ‘death of a party terminates only the action as one for divorce and does not necessarily prevent it from being revived and continued in so far as it seeks an adjudication of property rights between the parties.’”¹¹⁹ The court is making an important distinction here, that such an action may only be revived and continued where the plaintiff has sought an adjudication of property rights and not only an absolute divorce.¹²⁰

South Carolina

In *Perry*, the court considered whether a vested interest in marital property arising from marital litigation survives the death

¹¹⁴ *Id.* at 53.

¹¹⁵ *See Listh v. Listh*, 46 N.W.2d 385, 386 (Mich. 1951).

¹¹⁶ *Groh v. Groh*, 672 A.2d 262 (N.J. 1995).

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ *Elmore v. Elmore*, 313 S.E.2d 904, 908 (N.C. Ct. App. 1984), *quoting* 48 N.C. (1 R.Lee) at 253 (1979).

¹²⁰ As this article was going to print, the North Carolina Supreme Court held that the death of a party prior to the granting of the divorce abated the equitable distribution action. *Brown v. Brown* 2001 WL 1856 (N.C. 2000).

of a spouse.¹²¹ The court recognized that Code of Laws of South Carolina 1976 Annotated § 20.7.420 provides the family court with exclusive jurisdiction over a divorce and the settlement of all legal and equitable rights of the parties to the real and personal property of the marriage.¹²² The court held marital litigation not to abate by the death of a spouse and, as such, the family court maintains jurisdiction to resolve all issues between the parties.¹²³

West Virginia

In *Bridgeman*, the court held that “divorce actions abate at death except as to property rights.”¹²⁴ The court further noted that there is no abatement “as to attendant property rights, if those rights survive a party’s death and are enforceable in favor of, or against, a party’s estate.”¹²⁵

Wyoming

Wyoming Statutes Annotated § 1.4.102 governs whether courts retain jurisdiction over property rights in a divorce proceeding when a party dies during the pendency of the action. The statute reads in pertinent part,

[n]o action or proceeding pending in any court abates by the death of either or both of the parties thereto except as herein provided; an action for libel, slander, malicious prosecution, assault, assault and battery, nuisance, or against a justice of the peace for misconduct in office shall abate by the death of either party.¹²⁶

As dissolution and its related property rights are not specifically set out in the statute it would appear that a Wyoming court would maintain jurisdiction over a matter where a party has died. However, this statute, as it relates to dissolution proceedings, has not been tested in a court of law.

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¹²¹ See *Perry v. Estate of Perry*, 473 S.E.2d 860, 863 (S.C. Ct. App. 1996).

¹²² See *id.*

¹²³ See *id.*

¹²⁴ *Bridgeman v. Bridgeman*, 391 S.E.2d 367, 369 (W. Va. 1990).

¹²⁵ *Id.* at 367.

¹²⁶ WYO. STAT. ANN. § 1-4-102 (Michie 1997).