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Death During Divorce:
The Deepening Abyss of the 'Black Hole'

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To what extent will a court of equity protect the estate of a party who dies during divorce proceedings? In light of the Appellate Division's Dec. 5, 2018, decision of *Nildia Acosta-Santana v. Cesar A. Santana*, A-5646-16T4, a myriad of questions have arisen for both matrimonial and estate planning attorneys with respect to counseling a client in order to insure the client's testamentary intent is accomplished should the client die during the divorce proceedings.

Santana involved the defendant husband dying during the divorce proceedings while the marital settlement agreement was still being finalized. The parties had been married for 25 years when wife filed a complaint for divorce in September 2015. In June 2016, during the pendency of the litigation, husband executed a will, in large part leaving his estate to his children, naming his brothers and sister-in-law as contingent beneficiaries, and naming his brother as his executor. Although Mr. Santana was seriously ill, during the fall of 2016 he was feeling better and his death was not imminently expected. In October 2016, while the parties were circulating a draft property settlement agreement whereby they would each receive 50% of the marital assets, but before an agreement was reached and executed, Mr. Santana died.

Common practice has been for estates to be permitted to intervene in the matrimonial action in order to permit the family court to complete distribution of the marital estate. Upon Mr. Santana's death, a motion to intervene on behalf of the decedent's estate was filed, whereupon Mrs. Santana cross-moved for summary judgment. In granting summary judgment, the trial court reasoned that New Jersey's equitable distribution statute does not authorize distribution of marital assets except upon divorce. The court further found that the estate failed to establish "exceptional circumstances" allowing the intervention of the estate in the matrimonial action or the establishment of a constructive trust for the benefit of the defendant's estate.

The Appellate Division affirmed and, like the trial court, found that this case was distinguishable from the precedents of *Carr v. Carr*, 120 N.J. 336 (1990), and *Kay v. Kay*, 405 N.J. Super. 278 (App. Div.), *aff'd*, 200 N.J. 551 (2010). In *Carr*, the Supreme Court concluded that marital property does not lose its essential and distinctive nature as property arising from joint contributions of both spouses during the marriage due to the death of one during divorce proceedings. In that case, the plaintiff wife had no right to equitable distribution as a result of her husband's death during the divorce. She also had no right, pursuant to N.J.S.A. 3B:8-1, to an elective share of her decedent husband's estate because the parties were not living together at the time of her husband's death. The court in *Carr* compared the wife's situation to a "black hole" and invoked and imposed the equitable remedy of a constructive trust on the marital property under the control of the executor of the estate. In *Kay*, the estate sought to intervene to continue to prove the allegation that the plaintiff wife had diverted marital assets to her daughter. The Appellate Division found that the allegations, if proved, would not bar an equitable remedy as established in *Carr*. The New Jersey Supreme Court affirmed, finding no real difference between the claims of the wife in *Carr* and the estate in *Kay* and further invited the legislature to address the anomalous results that may occur due to the collision between the statutes governing equitable distribution and probate, the outcome of which is an innocent spouse being left with no remedy. As demonstrated by the *Santana* case, the legislature has not responded.

Should death occur during divorce, probate assets pass in accordance with the party's will or laws of intestacy based on the general rule that divorce is personal, and thus the estate will not be substituted as a party pursuant to N.J. Ct R. 4:34-1(b). Probate assets are assets held in the decedent's name alone with no beneficiary designation (or where the estate is named the beneficiary) and assets held as a tenants-in-common. Non-probate assets, which include joint assets with rights of survivorship or tenancy-by-the-entirety, or assets on which parties other than the estate are named as beneficiaries, will pass by operation of law or pursuant to beneficiary designation. Probate and non-probate transfers to a spouse by a former spouse, except as otherwise provided by the express terms of a court order or property settlement agreement, are revoked by the divorce itself, pursuant to N.J.S.A. 3B:3-14, but not by the mere filing of the divorce complaint. Changes with respect to life insurance, including a change of beneficiary, must be disclosed if made within 90 days of filing of a complaint, as any such insurance coverage is then to be maintained pending further order of the court pursuant to N.J. Ct R. 5:4-2(f).

Notwithstanding defendant husband having executed a new will benefiting his children, the holding in *Santana* resulted in plaintiff wife receiving approximately $615,000 more as a result of his death than she would have received in equitable distribution. This windfall arose largely because (i) the home was owned as tenancy-by-the entirety and passed by operation of law, (ii) all jointly owned accounts passed by operation of law, (iii) defendant had a life insurance policy naming wife as beneficiary which he would have wanted to change but was seemingly precluded from doing so pursuant to the court rule, and (iv) defendant had named wife as a beneficiary of his retirement account under his employer's plan, which unlike insurance is not precluded by court rule from being changed (although some retirement plans do preclude a party from removing a spouse as a beneficiary without such spouse's consent), but in this case would have generated a notice to plaintiff which defendant feared would have disrupted the settlement negotiations.

No court rule prevented defendant from withdrawing half of the parties' joint bank account and opening a separate one in his name. However, had Mr. Santana taken

action to change the beneficiary or transfer assets during the litigation, as matrimonial attorneys are well aware, it is likely that Ms. Acosta-Santana's attorneys would have filed an application to undo the change and transfers. The court likely may have ordered Mr. Santana to return the assets to joint title and in fact probably would have sanctioned Mr. Santana if he had changed the beneficiary on the life insurance policy. Notwithstanding defendant's good faith actions, the court found plaintiff's windfall not to be an "unjust" enrichment. Unpaid creditors of decedent's estate presumably disagree, although defendant's children seemingly supported their mother.

The Santana court further found the case did not present any exceptional circumstances such as those presented by *Carr* and *Kay*. In *Carr* the court sought to protect an innocent spouse, and in *Kay* there were allegations of dissipation of marital assets leaving a party unjustly enriched. *Santana* concluded that the phrase "exceptional circumstances" means only harm to the surviving spouse or situations in which the decedent's estate could establish fraud or other misconduct on the other party's part. However, neither *Carr* nor *Kay* confined its equitable considerations solely to the facts before it, and constructive trusts have been utilized absent such harm—as in *Carr*—fraud or misconduct (e.g., *Thieme v. Aucoin-Thieme*, 227 N.J. 269 (2016) (constructive trust used to allocate a bonus where allocation based on the date of marriage would cause unjust enrichment).

The murky waters stirred by the *Santana* decision were not clarified by the Supreme Court of New Jersey, which denied the estate's petition for certification. In its wake, numerous questions plague estate planning and matrimonial attorneys as to the advice to give to clients. Do we suggest to a healthy spouse to unreasonably delay litigation until a sickly spouse dies? Do we bring to the attention of a dying or elderly divorcing defendant spouse, who did not have the option of planning prior to divorce, that notwithstanding the prohibition of changing beneficiaries of a life insurance policy, defendant may want to risk sanctions and consider modifying beneficiaries in violation of the court rule, to place the onus on the court to reassign beneficiary designations because maybe the court will not do so or will only reassign a portion thereof? Do we advise clients to transfer and/or convert every conceivable non-probate asset held with

a spouse into a probate asset, to force the potentially surviving spouse to seek equitable distribution from an estate? Are practitioners bound to advise every client of the possibility and potential outcomes of "black hole" litigation, should such litigant die pending the divorce? Should practitioners ask the court to bifurcate every divorce where non-probate assets are a concern, notwithstanding the March 3, 1979, New Jersey Supreme Court directive stating bifurcation will be permitted only with the approval of the assignment judge which will not be granted except in the most unusual and extenuating circumstances?

Interestingly, other state legislatures have addressed the issue. For example, in nearby Pennsylvania, pursuant to 23 Pa. C.S.A. 3323(d.1), a divorce proceeding continues after death with the economic rights and obligations between the parties determined under the family law statutes instead of the probate statutes.

Until the legislature and/or the Supreme Court answers the question of how to equitably address division of assets of the marriage, as well as issues of providing for support of the minor children, upon the death of a party during a divorce proceeding, practitioners are left with little guidance in counseling clients to avoid the black hole should they die during a divorce.

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