Comment, TILL DEATH DO US PART—AND THEN SOME: THE EFFECT of a PARTY'S DEATH DURING DISSOLUTION

I. Introduction

Divorce is increasingly common these days. In fact, statistics now say that nearly 50 percent of marriages end, not by death—as the vows proclaim—but by divorce.[1] And although both death and divorce effectively sever the marital covenant, the manner in which marriage terminates can have extremely disparate effects on parties to the marriage, as well as their heirs and other third parties. Generally issues of property, debts, and income are clearly subject to either dissolution statutes or the probate code, but when a party dies *after* commencement of a divorce proceeding, but *prior* to final disposition, this disposition and distribution issue can become extremely complex.

II. Overview

Attorneys who are aware of, and prepare for, potential problems that accompany the death of a party during dissolution are in a much better position to responsibly represent their clients. While this biological reality may seem obvious, every client has the potential of falling within the subject matter of this comment. Moreover, the occurrence of death during dissolution happens more often than one might think. In addition to life accidents, parties under stress prior to and during divorce proceedings may suffer heart failure, stroke, or even suicide. And when death occurs, it leaves clients, families, lawyers and the court looking for answers.

As a general rule, a cause of action for dissolution is strictly personal and the death of either spouse after commencement but

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[1] Jerome H. Poliacoff, *What Does Love Have To Do With It? A Prenuptial Agreement Should Not Kill the Romance, but Should Quell Your Clients' Fears about Marriage and Divorce*, 33 WTR FAM. ADVOC. 12, 14 (2011).

prior to a final decree will abate the action.[2] However, this general proposition is largely confined to cases that are purely divorce; courts that allow bifurcation routinely retain jurisdiction over property interests, and in some rare instances, courts will retain jurisdiction to enter a final decree of dissolution even after the death of a party.[3]

This comment highlights certain exceptions to this general rule of abatement. In Part I, various problems involved with the entry of judgments *nunc pro tunc* are described. Part II then examines special considerations concerning the bifurcation of trials, with the few state statutes that control that issue explored in Part III. Parts IV and V describe the effect of the death of a party during the pendency of an appeal, as well as the "slayer exception," respectively. Finally, Part VI briefly analyzes the effect of death on collateral agreements, including separation agreements and qualified domestic relations orders (QDROs).

One important caveat: although this comment provides an overview of death and dissolution, jurisdictions vary widely by case law and statute.[4] Therefore, legal practitioners should pay close attention to the judicial and legislative tilt of his or her jurisdiction[5] because these cases are ripe for strained attorney-client relations and all the attendant consequences.

III. Judgments *Nunc pro Tunc*

An exception to the general proposition that the death of either party terminates an action for dissolution occurs where a court renders judgment *nunc pro tunc*, or "now for then."[6] Although some jurisdictions have statutes that regulate a court's authority to render judgments *nunc pro tunc*, the power to do so is generally held as inherently vested in the court.[7] As a matter of

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2 Francis M. Dougherty, Annotation, *Effect of Death of Party to Divorce Proceeding Pending Appeal or Time Allowed for Appeal,* 33 A.L.R. 4TH 47, 50 (2009).

3 *See* Fulton v. Fulton, 499 A.2d 542, 549-550 (N.J. Super. Ct. Ch. Div. 1985).

4 *See generally* C.P. Jhong, Annotation, *Entering Judgment or Decree of Divorce Nunc pro Tunc,* 19 A.L.R 3D 648 *1 (2009).

5 *Id*.

6 *See, e.g.,* Yelenic v. Clark, 922 A.2d 935 (Pa. Super. Ct. 2007).

7 Jhong, *supra* note 4, at *2.

definition, *nunc pro tunc* judgments are not meant to render judgments today which *should have been rendered then* but rather should merely effectuate judgments today that actually *were rendered then.*[8] Of course, the recitation of a general rule naturally leads to exceptions.

For example, despite the death of a party during the action, courts that have obtained jurisdiction may have the discretion and power to enter judgments *nunc pro tunc* in those cases where all evidence has been submitted and the cause is ripe for judgment.[9] *Nunc pro tunc* judgments are generally used to bolster an earlier ruling or action.[10] Other courts have concluded that a judgment *nunc pro tunc* may only be rendered when the judgment was actually entered previously but where entry of the order was technically omitted or inadvertently delayed.[11] Hence, whether a court renders a judgment *nunc pro tunc* depends on several factors including the type of error that resulted in the "lost judgment" (a judgment that was arguably rendered, but was not formally recorded), how much evidence the court requires to substantiate the existence of a previous judgment, what type of evidence a court will consider, and whether a *nunc pro tunc* amendment will affect rights of third parties. These various issues often become comingled but a discrete discussion of each is worthwhile.

A. *Clerical Error/Mistake*

Although most courts generally limit the use of *nunc pro tunc* judgments to instances that require amendment solely due to clerical errors,[12] they may differ in their determinations as to what constitutes a clerical error such that a *nunc pro tunc* judgment is proper. At first glance, the definition of "clerical error" would seem rather axiomatic, but there is significant potential for argument when trying to justify a *nunc pro tunc* judgment. For instance, the California Court of Appeals defines "clerical" to

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8 *See, e.g.,* Gustafson v. Gustafson, No. 1 CA-CV 09-243, 2010 WL 1640974 (Ariz. Ct. App. April 22, 2010).

9 Becker v. King, 307 So. 2d 855, 858 (Fla. Dist. Ct. App. 1975).

10 *Id.* at 859.

11 Jhong, *supra* note 4, at *2.

12 *See, e.g.,* Estate of Eckstrom, 354 P.2d 652, 654-55 (Cal. 1960); Doser v. Doser, 664 A.2d 453, 462 (Md. Ct. Spec. App. 1995).

mean something more than only those errors made by the clerk, but excludes errors made by the court because of a failure to correctly interpret the law or apply the facts.[13] And though it may seem obvious that clerical errors would not include errors of law, the distinction requires further analysis.

In *Estate of Harris,* the California Court of Appeals applied a three part test to determine whether the mistake was clerical, and therefore amenable to correction, or judicial and therefore barred.[14] First, the court excluded from the definition any omissions which, if corrected, would result in a new trial.[15] Second, the court explained that where serious disparities exist between the judgment of record and the proposed *nunc pro tunc* judgment, the court must clearly demonstrate the clerical nature of the error by a showing of the record.[16] Third, where evidence exists that could support either clerical error or judicial error, deference is given to the trial court's conclusion.[17] However, when a trial court grants a *nunc pro tunc* judgment that is void of *any* supporting evidence, the trial court's decision will not be conclusive.[18]

Conversely, other courts like the Oregon Supreme Court may apply a less strenuous test:

> It is also held by the weight of authority, and, as we think, the better reasoning, that . . . "clerical" is employed in a broad sense as contra-distinguished from "judicial" error and covers all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. In other words, the distinction does not depend so much upon the person making the error as upon whether it was the deliberate result of judicial reasoning and determination, regardless of whether it was made by the clerk, by counsel or by the judge.[19]

In many respects, the "test" will be a function of the historical traditions of a specific judicial system, including the definition

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13 Estate of Harris, 200 Cal. App. 2d 578, 586 (Cal. Ct. App. 1962).

14 *Id.* at 585-86 (Cal. Ct. App. 1962). *See also* Hubbard v. Hubbard, 324 P.2d 469, 488 (Or. 1958).

15 Estate of Harris, 200 Cal. App. 2d at 585-86. *See also Hubbard*, 324 P.2d at 488.

16 Estate of Harris, 200 Cal. App. 2d at 585-86

17 *Id*.

18 *Id*.

19 *Hubbard*, 324 P.2d 469 at 472 (citing 1 A.C. Freeman, *A Treatise of the Law of Judgments*, § 146, 284 (Edward. W. Tuttle, 5th ed. 1993).

of "clerical," the scope of "intent," and the clarity of the trial court's prior activities.

B. *The Existence of a Previous Judgment*

As previously discussed, courts are more likely to enter *nunc pro tunc* judgments in cases where an earlier judgment was rendered, supported by the record, and failed to be entered due to ministerial or clerical error. However, some jurisdictions have allowed such judgments in cases where no clerical error exists, and even where no judgment was previously rendered at all.[20] The question then becomes: When is a case effectively decided, such that it may support a later *nunc pro tunc* amendment? The answer depends on the circumstances of each case, as well as the jurisdictional peculiarities involved. One must not only look at what the trial court said, but also how the court said it, and then apply those circumstances to state law. The following paragraphs offer a few specific examples which illuminate the range of possibilities.

A primary example involves the situation in which a judge states that the "marriage is dissolved" but neglects to check the corresponding box on the docket entry form.[21] When faced with this situation, the Missouri Court of Appeals for the Southern District allowed a *nunc pro tunc* amendment due to the unequivocal evidence of the judgment found in the record.[22] Although the issue seems to be resolved by the fact that it was merely a clerical error, the court's analysis sheds some light on the importance of the nature of the judgment. In its analysis the court stated that "[a] pronouncement that the trial court 'would' grant a divorce, or that one of the parties is 'entitled' to a divorce does not amount to a 'rendering' of a decision or judgment."[23]

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20 Fulton v. Fulton, 499 A.2d 542 (N.J. Super. Ct. Ch. Div. 1985). *See* Olen v. Olen, 307 A.2d 121, 123 (N.J. Super. Ct. App. Div. 1973) (stating that "[e]ven if no judgment had been entered before defendant wife's death, the court would be called upon to enter a judgment, [n]unc pro tunc as of the date of its ruling, in accordance with its findings and conclusions").

21 *In re* Marriage of McIntosh, 126 S.W.3d 407, 410 (Mo. Ct. App. 2004).

22 *Id*.

23 *Id*. at 416.

Not all states agree. The authority in California is a matter by statute.[24] In *In re Marriage of Mallory*, the court relied on its state statute which provides that the court will retain jurisdiction over the matter as long as the case was submitted to the court for judgment prior to the death of the party.[25] According to the California Rules of Court, a case is considered submitted at the first of either of the following: "(1) . . . the court orders the matter submitted; or (2) . . . the final paper is required to be filed or . . . argument is heard, whichever is later."[26] Arkansas goes a step further by requiring both a docket entry as well as "a separate document setting forth a final decree," before considering a judgment final.[27]

Courts may also render *nunc pro tunc* judgments in the absence of either a previous judgment or a supporting statute by using their inherent equitable powers.[28] It should be noted, however, that these types of judgments are quite rare.[29] For instance, the New Jersey Superior Court's rationale juxtaposes that of Missouri's Court of Appeals[30] and clearly allows for *nunc pro tunc* judgments where "the facts justifying the entry of a decree were adjudicated during the lifetime of the parties to a divorce action, so that a decree was rendered or could *or should have been rendered* thereon immediately, but for some reason was not entered as such on the judgment record."[31] A similar case was faced by the Superior Court in *Fulton*[32] where the court clarified its reasoning by citing the following statement:

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24 *In re* Marriage of Mallory, 64 Cal. Rptr. 2d 667, 670 (Cal. App. 5th Dist. 1997) (citing Cal. Rules of Court, rule 825(a)).

25 *Id.* (relying on CAL. CIV. PROC. CODE § 669).

26 In re Marriage of Mallory, 64 Cal. Rptr. 2d 667, 670 (Cal. App. 5th Dist. 1997) (citing Cal. Rules of Court, rule 825(a)).

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

28 *See* Fulton v. Fulton, 499 A.2d 542 (N.J. Super. Ct. Ch. Div. 1985).

29 Olen v. Olen, 307 A.2d 121 (N.J. Super. Ct. App. Div. 1973); Fulton v. Fulton, 499 A.2d 542 (N.J. Super. Ct. Ch. Div. 1985); and Figueroa v. Figueroa, 281 N.Y.S.2d 392, 393 (N.Y. Sup. Ct. 1967) were the only readily discovered cases that support the stated proposition, although there may be others.

30 *See supra* text accompanying note 23.

31 *Olen*, 307 A.2d at 123.

32 Fulton v. Fulton, 499 A.2d 542 (N.J. Super. Ct. Ch. Div. 1985). In coming to its holding the court cited *Olen v. Olen* which stated that "[e]ven if no judgment had been entered before defendant-wife's death, the court would be

> It is true that a court of equity, where a party entitled to decree dies between the submission of the cause and the determination thereof, will enter the decree as of the date of final hearing. Presumably, this is because the party has done all that he or she could do; the right has actually been proven and established by the evidence submitted, *even though the court has not as yet arrived at that conclusion*.[33]

The reasoning found in this line of cases was followed by the Superior Court of New York which similarly upheld a judgment where the trial judge had not yet formally ruled, but rather had orally stated that he would grant the divorce.[34] These cases, although relatively rare, do demonstrate the court's ability to rely on its equitable powers to effectuate a "now for then" judgment.

How a particular jurisdiction determines a judgment's "finality" as a matter of law is equally as important as the practical components relating to the question, such as the nature and content of the court's actions when looking to substantiate or repudiate the existence of an earlier decision. Thus, it is essential to not only look at *what* the trial court said when it rendered judgment, but also *how* it spoke. A few cases will help demonstrate this point.

In *Camp v. Camp* the judge ordered a marriage dissolved but the husband died prior to its entry by the clerk.[35] The trial court's decision to render a judgment *nunc pro tunc* was reversed because the judge's order specifically stated that the order would become effective "upon the *signing and filing* of a divorce decree."[36] In that case, it could be argued, in line with the equitable powers granted to family courts, that the court had heard all the facts of the case and that each party had done all that they could do such that the case was ripe for judgment prior to the husband's death. Furthermore, the trial court's intent to grant the divorce is clearly evidenced by the fact that the court granted the divorce *nunc pro tunc* to the date of the judge's original statement. However, despite the trial court's clear intent to render a

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called upon to enter a judgment *nunc pro tunc* as of the date of its ruling in accordance with its findings and conclusions." *Id*. at 550.

33 *Id.* at 549. This statement was recited in dicta, from Sutphen v. Sutphen, 142 A. 817, 818 (N.J. Ch. 1928) (emphasis added).

34 Figueroa v. Figueroa, 281 N.Y.S.2d 392, 393 (N.Y. Sup. Ct. 1967) (citing Cornell v. Cornell, 164 N.E.2d 395 (N.Y. 1959)).

35 Camp v. Camp, 128 P.3d 351, 361 (Haw. Ct. App. 2006).

36 *Id*. (emphasis added).

judgment, the *nunc pro tunc* order was not affirmed. The appeals court instead relied upon the fact that the judgment was never *signed and filed*. Had the trial court simply ordered the case dissolved, without the subsequent clause, the case would likely have been disposed of differently.

In contrast, a Tennessee judge had ordered dissolution, but the order never appeared within the minutes of the court.[37] The Supreme Court of Tennessee granted the dissolution *nunc pro tunc*, relying upon the fact that the trial judge had written "divorce granted, property awarded" as well as his name and the date on the face of the court file.[38] Therefore it would appear, at least in Tennessee, that where the judge unequivocally intends that the judgment be final, and where such intent is clearly evidenced, courts will find *nunc pro tunc* orders appropriate. However, that is not necessarily the case. In fact, the Tennessee Court of Appeals, subsequent to its own state's Supreme Court ruling,[39] later held that a written, signed letter from the trial judge to the trial clerk announcing his decision was insufficient grounds for an order *nunc pro tunc* because, although it was filed as part of the trial court's record, there was no indication that the trial clerk ever received or filed the letter, or any other evidence indicating the time that the letter became part of the record.[40]

It is difficult to pinpoint the sufficiency quota for establishing the existence of a prior judgment. Suffice it to say that there is sufficient room for argument, and the results strongly influence the likelihood of a *nunc pro tunc* fix.

C. *Parol Evidence and* Nunc Pro Tunc *Judgments*

Courts also differ on the quality of evidence necessary to substantiate a court's earlier rendering of a judgment.[41] Decisions regarding this issue run the gamut, but an analysis of varying case law will help to better understand when certain types of evidence may be considered.

The issue of evidentiary reliance is discussed rather comprehensively by the Missouri Court of Appeals for the Southern Dis-

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37 Vessels v. Vessels, 530 S.W.2d 71 (Tenn. 1975).

38 *Id.*

39 *Id.*

40 Steele v. Steele, 757 S.W.2d 340, 346 (Tenn. Ct. App. 1988).

41 *In re* Marriage of McIntosh, 126 S.W.3d at 413.

trict in *In re Marriage of MacIntosh*.[42] In its analysis of whether an earlier judgment was "discernible from the record," which is the standard in Missouri, the court analyzed various holdings throughout the state.[43] For instance, the court in *Javier v. Javier* held that a *nunc pro tunc* order "must be supported by a writing in the record which indicates the intended judgment is different from the one actually entered."[44] In *Dobson v. Riedel Survey & Engineering Co.,* the court summarized the rule as follows: "Parol evidence will not support an order *nunc pro tunc*, and there must be a source supporting the order in the court's record or papers . . .[a] judge's recollection of what occurred may not serve as the basis for an order *nunc pro tunc*."[45] According to these rules, one would think that any part of the transcribed record could be used to help substantiate the existence of an earlier ruling. Surprisingly though, in *In re Marriage of Rea* the Missouri Court of Appeals for the Southern District stated that a transcription of the wife's testimony which was later transcribed by the court reporter was incompetent evidence to support an order *nunc pro tunc*.[46] There, the court defined parol evidence as "oral or verbal evidence; that kind which is given by word of mouth; the ordinary kind of evidence given by witnesses in court."[47] Even though the order was technically supported by the record, the court limited amended orders to only those that could be supported by "evidence furnished by the papers and files in the cause, or in the clerk's minute book, or on the judge's docket.[48] The transcription was of no effect.[49] Notwithstanding the holding in *Rea*, the Missouri Court of Appeals for the Eastern District held that a transcription of an oral stipulation between parties could be used to substantiate a judgment *nunc pro tunc*.[50]

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42 *Id.* at 413-17.

43 *Id.*

44 Javier v. Javier, 955 S.W.2d 224, 226.

45 Dobson v. Riedel Survey & Eng'g Co., 973 S.W.2d 918, 921-22 (Mo. Ct. App. 1998). *Dobson* was decided in the Western District.

46 *In re* Marriage of Rea, 773 S.W.2d 230, 234 (Mo. Ct. App. 1989).

47 *Id.*

48 *Id.* at 234.

49 *Id.* at 235.

50 Unterreiner v. Estate of Unterreiner, 899 S.W.2d 596, 599 (Mo. Ct. App. 1995). The court explained that the holding in *Rea* was narrow, and that the *nunc pro tunc* order was improper because the agreement which was evi-

In *Blackburn v. Blackburn,* the Supreme Court of Tennessee held "that as a prerequisite to an entry *nunc pro tunc*, there generally must exist some written notation or memorandum indicating the intent of the trial court to enter the judgment on the earlier date," and cited case law that further narrows such a memorandum to that which is found among the papers or books of the presiding judge.[51]

Although it can generally be stated that most of the time courts will require some form of writing that evidences an earlier decision, some courts are not so restrictive. The Supreme Court in Oregon adopted the holding in *State v. Donahue*[52] and stated that a *nunc pro tunc* order may be entered even if it is "merely based on the court's memory or on any competent legal evidence foreign to the record."[53] The court goes on to recognize a heightened standard for such judgments, and cites cases from other jurisdictions that require the application to be made within "so short a time after the judgment is entered that the terms of the judgment pronounced will be fresh in the minds of both counsel and the court."[54]

D. *Equitable Powers*

1. *Third Party Rights and "Now for Then" Judgments*

Courts may consider the possible effects on third parties when deciding whether to render an amended judgment.[55] Third party rights were largely what led to the court's decision in *Fulton v. Fulton*, discussed previously.[56] In *Fulton*, the parties had been separated for thirteen years when the action for dissolution was filed.[57] The plaintiff husband filed on the grounds that the parties had been separated for the statutory period. The wife was served but did not show for trial.[58] The judge entered a de-

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denced by the court's transcription expressly stated that any amendments to the stipulation must be evidenced in writing.

51 Blackburn v. Blackburn, 270 S.W.3d 42, 54 (Tenn. 2008).

52 State v. Donahue, 144 P. 755, 758 (Or. 1914).

53 *Hubbard*, 324 P.2d 469 at 472.

54 *Id.* at 473.

55 Jhong, *supra* note 4, at *2.

56 *Fulton*, 499 A.2d at 550.

57 *Id*.

58 *Id*.

fault but refused to enter judgment for divorce until the status of the plaintiff's children had been investigated.[59] However, the husband died intestate prior to the subsequent hearing.[60] The only asset of consequence belonging to the decedent husband was a structured settlement from a personal injury claim.[61] According to New Jersey law, the settlement was potentially subject to equitable division. The court explained in its holding to grant a posthumous divorce that "[a]djudication of a final judgment of divorce at this time would not unjustly deprive the wife of marital assets, but to the contrary would eliminate the potential of injustice to the children insofar as the wife may receive a large portion, if not all, of the assets of the decedent based on intestacy."[62] Although one may not be convinced of the propriety in such a decision, there can be little doubt that third party rights may drastically affect a court's equitable exercise of power.

Similarly, in *In re Marriage of Himes*, the Supreme Court of Washington upheld a *nunc pro tunc* order that set aside a prior divorce decree because the decedent's first wife would be unjustly deprived of her equitable share of the decedent's estate.[63] In making its ruling, the court squarely overruled longstanding case law which had consistently held that death of a party strips the court of its jurisdiction over a divorce proceeding.[64] However, that is not to say that a *nunc pro tunc* order will always be granted when *any* third party rights are involved. Surviving spouses will commonly argue that the entering of a *nunc pro tunc* divorce decree deprives them of their right to an inheritance, or equitable share.[65] These rights are not the type of vested rights generally considered by courts when deciding whether a *nunc pro tunc* order is proper.[66] Both Washington and Oregon courts have reasoned that:

> The expression so frequently made that a *nunc pro tunc* entry is not to affect the rights of third persons must not be understood as signifying

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59 *Id*.

60 *Id*.

61 *Id*.

62 *Id*.

63 In re Marriage of Himes, 965 P.2d 1087 (Wash. 1998).

64 The court overruled Nolan v. Dwyer, 965 P.2d 1087 (Wash. 1905).

65 *See, e.g., In re* Estate of Kelley, 310 P.2d 328, 336 (Or. 1957); *In re* Tabery, 540 P.2d 474 (Wash. Ct. App. 1975).

66 *In re Tabery*, 540 P.2d at 477.

> that effect must be denied to such an entry in all cases where third persons have acquired interests. Courts in determining whether or not to amend or perfect their records are controlled by considerations of equity. If one not a party to the action has, when without notice of the rendition of the judgment or of facts from which such notice must be imputed to him, advanced or paid money or property, or in other words, has become a purchaser or encumbrancer in good faith and upon a valuable consideration, then the subsequent entry of such judgment *nunc pro tunc* will not be allowed to prejudice him. Otherwise its effect against him is the same as if it had been entered at the proper time.[67]

2. *Equitable Powers Used to Overcome Fraud or Bad Faith Distribution of Funds*

In the absence of statutes that control *nunc pro tunc* judgments, courts may rely on their equitable powers to allow the substitution of a party to overcome a surviving spouse's bad faith behavior.[68] In *Kay v. Kay,* the surviving wife had attempted to re-distribute marital funds into accounts bearing her name, and accounts bearing her name and her daughter's name jointly, to preclude her husband from receiving his equitable share. The court reasoned that public policy required that courts allow, at least in some narrow circumstances, a decedent's estate the opportunity to substitute in order to make a claim of unjust enrichment or fraud.[69] The court weighed the negative effect of a policy that increased the length of controversies brought by a decedent's estate against the positive results gained by discouraging unfair behavior by otherwise would-be bad actors. The court concluded that "when the estate of a spouse who died while an action for divorce is pending presents a claim for equitable relief related to marital property, the court may not refuse to consider the equities arising from the facts of that case solely on the ground that the estate may not assert equitable claims against the marital estate."[70] The court was careful not to broadly allow any claim of equity to result in substitution, but rather foreclosed a

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67 *In re* Estate of Kelly, 310 P.2d at 336; *In re* Tabery, 540 P2d at 477.

68 *See* Kay v. Kay, 964 A.2d 324 (N.J. Super. Ct. App. Div. 2009).

69 *Id.* at 328-29.

70 *Id.* at 329.

surviving spouse from bad faith reliance on the general rule of abatement.[71]

IV. Bifurcated Trials/Property Settlements

A second exception to the general rule of abatement is found in cases which have been bifurcated.

A. *Bifurcation, Generally*

The issues surrounding death of a party during dissolution are further complicated by the existence of bifurcated trials, that is, trials in which property and support issues are handled independently of the divorce decree.[72] Bifurcation is generally accomplished by statute.[73] Most states, including those that have adopted the Uniform Marriage and Divorce Act, may allow domestic relations courts to bifurcate trials. Bifurcation is not generally required, but is left to the court's discretion.[74] States vary with respect to what circumstances justify bifurcation. For example, some courts require only a showing of "furthered convenience," while others may require extraordinary circumstances.[75] A few states expressly preclude bifurcation.[76]

B. *To Bifurcate or Not to Bifurcate*

Where available, bifurcation may be desirable due to the greater likelihood of preserving a court's jurisdiction over matters incidental to divorce. As with most public policy discussions involving the judicial system, there are trade-offs that may be equally undesirable for the same reasons.

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71 *Id.* at 329-30.

72 *See, e.g.*, Becker v. King, 307 So. 2d 855 (Fl Dist. Ct. App. 1975).

73 *See* Ind. Code §31-15-2-14 (2011). Indiana's bifurcation statute provides a representative example of statutory authorization; it states that a court may "bifurcate the issues in an action for dissolution of marriage . . . to provide for a summary disposition of uncontested issues and a final hearing of contested issues."

74 James Burd, *Splitting the Marriage in More Ways than One: Bifurcation of Divorce Proceedings*, 30 J. FAM. L. 903 (1991).

75 *Id.*

76 *See, e.g.,* WASH. REV. CODE § 26.090.050 (2010), *see also* Burd, *supra* note 74.

Bifurcating trials may allow parties to remarry at an earlier date, provide certain tax advantages (or disadvantages), and give parties the psychological benefit of putting the marriage to an end as soon as possible.[77] Without bifurcation, and where complex property settlement or support issues are concerned, parties may be held in a state of indefinite limbo.[78] Also, bifurcation may prevent a party in a superior financial position from leveraging the weaker party out of an equitable settlement agreement with the threat of a long, drawn out divorce trial.[79]

However, some commentators believe that the disadvantages of bifurcation greatly outweigh the advantages.[80] Many times the bifurcation will have the opposite of the desired effect, actually increasing the length of the trial—firstly, because the proceeding will necessarily require two separate trials,[81] and secondly, without the dissolution incentive, property issues may be disputed almost endlessly.[82] Furthermore, subsequent marriages will be plagued with unforeseen liabilities and the emotional turmoil of continuing disputes between prior spouses, nullifying the intended advantages of bifurcation.[83]

In bifurcated proceedings, the period between the original granting of dissolution and the rendering of the final decree is a

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77 Burd, *supra* note 74. *See also* http://myfamilylaw.com/library/divorce-separation/what-is-a-bifurcated-divorce-2/; http://www.divorcelawfirms.com/resources/divorce/types-divorce/terminating-marriage-quickly-divorce-bifurcation. States which generally allow bifurcation for any reason are California and Kansas. States which do not generally allow bifurcation include Texas, Arizona, Michigan, New York and Nebraska. Most other states generally disfavor bifurcation but will allow them under some circumstances. Some states require a compelling reason for the bifurcation. *Id. See also* http://www.divorcesource.com/research/edj/bifurcation/98jun61.shtml.

78 http://myfamilylaw.com/library/divorce-separation/what-is-a-bifurcated-divorce-2/; http://www.divorcelawfirms.com/resources/divorce/types-divorce/terminating-marriage-quickly-divorce-bifurcation.

79 *Id*.

80 *Id*.

81 Steven H. Levy, *Divide and Conquer*, *Bifurcating the Complex Case,* 20 WTR FAM. ADVOC. 38 (1998).

82 Burd, *supra* note 74. *See also* http://myfamilylaw.com/library/divorce-separation/what-is-a-bifurcated-divorce-2/; http://www.divorcelawfirms.com/resources/divorce/types-divorce/terminating-marriage-quickly-divorce-bifurcation.

83 *See* Debra Cassens Moss, *BIFURCATE DIVORCE? WELL,. . .Critics Say 2-Step Process Often Leads to Delay,* 72 A.B.A.J. 29 (1986).

breeding ground for conflict.[84] Questions arise as to when certain rights and obligations associated with marriage are severed and these questions lead to increased disputes, specifically in areas such as insurance coverage, tax status and liability, and bankruptcy. And there is no doubt that bifurcation leads to jurisdictional peculiarities and an array of unpredictable results when a party dies during the course of the proceeding.[85]

C. *Effect of the Death of a Party in a Bifurcated Proceeding*

As previously stated the general rule is that the death of a party prior to the entry of a decree will cause the action to abate and divests the court of jurisdiction to determine property rights, support, alimony, costs, and attorney's fees.[86] However, in a bifurcated trial, once the decree has been entered, courts may retain jurisdiction over issues which are incidental to the divorce.[87]

1. *Application, Generally*

As mentioned previously, most states provide for bifurcation by statute. For example, Indiana's bifurcation statute provides:

> (a) The court may bifurcate the issues in an action for dissolution of marriage . . . to provide for a summary disposition of uncontested issues and a final hearing of contested issues. The court may enter a summary disposition order under this section upon the filing with the court of verified pleadings, signed by both parties, containing:
>
> (1) a written waiver of a final hearing in the matter of:
>
> (A) uncontested issues specified in the waiver; or
>
> (B) contested issues specified in the waiver upon which the parties have reached an agreement;
>
> (2) a written agreement . . . pertaining to contested issues settled by the parties; and
>
> (3) a statement:

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84 Burd, *supra* note 74.

85 Burd, *supra* note 74. *See also* http://myfamilylaw.com/library/divorce-separation/what-is-a-bifurcated-divorce-2/; http://www.divorcelawfirms.com/resources/divorce/types-divorce/terminating-marriage-quickly-divorce-bifurcation.

86 *See* Anthony Bologna, Comment, *The Impact of the Death of a Party to a Dissolution Proceeding on a Court's Jurisdiction Over Property Rights,* 16 J. AM. ACAD. MATRIM. LAW. 507 (2000).

87 *Id*. at 507.

(A) specifying contested issues remaining between the parties; and
(B) requesting the court to order a final hearing as to contested issues to be held under this chapter.

(b) The court shall include in a summary disposition order entered under this section a date for a final hearing of contested issues.[88]

In *Beard v. Beard*, the Indiana Court of Appeals (a case of first impression), relying on the language of its bifurcation statute, dealt with the issue of death of a party during a bifurcated proceeding.[89] In *Beard*, the husband died after the trial court ordered the marriage dissolved, but prior to final disposition of all property issues.[90] The wife then filed a motion to dismiss for lack of subject matter jurisdiction, essentially arguing that the trial court's order to dissolve the marriage was "provisional" and that it necessarily terminated upon husband's death.[91] Her arguments were found unpersuasive.

In setting the stage for its analysis (and eventually its holding), the court first noted the inherent equitable powers that courts historically have had when handling divorce proceedings.[92] The court then looked to legislative intent—and found that the wife's proposition would be potentially unworkable within the statutory language.[93] Furthermore, an interpretation in which the first order was not binding upon the parties could create highly inequitable results. For instance, bifurcation is a vehicle that is supposed to allow parties to move on and get remarried prior to the resolution of incidental issues. If neither party could rely on a dissolution ordered during the first phase of a bifurcated proceeding until the action was finally disposed of, then a party which had remarried and subsequently died (prior to the disposition of the second phase of the bifurcated trial) would have effectively left behind two spouses. The Indiana legislature could not have intended such a result.[94]

Moreover, to disregard the first phase order would essentially disregard the findings of the trial court and would lead to

88 Ind. Code §31-15-2-14 (2011).
89 Beard v. Beard, 758 N.E.2d 1019 (Ind. Ct. App. 2001).
90 *Id*. at 1021.
91 *Id*.
92 *Id*. at 1022.
93 *Id*. at 1022-23.
94 *Id*. at 1023.

inequities with regard to the heirs and devisees of the decedent spouse. Accordingly the court determined "the better rule to be one which gives full credit to the trial court's findings and orders and which allows the trial court to continue the process it began."[95] More generally, and separate from issues of equity, a bifurcation in which parties could not rely on the first phase order, would be no bifurcation at all.

Beard is a classic example of the application of the general rule—but all cases may not go so smoothly. For instance, in *In re Marriage of Davies*, the Illinois Court of Appeals held that the bifurcation of the dissolution action would not allow a retroactive final decree of divorce and therefore abated the action entirely upon the husband's death.[96] The Illinois Supreme Court reversed, but apparently only did so because the trial judge had written an opinion letter that had "resolved" all the incidental issues prior to the husband's death. In absence of the opinion letter, the court could have very easily sustained the abatement—sending the property issues to probate court.[97]

One can see how the issues revolving around *nunc pro tunc* judgments in Part I, may be critical to issues of abatement in bifurcated trials. That is, questions involving the finality of, or existence of, a judgment in a traditional trial are essentially the same questions that one must decide regarding the judgments entered during the first phase of a bifurcated trial.

V. Death and Dissolution Statutes

In an effort to simplify the issue, Pennsylvania, North Carolina, New Mexico,[98] and Illinois[99] have enacted statutes that specifically deal with the issue of a party's death during a dissolution proceeding.

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95 *Id*. at 1024.

96 *In re* Marriage of Davies, 448 N.E.2d 882, 884 (Ill. 1983).

97 Burd, *supra* note 74; *In re* Marriage of Davies, 448 N.E.2d 882 (Ill. 1983).

98 *See* Karpien v. Karpien, 207 P.3d 1165, 1168 (N.M. Ct. App. 2009).

99 Burd, *supra* note 74; 750 Ill. Comp. Stat. 5/401(b) (2011).

A. *Application*

The issues surrounding death during a dissolution proceeding are not necessarily trouble free even when states have enacted specific statutes. In 2005, Pennsylvania amended its divorce code to provide that "a divorce action will not abate upon the death of a spouse, so long as the grounds for divorce have been established."[100,101] Thereafter, in *Yelenic* the trial court refused to grant a posthumous divorce despite the amendment and despite the fact that both parties agreed that the divorce should be granted."[102] Even though the trial court found that grounds for a divorce had been established, it interpreted the statute in accordance with a long line of Pennsylvania case law, and the Official Comment to the amendment, to mean that a court could retain jurisdiction only with respect to the parties' economic rights.[103] Notwithstanding the ironic outcome in *Yelenic*, the court explained that the purpose of the amended statute was to "solve the problem for practitioners of how 'to advise clients on whether to bifurcate divorce proceedings, because of the difficulties often involved in predicting whether eq-

100 *Yelenic*, 922 A.2d at 938.

101 Pennsylvania also addresses the death of a party during a bifurcated proceeding. 23 PA. CONS. STAT. § 3323(d) is a substitution provision that provides "if one of the parties dies after the decree of divorce has been entered, but prior to the final determination in such proceeding of the property rights and interests of the parties under this part the personal representative of the deceased party shall be substituted as a party as provided by law and the action shall proceed."

102 The court in *Yelenic* found that grounds had been established based on a signed affidavit from the husband stating that "the parties had been separated for more than two years and the marriage was irretrievably broken." *Id.* Although the wife filed a counter-affidavit, she did not deny that the parties had been separated for the statutory period, a negation that was apparently significant to the court's recognition of the establishment of grounds for divorce. The Superior Court of Pennsylvania dealt with the same issue again in *Taper*, and found that grounds had been established by filed affidavits of consent that the marriage was irreconcilable; the court therefore retained jurisdiction to determine the remaining economic issues, notwithstanding abatement of the dissolution action. Taper v. Taper, 939 A.2d 969 (Pa. Super. Ct. 2007).

103 *Yelenic*, 922 A.2d at 941. The Official Comment to the amendment states "[u]nder the new procedure, the death of a party does not abate the equitable distribution action regardless of whether a divorce has been granted, so long as the grounds for divorce had been established." *Id*. at 938-39.

uitable distribution would provide more favorable result than the elective share procedure.'"[104]

The reasoning of the court in *Yelenic* seemed to play out more smoothly in a New Mexico decision. In *Karpien v. Karpien*, the New Mexico Court of Appeals, relying on New Mexico Statute section 40-4-20(b) (a statute similar to that found in *Yelnic*[105]) denied the husband's request to be treated as a surviving spouse and instead disposed of the wife's property according to New Mexico's probate code.[106] Under New Mexico's statute:

> Upon the filing and service of a petition for dissolution of marriage, separation, annulment, division of property or debts, spousal support, child support or determination of paternity. . . if a party to the action dies during the pendency of the action, but prior to the entry of a decree granting dissolution of marriage, separation, annulment or determination of paternity, the proceedings for the determination, division and distribution of marital property rights and debts, distribution of spousal or child support or determination of paternity shall not abate. The court may allow the spouse or any children of the marriage support as if the decedent had survived.[107]

Essentially, the husband's argument was that section 40-4-20(b) was in conflict with the probate code and, therefore, the court should give the statute no effect. The court however, found this argument without merit and concluded, according to the plain language of the statute, that the court was, in fact, directed not to abate the action but rather to continue as if the parties had survived.

In states that have enacted these types of statutes, the issue has been partially clarified, leading to some uniformity. But such a uniform resolution may have a cost of its own. For instance, courts in such jurisdictions may be bogged down by the substitution of parties in cases that would otherwise have been dismissed.[108] Also, dissolution cases are difficult enough when both

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104 *Yelenic*, 922 A.2d at 938.

105 The New Mexico statute is different, however, because it does not require that grounds for divorce be established in order for the court to retain jurisdiction. *See* N.M. STAT. § 40-4-20(b) (2010).

106 *Karpien* 207 P.3d at 1169.

107 *Id.* at 1168-69. *See also* N.M. STAT. § 40-4-20(b) (2010).

108 There may also exist a rare instance in which a discontented spouse could file for divorce at the end of his or her life in order to tie up property and give their heirs or devisees a chance at what would otherwise go to the surviving

parties are present. Courts which are directed to retain jurisdiction after the death of a party are at an equitable disadvantage (at least arguably). Moreover, parties generally have the option of reconciling during divorce proceedings, and dismissing the action. In a point of value for its obviousness, a dead party can no longer actively reconcile. Nonetheless, these cases trudge along because the negatives are likely outweighed by the fact that these statutes are rarely implicated and offer clarity for practitioners to advise clients prior to and during dissolution.

But the enactment of these statutes does not remove all opportunity for conflict. Even where the action does not abate, the death of a party may still have a significant effect on the inheritance rights of the surviving party.[109] For instance, the surviving party may lose their "spousal" designation upon the first phase of the proceeding, which could greatly affect their rights under certain provisions of the decedent's will as well as their ability to serve as representative of the decedent's estate and their rights to certain death or retirement benefits.[110] Therefore, it is important that practitioners consider these effects, even in states which specifically refute abatement by statute.[111]

VI. Death of a Party on Appeal

The issue of abatement may become further convoluted when a party dies while the divorce case is under, or pending, appeal.[112] For instance, even if the court follows the general rule that the action will abate, the court must determine whether the whole action abates, or simply the issue asserted on appeal. Of course, where the decree itself is the issue on appeal, the issues may be one in the same. Again, jurisdictional and circumstantial peculiarities abound.

In appeals where the only issue that is in dispute is the decree itself, i.e., where no property is in dispute, courts have gen-

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spouse. The court would then be caught up in the mess of trying to figure out the merits of the claim.

109 Burd, *supra* note 74.

110 *Id.*

111 *Id.*

112 Dougherty, *supra* note 2.

erally adopted the view that the entire action abates.[113] This is apparently because courts consider the question moot "death itself has dissolved the relation which the decree brought up for review."[114] However, courts of appeal routinely retain jurisdiction to resolve property disputes despite the death of a party:[115]

> Where the consequences of the divorce are such as affect the property rights of the parties to the suit, the heirs or personal representatives may have such an interest in the litigation as that the cause will survive, not for the purpose of continuing the controversy touching the right of divorce within itself; but for the ascertainment of whether the property has been rightfully diverted from its appropriate channel of devolution.[116]

Despite the general rule, the court in *Panter v. Panter* abated the entire action, claiming that the death of the party rendered the entire case moot notwithstanding the trial court's granting of the dissolution and the fact that property rights were in dispute.[117]

There is also the question of whether courts will give consideration to an ex-spouse's contention that the case is not final until the period for allowing appeals has lapsed.[118] In *Laub v. Laub*, the Superior Court of Pennsylvania concluded that a divorce decree does not become final until the expiration of the appeals period.[119] However, in a later case, the court clarified by saying that an action for divorce will not *automatically* abate where a party dies within the time period allowed for appeal.[120] The court did, however, state that the decree would be fully reviewable and subject to "possible reconsideration by the trial

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113 Francis M. Dougherty, J.D., Annotation, *Effect of Death of Party to Divorce Proceeding Pending Appeal or Time Allowed for Appeal*, 33 A.L.R.4th 47, *2b (2009).

114 *Id.*

115 *See, e.g.,* Barnes v. Barnes, 15 P.3d 816, 818 (Idaho 2000); Matsuura v. Loving, No. 1 CA-CV 06-0633, 2008 WL 4061074 (Ariz. Ct. App. Feb. 14, 2008).

116 *Matsuura*, 2008 WL 4061074, at *2-3.

117 Panter v. Panter, 499 A.2d 1233, 1233 (Me. 1985). "Where husband died while appeal from divorce judgment was pending, judgment of divorce and division of marital property became mooted, and entire action thus abated, so cause had to be remanded with instructions to dismiss." *Id.*

118 MacPherson v. Estate of MacPherson, 919 A.2d 1174 (Me. 2007).

119 Laub v. Laub, 505 A.2d 290, 294 (1986).

120 Estate of Pinkerton v. Pinkerton, 646 A.2d 1184, 1185 (Pa. Super. Ct. 1994) (emphasis added).

court or reversal by an appellate court.[121] But not all courts are open to such reasoning. The court in *Macpherson* handled the issue rather succinctly by stating that according to the petitioner's logic, no divorce would ever be appealable because the judgment would not become final until after the appeal period lapsed.[122]

VII. Slayer's Exception

Most states have enacted "Slayer's Statutes," which constitute another exception to the general rule that a divorce action abates upon the death of either spouse. Where one spouse in a dissolution proceeding is responsible for the death of the other, the action will not abate.[123]

VIII. Collateral Agreements

Although not truly an exception to the abatement rule, it is important to consider the status of agreements when considering divorce proceedings and the possibility of abatement. If parties to a divorce have resolved property disputes by agreement, and have done so effectively, the subsequent death of a party may have a diminished negative effect.

A. *Settlement Agreements*

Settlement or separation agreements provide concrete evidence of items that are no longer in dispute. Therefore, courts that allow *nunc pro tunc* judgments in those cases where all issues have been submitted to the court will more likely consider settlement agreements definitive evidence. The Alabama Supreme Court held that an action for dissolution did not abate when the husband died prior to judgment because all the testimony had been heard and the parties had submitted a final settlement agreement to the court for judgment.[124]

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121 *Id*.

122 *MacPherson*, 919 A.2d at 1176.

123 *See, e.g., In re* Estate of Eliasen, 668 P.2d 110, 117-118 (Idaho 1983); Drumheller v. Marcello, 532 A.2d 807, 809 (Pa. 1987). The Slayer's Act in Pennsylvania provides "in pertinent part, that: No slayer shall in any way acquire any property or receive any benefit as the result of the death of the decedent . . ." Other state statutes have similar language. *Id*.

124 *Ex parte* Adams, 721 So. 2d 148 (Ala. 1998).

Furthermore, even where courts are not willing to make *nunc pro tunc* judgments, courts may retain jurisdiction over the terms of the agreement.[125] However, having an agreement does not necessarily end the discussion. For example, in *Bruce v. Dyer*, the parties drafted a separation and property settlement agreement with the intent of dividing their marital property.[126] The husband died prior to the divorce becoming final.[127] The court examined the agreement to determine, first, whether or not the agreement supported conversion of marital property from a tenancy by the entirety to a tenancy in common, and second, whether the agreement was enforceable by the decedent's estate.[128] The Maryland Court of Appeals held that, according to a Maryland statute, a tenancy by the entireties can only be severed where such intent is clearly expressed in the agreement.[129] The parties in *Bruce*, however, only expressed their agreement to sell the home and divide the proceeds.[130] Therefore, the agreement was ineffective for purposes of voiding the right of survivorship.[131] However, even though the right of survivorship remained intact, the court nonetheless held that the agreement gave sufficient grounds for the decedent's heirs to assert their property interest in the estate against the surviving spouse. In pertinent part, the agreement stated "[a]s to these covenants and promises, the parties hereto severally bind themselves, their heirs, personal representatives and assigns."[132] The court distinguished the instant case from those that premise the terms of an agreement on the divorce becoming final.[133]

Bruce effectively lays out several principles of importance. First, practitioners should be proactive in determining the issues

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125 *See, e.g., Ex parte* Adams, 721 So. 2d 148 (Ala. 1998).

126 Bruce v. Dyer, 524 A.2d 777, 778 (Md. 1986).

127 *Id*. at 779.

128 Brian M. Reimer & Tracey G. Turner, *Developments In Maryland Law, 1986-87: V. Family Law*, 47 MD. L. REV. 882, 882-883 (1988).

129 *Bruce*, 524 A.2d at 783-84.

130 *Id.* at 779.

131 *Bruce*, 524 A.2d at 786. The court does mention a jurisdictional split in this regard. Some states will consider an agreement to sale property held in a tenancy by the entirety sufficient to sever the right of survivorship. *Id*. at 783.

132 *Bruce*, 524 A.2d at 787.

133 *Id*. The statement is found in footnote 7.

of estate planning that may be of interest to their client.[134] Second, they should explain the various options that their clients have regarding property transfer.[135] Third, they must choose the terms of their agreements carefully to ensure that they fully represent the client's intent.[136]

B. *Qualified Domestic Relations Orders (QDROs)*

Family law practitioners may find themselves especially vulnerable when a participant ex-spouse dies prior to the qualification of a domestic relations order.[137] Attorneys who do not properly and timely qualify an order prior to the participant's death (or retirement) may find themselves at the court's mercy, begging for *nunc pro tunc* fixes, which may or may not be available.[138] Although the issue is complex because of the interplay between federal and state law, and not meant to be fully covered by this comment, the following references may be helpful.

The appellate court in *In re Marriage of Padgett* reversed the trial court's decision to enter a *nunc pro tunc* order that retroactively qualified a domestic relations order. Although the case was bifurcated and the trial court retained jurisdiction over the former spouse's pension plan, the appeals court found that the trial court did not have the power under the state statute to retroactively qualify the order after the participant/ex-spouse's death.[139] However, had the domestic relations order specifically

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134 Reimer & Turner, *supra* note 128, at 885-86.

135 *Id.*

136 *Id*.

137 *See* Gary Shulman, *QDROS—The Ticking Time Bomb*, 23 FAM. ADVOC. 26 (2001).

138 *Id*. at 27-29. *Compare* Samaroo v. Samaroo, 193 F.3d 185 (3d Cir. 1999) (holding that an order could not be qualified *nunc pro tunc* because it constituted an increased benefit), *with* Patton v. Denver Post Corp., 326 F.3d 1148 (10th Cir. 2003) (holding that *nunc pro tunc* amendment could be qualified because it was "akin to the correction of a clerical error" and did not "rewrite historical facts but merely allotted assets in the manner originally intended"). *See also* Hogan v. Raytheon, Co., 302 F.3d 854 (8th Cir. 2002); Trustees of the Directors Guild of America-Producer Pension Benefits Plans v. Tise, 234 F.3d 415 (9th Cir. 2000).

139 *In re* Marriage of Padgett, 2009 Cal App. Lexis 420, 46-47, 91 Cal. Rptr. 3d 475, 493 (Cal. Ct. App. 2009).

vested rights in the surviving spouse, case law suggests that the *nunc pro tunc* order may have been appropriately rendered.[140]

Amendments are more likely in cases when the agreement provides that the court retains jurisdiction. In *Eller v. Bolton,* for example, the court retained jurisdiction to modify a QDRO to comport with the parties' consent order.[141] Under the terms of the original QDRO the payments to the wife were subject to the husband receiving the retirement benefit and would terminate upon the wife's death. Although the plan administrator had qualified the order, he later noted several deficiencies and the parties agreed to amend the order to, among other things, remove the requirement that the wife survive the plan payout. Prior to amending the order, the wife died. Since the trial court had retained jurisdiction over the wife's interest in the husband's retirement plan, and the parties' intentions were expressly stated in the consent order, the appellate court found that an amendment to the QDRO *nunc pro tunc* was proper. The appeals court noted that even if the amended domestic relations order was not qualifiable, that it could nonetheless be amended so that it was consistent with the clear intent of the parties which were expressly evidenced by the consent order.[142]

IX. Conclusion

Given the broad disparity in outcomes, practitioners should do their best to avoid abatement, and the subsequent forfeiture of client benefits, by providing as much documentation and judicial approval of a divorce judgment as permitted by state statute or local rule.

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140 *Id.*

141 Eller v. Bolton, 895 A.2d 382 (Md. Ct. Spec. App. 2006).

142 *Id*. at 386. In paragraph (13) of the consent order "[t]he parties agree that their mutual intent is to provide the Alternate Payee [Wife] with a retirement payment that fairly represents a marital share of the retirement before as defined herein. If this Order submitted to the Administrator of the Plan is held not to be a Qualified Domestic Relations Order within the meaning of IRC Section 414(p), the parties permit this Court to retain jurisdiction over this matter and they further agree to request this court to modify the Order so as to make it a Qualified Domestic Relations Order that reflects the parties' intent, said modification order to be entered *nunc pro tunc*, if appropriate."

Courts which provide for bifurcation will likely retain jurisdiction as long as the dissolution was granted during the first phase of trial. Courts that do not allow bifurcation are likely to abate the action altogether; exceptions are extremely rare.

Attorneys representing the decedent's estate should emphasize the equitable powers of the court and highlight any injustice or inequity that would fall upon the heirs, devisees, or innocent third parties. Regardless of whether or not a trial is bifurcated, separation agreements are an extremely important tool in preserving the pre-death intent of the parties. The agreement must unequivocally evidence the parties' intent, clarify the effective date, and clearly expresses that it is in no way dependent on the dissolution decree.[143] Many courts will also look to the parties' post-agreement behavior when determining the intent of the parties so it is important to educate and direct clients accordingly.[144]

In cases involving division of retirement accounts or pensions, attorneys must be diligent in getting domestic relations orders qualified as soon as possible to avoid liability and/or unwanted outcomes. Although some courts may rescue a vulnerable practitioner for QDRO deficiencies, the odds are not worthy of reliance. Attorneys should also make certain that the beneficiary designations represent their clients' post-divorce wishes. Omissions in this regard can be extremely costly to both attorney and client. In short, attorneys must do everything in their power to ensure that the settlements they make are final and readily apparent in the record, such that the only mistake or error which might occur, regarding the judgment, will be one of clerical origin—the type that courts are relatively willing to correct at a later date.

Brandon Carney

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143 Michael R. Flaherty, Annotation, *Separation Agreements: Enforceability of Provision Affecting Property Rights Upon Death of One Party Prior to Final Judgment of Divorce*, 67 A.L.R. 4TH 237, *2 (2008).

144 *Id.*