

UPDATE ON DEATH AND DIVORCE PURSUANT TO RECENTLY ENACTED ACT 85 of 2010

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Act No. 85 was approved by the Governor of Pennsylvania on October 27, 2010, after being amended three times.

Like taxes, death and divorce never go away and impact every area of the practice of law. That is the reason why a member of the Probate and Tax Section was requested to provide this update on Senate Bill 53 (Act. 85 of 2010) which amends Titles 15 and 20 relating to the effect of the death of a party during divorce proceedings.

Senate Bill 53 was proposed by our very own Montgomery Bar Association member, Senator Stewart J. Greenleaf. The Bill begins by making what amounts to two changes to 15 Pa.C.S.A. Section 5547 (b) and 5548 (b) (Corporations and Unincorporated Associations) identical in nature and both make reference to Chapter 77, D of Title 20, (Decedents, Estates and Fiduciaries) also known as the PEFCODE. The remainder of the Act not referenced herein amends other sections of the Title 20 dealing with duties, responsibilities and notices of personal representatives and regarding trusts. Senate Bill 53 (Act 85 of 2010) makes the following changes to Title 20 (Decedents, Estates and Fiduciaries):

§2106. Subsection a(2) (Forfeiture) is amended to provide that a spouse has no right or interest in the real or personal property of the Estate of the other spouse if the other spouse dies during the course of divorce proceedings, or, if no divorce decree has been entered and the grounds for divorce have been established.

§ 2507 Paragraph (2) (modification by circumstances) is amended to provide that a provision in an testator's Will, in favor of the testator's spouse, becomes *ineffective* if the testator dies during the course of the divorce proceedings and no divorce decree has been entered and the grounds for divorce have been established. However, this is not operative, if it appears from the Will that the provision for the Testator's spouse was intended to survive a divorce.

Title 23Pa.C.S.A. §3323 of the Divorce Code states that in the event a one party dies during the course of divorce proceedings and no decree of divorce has been entered, the parties' economic rights and obligations arising under the marriage shall be determined under this part rather than under Title 20 provided that grounds for divorce can be established. In this instance, grounds can be established in a few ways: In the case of an action for divorce under Section 3301 (a) or (b) where the court adopts a report of the Master or makes its own findings that grounds for divorce exist; In the case of an

action for divorce under Section 3301(c), where both parties have filed affidavits of consent; In a case of an action for divorce under Section 3301(d), where an affidavit has been filed and no counter-affidavit has been filed, or if a counter-affidavit has been filed denying the affidavit's averments, the court determines that the marriage is irretrievably broken and the parties have lived separate and apart for at least two years at the time of the filing of the affidavit.

Sections 2106 (a) and 2507 (2) of Title 20 are amended and set forth below as follows:

2106. Forfeiture.

(a) Spouse's share.

(1) A spouse, for one year or upwards previous to the death of the other spouse, who has willfully neglected or refused to perform the duties to support the other spouse, or who for one year or upwards willfully and maliciously deserted the other spouse, shall have no right or interest under this chapter in the real or personal Estate of the other spouse.

(2) (Amended) A spouse shall have no right or interest under this chapter in the real or personal estate of the other spouse if:

(i) the other spouse dies domiciled in this Commonwealth during the course of divorce proceedings;

(ii) no decree of divorce has been entered pursuant to 23 Pa.C.S. 3323 (relating to decree of court): and

(iii) grounds have been established as provided in 23 Pa.C.S. §3323(g).

Section 2507 is amended as follows:

Section 2507. Modification by circumstances.

Wills shall be modified upon the occurrence of any of the following circumstances, among others:

(2) Divorce or Pending Divorce – Any Provision in a testator's Will in favor of or relating to the testator's spouse shall become ineffective for all purposes unless it appears from the Will that the provision was intended to survive a divorce if the testator:

(i) is divorced from such spouse after making the Will; or

(ii) dies domiciled in this Commonwealth during the course of divorce proceedings, no decree of divorce has been entered pursuant to 23 Pa. C.S. §3323 (relating to Decree of Court) and grounds have been established as provided in 23 Pa.C.S. §3323(g).

continued on page



UPDATE ON DEATH AND DIVORCE PURSUANT TO RECENTLY ENACTED ACT 85 of 2010

continued from page 16

The forfeiture provision of Section 2106 amends Section 2507 to provide that a spouse has no right or interest in the estate of the other spouse who has written the Will if that spouse dies during a pending divorce proceeding and a decree of divorce has not yet been entered but grounds for divorce have been established, in the event of willful neglect and or desertion. Currently there is no such provision in Section 2106. It is not known what level of proof will be required to establish and substantiate these allegations.

Section 2507 is amended (relating to modification by circumstances), in order to provide that the provisions of a Will shall be modified in the case of divorce or in the case of a pending divorce. In either instance, unless it appears that the provision in the Will was meant to survive the divorce, any provision in favor of other spouse shall be ineffective if the spouses are divorced from each other or even if the decree of divorce has not yet been entered but grounds for divorce have been established.

Previously, Section 2507 only addressed the cases of divorce if the decree of divorce has already been entered prior to the death of a spouse. Under the new law, if a decree in divorce has been entered, a provision in a Will in favor of the other spouse will *not* survive *unless* that provision was *intended* to survive the divorce.

Section 6111.1 (Modification by Divorce). Pending divorce is included in addition to those already divorced. This section is amended to provide that a provision in a conveyance that was revocable by a conveyor at the time of the conveyor's death in favor of or relating to the conveyor's spouse, becomes ineffective if the conveyor dies during the *course of divorce* proceedings, no divorce decree has been entered and grounds have been established, unless it appears in the governing instrument that the provision was intended to survive a divorce. This section is to provide for conveyances made by spouses who are divorced OR who are in the middle of a divorce proceeding, unless the conveyance was intended to survive the divorce, the conveyance is ineffective if the person is divorced from the spouse after making the conveyance, or if no decree of divorce has been entered and the grounds for divorce have been established. Previously, Section 6111.1 only applied if a decree of divorce was entered. The Section does not dispute the circumstances of a pending divorce and that is what the Amendment is designed to address.

Section 6111.2 Effect of Divorce or Pending Divorce on Designation of Beneficiaries. The previous section was amended to provide that in a case of a spouse who dies and has designated the other spouse as a beneficiary of a life insurance

policy, pension or profit-sharing plan, the other spouse may not receive proceeds from the life insurance policy, pension plan or profit-sharing plan, if a decree of divorce has been entered or if divorce proceedings are pending. In such a case, the former spouse or soon to be former spouse, is treated as if he or she pre-deceased the other spouse, unless the designation regarding payments was intended to survive the divorce, based upon a court order or wording of the instrument.

Currently, Section 6111.2 of Title 20 only speaks to the circumstances of a decree of divorce being entered. In such a case, the contract of a spouse in a pending divorce whose beneficiary designation provided benefits to the other spouse, whether the contract is for life insurance, pension, or a profit-sharing plan, becomes an ineffective beneficiary designation, unless it is clear that the contract was intended to survive the divorce.

The changes to these Sections reflect existing law. Several years ago, the Senator introduced legislation amending the Divorce Code (2004 Act 175), which amended both Title 23 of the Divorce Code and Title 20 of the Tax Code to indicate that if the grounds for divorce had been established and a party dies, then Title 23 is to be followed. Act 175 of 2004 was recommended by the Advisory Committee on Domestic Relations Law.

The changes made to Title 20 (the Probate Code) by Senate Bill 53 (2010 Act 85) are intended to conform the Probate Code to the changes made in the Divorce Code in 2004. The provisions in Senate Bill 53 were recommended by the Advisory Committee on Decedents' Estates Laws.

The 1999 report of the Advisory Committee on Domestic Relations Law on which Act 175 was based contains this comment:

Therefore, Title 20 Section 6111.2 was amended for organizational purposes (subsections are added) *and* to provide that the designation of an individual's spouse or former spouse, as the beneficiary of a contractual arrangement (for example, an insurance policy, annuity contract, pension or profit-sharing plan) providing payments to the spouse if the designation was revocable by the individual at the time of the individual's death, *becomes ineffective* if the individual dies during the course of divorce proceedings and no decree of divorce has been entered and grounds have been established, or, where the divorce is final at the time of death. In such an

continued on page

18

UPDATE ON DEATH AND DIVORCE PURSUANT TO RECENTLY ENACTED ACT 85 of 2010

continued from page 17

instance, the designation will be construed as if the spouse or former spouse predeceased the individual, unless it appears that the designation was intended to survive the divorce based on the wording of the designation, a court order or written contract between the individual between the spouse or former spouse.

These Sections read as follows:

Title 20, 6111.1 Modification by Divorce or Pending Divorce

Any provision in a conveyance which was revocable by a conveyer at the time of the conveyer's death and which was to take effect at or after the conveyer's death in favor of relating to the conveyer's spouse shall become ineffective for all purposes unless it appears in the governing instrument that the provision was intended to survive a divorce, if the conveyer:

(1) is divorced from such spouse after making the conveyance; or

(2) dies domiciled in this Commonwealth during the course of divorce proceedings, no decree of divorce has been entered pursuant to 23 Pa.C.S. Section 3323 (relating to Decree of Court) and grounds have been established as provided in 23 Pa. C.S. Section 3323 (g).

Title 20, Section 6111.2 Effect of Divorce or Pending Divorce on Designation of Beneficiaries Applicability – This section is applicable if an individual:

(1) is domiciled in this Commonwealth;

(2) designates the individual spouse as beneficiary of the individual's life insurance policy, annuity contract, pension or profit-sharing plan or other contractual arrangements providing for payments to the spouse; and

(3) either;

(i) at the time of the individual's death is divorced from the spouse; or

(ii) dies during the course of divorce proceedings, no decree of divorce has been entered pursuant to 23 Pa.C.S. §3323 (relating to Decree of Court) and grounds have been established as provided in 23 Pa.C.S §3323 (g).

(b) General rule – any designation described in subsection (a) (2) in favor of the individual's spouse or former spouse that was revocable by the individual's death shall become

ineffective for all purposes and shall be construed as if the spouse or former spouse had predeceased the individual unless it appears the designation was intended to survive the divorce based on:

(1) the wording of the designation;

(2) a Court Order;

(3) a written contract between the individual and the spouse or former spouse; or

(4) a designation of a former spouse as a beneficiary after the divorce decree has been issued.

(c) Liability.

(1) Unless restrained by court order, no insurance company, pension or profit-sharing plan trustee or other obligor shall be liable for making payments to a spouse or former spouse which would have been proper in the absence of this section.

(2) any spouse or former spouse to whom payment is made shall be answerable to anyone prejudiced by the payment.

The amendment to this Section expands its applicability to soon-to-be former spouse who are treated as if he or she had predeceased the other spouse, unless the designation regarding payments were intended to survive the divorce, based upon a Court Order or the wording of the instrument.

All of the foregoing amendments are to take effect 60 days from the date signed into law by the Governor on October 27, 2010. The balance of the Senate Bills amending Title 20 provide for formula causes for Federal tax purposes, for advertisement of the grant of letters, for duties of personal representatives, for various Federal Estate Tax provisions, for implementation and power of Powers of Attorney, for applicability for rule against perpetuities, for notices of representation, for creditor's claims against settlors, for actions contesting validity of revocable trust, for claims and distribution after a settlor's death for removal of trustee, for trustee's duty to inform and report, for Powers of Trustees and for limitations of actions against Trustees, and further provides for trust, retirement benefits, individual retirement accounts, deferred compensation, annuities and similar payments. These changes give us all the more reason for our members to work together for the benefit of our clients. > <