

STATE OF MINNESOTA
IN COURT OF APPEALS
NO. A10-126

In re the Marriage of:

Catherine A. Risk, on behalf)
the Estate of Mary Elizabeth)
Miller,)
Respondent,)
)
vs.)
)
Jarrin E. Stark,)
)
Appellant.)
)

APPELLANT'S BRIEF

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STATEMENT OF LEGAL ISSUES

- ISSUE:
1. In a bifurcated proceeding where judgment was entered dissolving the bonds of matrimony, can a trial court retain jurisdiction over significant and complex property division after the death of a party?
 2. Does the record support the trial court's determination that Respondent met the burden of showing nonmarital character of assets; did the trial court therefore err in determining Appellant dissipated such assets resulting in award of all real estate to Respondent?

- RULING:
1. The Findings and Order, entered on January 9, 2009, held that Catherine A. Risk, as personal representative of Mary Elizabeth Miller's Estate, was granted leave of Court to intervene and be substituted to act in Ms. Miller's place for the purposes of the dissolution proceeding.
 2. The Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree entered December 11, 2009, held that Appellant dissipated, hid, secreted, or otherwise disposed of \$55,06.45 from the parties joint bank account, and that \$44,636.59 of the amount was Ms. Miller's nonmarital money. The trial court awarded Respondent all right, title, and interest in the homestead and the hunting land to compensate the estate for the alleged dissipation.

APPELLANTS' ANSWER TO THE ISSUE TO BE ARGUED IN BRIEF:

I. THE DEATH OF A PARTY MUST ABATE A BIFURCATED DISSOLUTION MATTER EVEN AFTER THE DISSOLUTION JUDGMENT HAS BEEN ENTERED IF SIGNIFICANT PROPERTY ISSUES ARE YET LITIGATED.

- A. THE COURT NO LONGER HAD SUBJECT MATTER JURISDICTION TO DETERMINE PROPERTY DIVISION ISSUES FOLLOWING THE DEATH OF A PARTY.

II. THE RECORD DOES NOT SUPPORT THE TRIAL COURTS FINDINGS AND CONCLUSIONS.

- A. THE COURT ERRED IN DETERMINING APPELLANT DISSIPATED ASSETS OF THE PARTIES.

- B. THE COURT ERRED IN MAKING FINDINGS AND CONCLUSIONS REGARDING NONMARITAL VS. MARITAL PROPERTY CLASSIFICATIONS.

STATEMENT OF THE CASE

This matter came before the Honorable David R. Battey, Judge of the Douglas County District Court, State of Minnesota. The dissolution proceeding began when Appellant was served with process on May 12, 2008. Trial occurred on August 19, 2009 in the Douglas County District Court.

On May 21, 2008, Respondent made a Motion for an order to bifurcate the dissolution proceedings due to health and other concerns. The trial court granted the bifurcation and reserved issues of property division by the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree entered August 13, 2008.

Respondent, Mary Elizabeth Miller, died on August 19, 2008. Appellant, by motion dated September 26, 2008, requested dismissal of the matter for lack of subject matter jurisdiction due to Ms. Miller's death. By the Findings and Order entered January 9, 2009, the trial court found that Respondent's death subsequent to entry of the Judgment granting the dissolution did not terminate the trial court's authority and jurisdiction pertaining to property division. The trial court further ordered that Catherine A. Risk, the appointed Personal Representative of Respondent's estate, was granted leave to intervene in the matter to substitute and act as Respondent in the dissolution proceeding.

Following trial, the trial court entered its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree on December 11, 2009. Specifically in this Judgment, the trial court found that bifurcation of the dissolution of marriage and

retention of jurisdiction after Respondent's death was justified. The trial court found and concluded that Appellant dissipated, hid, secreted or otherwise disposed of \$55,096.045 of the Respondent's alleged nonmarital funds. The trial court awarded Respondent's estate all right, title, and interest in Appellant's premarital homestead. The trial court awarded Respondent's estate all right title and interest in the parties' jointly owned hunting land.

Appellant appeals the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree entered August 13, 2008, the Findings and Order entered January 9, 2009, and the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree on December 11, 2009.

Appellant alleges on appeal that the record does not justify the findings of the trial court, and that the trial court's findings and conclusions are an abuse of discretion, improper, contrary to law, unreasonable, arbitrary and capricious, and clear error. Essentially, Appellant alleges that the trial court did not have subject matter jurisdiction to determine property division issues following the Respondent's death. The proper jurisdiction to deal with Respondent's property and estate was through the probate court and under the probate laws of the State of Minnesota. Appellant appeals this Order.

STATEMENT OF THE FACTS

The parties were married on March 25, 2002. TRANSCRIPT August 19, 2009

P.99. At the time of marriage, Appellant and his wife, Respondent Mary Elizabeth Miller (hereinafter “Ms. Miller”), were 61 and 60 years of age respectively. SEE APPENDIX A-68. Ms. Miller began dissolution proceedings by serving Appellant with a Summons and Petition on May 12, 2008. The dissolution of marriage proceeding was bifurcated by the trial court. SEE APPENDIX A-19. The parties’ six (6) year marriage was dissolved by the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree entered August 13, 2008 by the Honorable David R. Battey, Judge of the Douglas County District Court, State of Minnesota. This Judgment also reserved the issues of property division for further determination. SEE APPENDIX A-19. The property division issues were finalized following trial on the merits by the trial court through the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree entered December 11, 2009. SEE APPENDIX A-68.

BIFURCATION

After service of the Summons and Petition upon Appellant on May 12, 2008, Ms. Miller made a motion for an order to bifurcate the dissolution proceedings due to health and other concerns on May 21, 2008. Before Appellant’s 30 days to answer Respondent’s Petition for Dissolution had lapsed, a hearing was held on the motion to bifurcate on May 28, 2008.

At the May 28, 2008 hearing, counsel for Ms. Miller asked to proceed with shortened time for service under Rule 3.02 based upon exigent circumstances.

TRANSCRIPT May 28, 2008 P.3. Her counsel stated the exigent circumstances were that Appellant allegedly withdrew money from the parties' joint money market account for which he had not accounted. TRANSCRIPT May 28, 2008 P.3-4. Counsel for Appellant objected to proceeding, arguing Appellant was without proper notice having been served with the Summons and Petition on May 12, 2008 and the motion by mail on May 22, 2008.

Counsel for Ms. Miller further motioned the trial court for bifurcation of the dissolution based upon Ms. Miller's terminal illness. TRANSCRIPT May 28, 2008 P.12. The trial court responded that it does not normally bifurcate but would do it when the matter involved a terminal illness. TRANSCRIPT May 28, 2008 P.12. Counsel for Appellant specifically objected to the matter being bifurcated. TRANSCRIPT May 28, 2008 P.22; P.23.L.2-3.

The trial court granted the bifurcation and reserved issues of property division by the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree entered August 13, 2008. SEE APPENDIX A-19.

TRIAL COURT MAINTAINED JURISDICTION FOLLOWING MS. MILLER'S DEATH

Shortly thereafter, Ms. Miller died on August 19, 2008. SEE APPENDIX A-68. Counsel for Appellant had made a motion to dismiss the matter due to Ms. Miller's death.

TRANSCRIPT December 30, 2008 P.1. A hearing was held on December 30, 2008 on Appellant's motion. SEE APPENDIX A-49. Appellant's counsel argued that the action should be abated due to a party's death. TRANSCRIPT December 30, 2008 P.4; P.8. Counsel argued that it was inappropriate for a personal representative to step in for a deceased party of a dissolution action unless their was little left to achieve or little remaining work to be done (i.e. following a mediation agreement or stipulation). TRANSCRIPT December 30, 2008 P.4; P.8. Counsel argued that the matter at hand included a whole myriad of property issues that would need to be litigated at the time of the death. TRANSCRIPT December 30, 2008 P.4. Counsel argued that due to Ms. Miller's death, the trial court did not have jurisdiction over the matter. TRANSCRIPT December 30, 2008 P.5.

Opposing counsel argued that the matter was a "post-decree" proceeding and that following bifurcation and judgment of dissolution, the trial court could retain jurisdiction. TRANSCRIPT December 30, 2008 P.7.

The trial court specifically stated during the hearing,

"The cases cited by the Respondent (Appellant herein) are almost all cases in which a party dies during the divorce proceedings. This is postdivorce. That's why we had the discussion back in July as to whether or not the Court would bifurcate the proceedings. I typically do not do that.

* * *

The divorce has already been granted. So at the time of her death, she was a single person.

* * *

Paragraph 2 of the Conclusions specifically reserve the issues of an equitable distribution of the parties' real and personal property. That clearly can be done. It's been done in the past by Minnesota courts. It's the equitable way to do it, actually, here, I think. So that's already been done.

There's been no appeal made. So, in fact, this divorce was granted. This is a postdivorce situation. There's absolutely no reason why a personal representative cannot step into the shoes of one of the parties to resolve property issues between the two of them.

And so the Respondent's motion to dismiss the divorce proceedings is denied. I do believe it is appropriate to go forward to resolve property issues.

* * *

I'll grant Petitioner's request, and the personal representative is allowed to intervene."

TRANSCRIPT December 30, 2008 P.8-11.

Following the December 30, 2008 hearing, the Findings and Order was entered on January 9, 2009. SEE APPENDIX A-49. Catherine A. Risk (hereinafter "Ms. Risk"), the Petitioner's daughter, was appointed as the Personal Representative of the Estate of Mary Elizabeth Miller and was granted leave of Court to intervene in this proceeding, to be substituted to act in Ms. Miller's place for the purposes of the dissolution proceeding by the January 9, 2009 Findings and Order. See Appendix A-49.

TRIAL

Thereafter, the action proceeded to trial to determine the property division issues. SEE APPENDIX A-68. At trial Ms. Risk testified that in order to prepare for testimony

that she reviewed Ms. Miller's assets prior to trial. TRANSCRIPT August 19, 2009 P.9.

She stated she received copies of bank and investment statements for the period of the marriage from 2002 through 2007. TRANSCRIPT August 19, 2009 P.10.

Ms. Risk testified that Ms. Miller received significant assets from a divorce decree from a prior divorce in 2000. TRANSCRIPT August 19, 2009 P.12. At the time of marriage, Ms. Miller had \$331,106.70 in investment money. SEE APPENDIX A-70.

Ms. Risk testified that Ms. Miller contributed significant amounts of her nonmarital assets to help support Appellant. She testified that her mother paid the mortgage payments on the homestead in the amount of \$29,884.12 during the marriage. TRANSCRIPT August 19, 2009 P.21. She testified that Ms. Miller contributed significant nonmarital assets towards life insurance, medicare premiums, dental expenses, real estate taxes, and utility expenses. SEE APPENDIX A-70.

Appellant testified that the amounts Ms. Miller contributed toward mortgage payments, utilities, or other joint expenses were not kept track of nor did she ask for repayment. TRANSCRIPT August 19, 2009 P.120. Appellant testified that the parties shared their income, money, and accounts. TRANSCRIPT August 19, 2009 P.115-116. Appellant contended at trial that all the mortgage payments that were not verified by the personal representative were paid by him. TRANSCRIPT August 19, 2009 P.120. Appellant contended that he never had blue cross/blue shield health insurance as stated by the personal representative. TRANSCRIPT August 19, 2009 P.120.

The Appellant had purchased the parties' homestead on March 13, 1996, well before the marriage of the parties. SEE APPENDIX A-70. The homestead remained in the Appellant's name only throughout the marriage. SEE APPENDIX A-70. At the time of the marriage in 2002, the encumbrance on the homestead was approximately \$70,000.00 and the Douglas County Tax Assessor's estimated market value for 2002 was \$67,200.00. SEE APPENDIX A-70. The assessed value of the homestead at the time of trial was \$108,900.00. SEE APPENDIX A-71.

Ms. Risk testified that one of the checks written for the homestead mortgage payment had Appellant's name written on it in Ms. Miller's handwriting. TRANSCRIPT August 19, 2009 P.21. She testified that she knew it was her mother's handwriting. When asked if she knew why her mother wrote Appellant's name on the check, she testified, "I think because the mortgage was in his name. I think she wrote his name on the top of the check so that there wasn't any confusion as to whose payment it was going to or whose mortgage it belonged to." TRANSCRIPT August 19, 2009 P.22.

Ms. Risk testified that she could track Ms. Miller's transfers from her investment account to her U.S. Bank account. TRANSCRIPT August 19, 2009 P.22. However, she stated she was not sure how she set up her withdrawals specifically from the investment funds. TRANSCRIPT August 19, 2009 P.23-24. The personal representative acknowledged there could be other reasons for Ms. Miller to write Appellant's name on the check. TRANSCRIPT August 19, 2009 P.70.

Not all funds and transfers by Ms. Miller were accounted for by Ms. Risk. TRANSCRIPT August 19, 2009 P.70. She acknowledged not being able to verify a \$10,000.00 deposit. TRANSCRIPT August 19, 2009 P.73. She acknowledged only verifying a portion of the utility payments on the homestead. TRANSCRIPT August 19, 2009 P.74. She testified about an Ameritrade account and transfers to and from the account, however she acknowledged she did not have a document showing an account number showing the transfers. TRANSCRIPT August 19, 2009 P.75. Of all the health insurance premiums the personal representative testified her mother paid for Appellant, she could only verify two. TRANSCRIPT August 19, 2009 P.77.

In 2005, the parties purchased 40 acres of hunting land located in Todd County, State of Minnesota. SEE APPENDIX A-73. The property was purchased for \$75,000.00 with \$25,000.00 paid down and the remainder financed through a bank. SEE APPENDIX A-73. Ms. Risk testified that from March 2005 through December 2007, Ms. Miller made all the mortgage payments on the hunting property totaling \$15,386.00. SEE APPENDIX A-74. The trial court determined that the value of the hunting land at the time of trial was \$99,000.00. SEE APPENDIX A-74.

Ms. Risk testified that the Todd County hunting property was purchased using Ms. Miller's funds, however, that she believed the parties were looking at probably building a homestead on the property. TRANSCRIPT August 19, 2009 P.30. She acknowledged that the parties represented to her that the parties would have liked to have built a home

on the property. TRANSCRIPT August 19, 2009 P.72. Ms. Miller showed Ms. Risk plans of the house the parties were thinking of building. TRANSCRIPT August 19, 2009 P.72.

Appellant testified that when the hunting land was bought, Ms. Miller stated to him, "it is a gift to you." TRANSCRIPT August 19, 2009 P.120. He testified she wanted to purchase the land for him so he did not have to be gone for weeks at a time to go hunting. TRANSCRIPT August 19, 2009 P.125. He testified Ms. Miller stated, "oh that's okay, I'll get it for you." TRANSCRIPT August 19, 2009 P.125.

Ms. Risk was not able to ascertain where the down payment for the hunting property was made from. TRANSCRIPT August 19, 2009 P.54. The deposit receipt and agreement of sale for the hunting property was executed by Ms. Miller and Appellant. TRANSCRIPT August 19, 2009 P.30.

During the marriage, in 2005, the parties purchased a farm in Wadena County, State of Minnesota. SEE APPENDIX A-74. The purchase price of the farm was \$62,000.00. Ms. Risk testified that Ms. Miller contributed \$500.00 of earnest money, \$12,170.99 due at closing, and \$12,716.15 of mortgage payments all from her nonmarital assets. SEE APPENDIX A-75. The trial court found that the property was sold during the marriage resulting in net proceeds of \$35,847.00. SEE APPENDIX A-75.

Appellant testified that he paid the down payment on the Amish farm from the \$60,000.00 of cash he had in the safety deposit box. TRANSCRIPT August 19, 2009

P.121. The Appellant performed all improvements on the farm and then resold the farm a year later for a profit of \$63,000.00. TRANSCRIPT August 19, 2009 P.123. That money was placed in their joint money market account. TRANSCRIPT August 19, 2009 P.123.

The net proceeds from the sale of the farm went into a joint bank account of the parties. SEE APPENDIX A-75. On February 28, 2008, Ms. Miller received an inheritance from a family member and deposited that amount into the same joint account. SEE APPENDIX A-76.

Ms. Risk testified that Appellant withdrew \$21,000.00 in the form of a cashier check made out to himself on April 8, 2008 and \$42,096.45 on April 9, 2008, which closed out this same joint account of the parties. TRANSCRIPT August 19, 2009 P.48. The total withdrawn was \$63,096.45. TRANSCRIPT August 19, 2009 P.48.

Ms. Miller never told Appellant she was getting a divorce from the time she left in April until the time she initiated dissolution proceedings in May 2008. TRANSCRIPT August 19, 2009 P.126.

Ms. Risk asked at trial that this money be repaid back by Appellant to Ms. Miller's estate because the funds placed in the joint account were premarital assets. TRANSCRIPT August 19, 2009 P.59. She asked the trial court to award the hunting land to Ms. Miller's estate. TRANSCRIPT August 19, 2009 P.61. She asked that the homestead be sold and then have the \$55,000.0 of the proceeds given to Ms. Miller's estate to compensate for Appellant's alleged removal of funds from the parties' joint

account, and then have the remainder of the proceeds split by the parties. TRANSCRIPT August 19, 2009 P.61.

In the Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree entered December 11, 2009, the trial court determined that Appellant dissipated, hid, secreted, or otherwise disposed of \$55,06.45 from the parties joint bank account. SEE APPENDIX A-80. The trial court found that \$44,636.59 of the amount was Ms. Miller's nonmarital money. SEE APPENDIX A-80.

The trial court awarded Ms. Miller's estate all right, title, and interest in the homestead, which acted as a conveyance of Appellant's \$20,850.00 marital interest and Appellant's \$200.00 nonmarital interest in the homestead. SEE APPENDIX A-80. This property was in Appellant's name alone during the marriage and at the time of Ms. Miller's death. SEE APPENDIX A-68.

The trial court awarded Ms. Miller's estate all right, title, and interest in the Todd County hunting property, which acted as a conveyance of Appellant's marital interest of \$14,750.00. SEE APPENDIX A-81. This property was owned jointly by the parties during the marriage and at the time of Ms. Miller's death. SEE APPENDIX A-68.

ARGUMENT

An action for dissolution of marriage is in rem, the res being the marriage status or relation existing between the parties. Sessions v. Sessions, 178 Minn. 75, 226 N.W. 211 (1929). Jurisdiction of a court to decree a dissolution of marriage is based on two

fundamental requirements that must be satisfied before it can lawfully set (1) it must have subject matter jurisdiction and (2) it must have jurisdiction of the defendant by procedural due process. Cummiskey v. Cummiskey, 259 Minn. 427, 107 N.W.2d 864 (1961). The parties cannot by their actions or agreement confer jurisdiction on the court. Davidner v. Davidner, 304 Minn. 491, 232 N.W.2d 5 (1975).

An appellate court will determine the jurisdictional facts on its own motion even if neither party has raised the issue. Davidner v. Davidner, 304 Minn. 491, 232 N.W.2d 5 (1975). However, it has been held that voluntary litigation of the parties respective property rights confers jurisdiction on the court to determine the questions raised thereby, regardless of whether the court would have had jurisdiction otherwise. Carlson v. Carlson, 234 Minn. 258, 48 N.W.2d 58 (1951).

I. THE DEATH OF A PARTY MUST ABATE A BIFURCATED DISSOLUTION MATTER EVEN AFTER THE DISSOLUTION JUDGMENT HAS BEEN ENTERED IF SIGNIFICANT PROPERTY ISSUES ARE YET LITIGATED.

A. THE COURT NO LONGER HAD SUBJECT MATTER JURISDICTION TO DETERMINE PROPERTY DIVISION ISSUES FOLLOWING THE DEATH OF A PARTY.

Appellant argues this matter presents to the Court of Appeals an issue that has not been previously determined in Minnesota Courts. The issue is as follows:

“In a bifurcated proceeding where judgment was entered dissolving the bonds of matrimony, can a trial court retain jurisdiction over significant and complex property division after the death of a party?”

Appellant strongly argues the answer is, “No.”

The effect of this determination for the parties is extremely profound and significant. In such a factual situation as we have here, should the dissolution trial court retain jurisdiction over property division, or should the matter be resolved under the probate code?

The application of the dissolution laws, as opposed to the probate code, to the parties hereto yields a significantly different net result of property award. If the higher courts affirm the trial court, Ms. Miller's estate retains ownership of the two pieces of property. If the trial court is reversed, and the matter is determined in a probate proceeding, it is clear that Appellant retains ownership of the homestead and a ½ interest in the hunting property.

It is well settled in Minnesota law that a suit for divorce abates at the death of either party, and judgment cannot thereafter be entered unless the complainant was entitled to have it entered while both parties were living. Tikalsky v. Tikalsky, 166 Minn. 468, 471, 208 N.W. 180, 181 (1926). When a party to a dissolution action dies, the trial court loses subject matter jurisdiction. See generally Cummiskey v. Cummiskey, 259 Minn. 427, 107 N.W.2d 864 (1961).

The general rule being stated above, the trial court determined, and the opposing party argues, that this matter is a "post-decree" or post-dissolution action. SEE APPENDIX A-44. According to this logic, it appears the opposing party argues that if the reservation of the property division issues following dissolving the bonds of

matrimony (but before final trial on the merits) the matter is a “post-decree” matter and the abatement at death rule does not apply. Similarly, the trial court specifically stated during the hearing of December 30, 2008,

“The cases cited by the Respondent (Appellant herein) are almost all cases in which a party dies during the divorce proceedings. This is postdivorce. That’s why we had the discussion back in July as to whether or not the Court would bifurcate the proceedings. I typically do not do that.

* * *

The divorce has already been granted. So at the time of her death, she was a single person.

* * *

Paragraph 2 of the Conclusions specifically reserve the issues of an equitable distribution of the parties’ real and personal property. That clearly can be done. It’s been done in the past by Minnesota courts. It’s the equitable way to do it, actually, here, I think. So that’s already been done.

There’s been no appeal made. So, in fact, this divorce was granted. This is a postdivorce situation. There’s absolutely no reason why a personal representative cannot step into the shoes of one of the parties to resolve property issues between the two of them.

And so the Respondent’s motion to dismiss the divorce proceedings is denied. I do believe it is appropriate to go forward to resolve property issues.

* * *

I’ll grant Petitioner’s request, and the personal representative is allowed to intervene.”

TRANSCRIPT December 30, 2008 P.8-11.

Appellant vehemently disputes the proposition that because the dissolution was bifurcated and the bonds of matrimony were initially dissolved, that the trial court can retain jurisdiction over complex property division even after the death of a party. The

trial court is correct in its statement that “Paragraph 2 of the Conclusions specifically reserve the issues of an equitable distribution of the parties’ real and personal property.

That clearly can be done. It’s been done in the past by Minnesota courts.”

TRANSCRIPT December 30, 2008 P.8-11. However, the trial court erred in stating, “this is postdivorce” proceeding. TRANSCRIPT December 30, 2008 P.8-11. The trial court erred in denying Appellant’s motion for dismissal.

Appellant argues that the dissolution proceeding, whether the marriage is dissolved by bifurcation or not, is not finalized until final judgment on all issues before the court. The trial court must not be allowed to bifurcate the matter, enter the dissolution in an initial judgment, retain jurisdiction over property, and determine significant property issues following the death of the party simply because the “bonds of matrimony have been dissolved.”

When a party is served with a Summons and Petition in a dissolution proceeding, the parties are subject to the jurisdiction of the trial court. Jurisdiction of a court to decree a dissolution of marriage is based on two fundamental requirements that must be satisfied before it can lawfully set (1) it must have subject matter jurisdiction and (2) it must have jurisdiction of the defendant by procedural due process. Cummiskey v. Cummiskey, 259 Minn. 427, 107 N.W.2d 864 (1961). The trial court must maintain subject matter jurisdiction over the entire matter until it loses jurisdiction or until final judgment is entered. Once a trial court loses jurisdiction, the court can no longer proceed,

even on its own accord. Hence, the abatement rule, if final judgment has not yet been entered, death of a party must abate the matter.

Arguing that a dissolution matter is not final until final judgment on all issues is entered, Appellant argues that when a party is served with a summons in a dissolution action, the parties are automatically subject to restraining provisions contained therein. Said provisions apply to the parties by operation of law until modified by further order of the court or dismissal of the proceeding, unless more than one year has passed since the last document was filed with the court. Minn.Stat. § 518.091, subd. 1(b). The restraining provisions do not terminate following an initial bifurcated judgment.

Similarly, judgment entered in a bifurcated dissolution proceeding on less than all issues may be timely appealed with a later judgment resolving remaining issues even if the timing for appeal has lapsed on the initial judgment. See Tasker v. Tasker, 395 N.W.2d 100, (Minn.Ct.App. 1986). Even if the matter is bifurcated, the initial judgment must not terminate the dissolution proceeding. The parties remain under the subject matter jurisdiction of the court until all the issues, including but not limited to, dissolving the bonds of matrimony, custody, support, spousal maintenance, and property division, are finalized or until the trial court loses jurisdiction (such as the death of the party resulting in abatement of the matter).

When a dissolution action starts by service of the summons and petition and a court obtains jurisdiction, the action must not be considered completed until final

judgment. When a bifurcation occurs, and the trial court reserves other issues, the dissolution proceeding is not terminated. The reservation cannot be looked at as a “post-decree” or “post-dissolution” matter, because final judgment has yet to be entered. Remaining issues are yet to be litigated. *The matter must be looked at as a “partial” or “supplemental” judgment action until all issues are resolved.* See Tasker v. Tasker, 395 N.W.2d 100, (Minn.Ct.App. 1986)(where the matter was bifurcated and party allowed to appeal issues entered in the initial judgment) with emphasis added.

At the time of Ms. Miller’s death, there were significant property division issues yet to be resolved. Final judgment had yet to be entered on all issues before the court when it took its original subject matter jurisdiction. *The trial courts subject matter jurisdiction must be abated at the time of a party’s death in such a fact situation even if the matter is bifurcated.* See Tikalsky v. Tikalsky, 166 Minn. 468, 471, 208 N.W. 180, 181) (1926) with emphasis added. There are simply too many issues involved for the trial court to skirt the abatement rule in order to retain jurisdiction and hear an entire fact trial over significant complicated issues with the personal representative in place of the deceased. The trial court’s reasoning that the matter is “post-divorce” is error.

This argument is consistent with existing Minnesota case law. In Tikalsky, the Supreme Court had determined all the issues had been presented, and directed that judgment divorcing the parties be entered because the judicial act was complete.

Tikalsky v. Tikalsky, 166 Minn. 468, 471, 208 N.W. 180 (1926) All that remained to be

done was for the court to enter judgment in the judgment book as directed. Id.

In Donnelly vs. Donnelly, not reported in N.W.2d, 1997 WL343107 (Minn.Ct.App.1997), the court concluded that the trial court's making a simple finding on the amount the appellant must repay is similar to unperformed "ministerial functions" and therefore affirmed the trial court's refusal to dismiss the dissolution for lack of jurisdiction. Id.

In Wegge vs. Wegge, 89 N.W.2d 891 (1958), the Supreme Court stated that if a party to a divorce dies pending appeal (where the divorce was granted but judgment not entered), the appeal abates with respect to the marital status, but not so far as property interests are concerned. Id. The Supreme court remanded the case for dismissal on the merits noting that, in order for judgment of divorce to be entered nunc pro tunc, the entry may not involve more than "a ministerial function", and the death of one of the parties to a suit for divorce results in abatement of action. Id.

In Anders vs. Anders, 213 N.W.35 (Minn. 1927), the Supreme Court said that if the entry of judgment requires the performance of some judicial proceeding involving discretion of the court, judgment nunc pro tunc cannot be entered if one of the parties dies before such proceeding is taken. Id.

A party whose marriage is terminated by the death of the spouse is entitled to have judgment entered on a mediated settlement agreement dividing the marital property if a judicial act is complete and all that remains to be done is for the clerk to enter judgment.

Rettke v. Rettke, 696 N.W.2d 846 (Minn.Ct.App. 2005).

As argued by Appellants' trial counsel in Appellant's proposed Judgment and Decree brief, the exception to the general rule of abatement is where there is some ministerial act that can be implemented without continuing a dispute over the application of divorce law to a deceased party. See Steiler v. Stieler as argued:

“The personal representative of a deceased spouse and the surviving spouse disagreed with the interpretation of the divorce judgment. As a result, the parties could not implement the decree without assistance from the court in interpreting the decree. The court allowed the personal representative to seek post judgment relief for the limited purpose of clarifying the meaning of the decree. The care and pains with which the Court explained that the personal representative was not participating to establish a property judgment, but only to interpret one already entered, is consistent with only one interpretation: that the Minnesota Supreme court did not believe that a divorce dispute can continue after the death of a spouse. Otherwise, the Court would simply have held that there is no impediment to continuation of these proceedings if they merely involve property division.”

70 N.W.2d 127 (Minn. 1955); SEE APPENDIX A-51.

Appellant was prejudiced at trial by the court allowing the personal representative to testify about property transfers and property intent. At trial, Ms. Risk, the personal representative of Respondent's estate, testified that in order to prepare for testimony that she reviewed Mary Elizabeth Miller's assets prior to trial. TRANSCRIPT August 19, 2009 P.9. She stated she received copies of bank and investment statements for the period of the marriage from 2002 through 2007. TRANSCRIPT August 19, 2009 P.10. Other than her review, she had very little to no direct knowledge of the facts.

Ms. Risk relied upon assumptions and speculation in providing testimony

regarding the transfers. Ms. Risk was in no position to testify about intent of transfers or any gifts made by the parties. Ms. Risk testified that she could track Ms. Miller's transfers from her investment account to her U.S. Bank account. TRANSCRIPT August 19, 2009 P.22. However, she stated she was not sure how Ms. Miller set up her withdrawals specifically from the investment funds. TRANSCRIPT August 19, 2009 P.23-24.

Appellant testified that when the hunting land was bought, Respondent stated to him, "it is a gift to you." TRANSCRIPT August 19, 2009 P.120. He testified she wanted to purchase the land for him so he did not have to be gone for weeks at a time to go hunting. TRANSCRIPT August 19, 2009 P.125. He testified she stated, "oh that's okay, I'll get it for you." TRANSCRIPT August 19, 2009 P.125.

Ms. Risk could not dispute that the purchase of the land was a gift. The personal representative testified that the Todd County hunting property was purchased using Ms. Miller's funds, however, that she believed the parties were looking at probably building a homestead on the property. TRANSCRIPT August 19, 2009 P.30. The personal representative acknowledged that the parties represented to her that the parties would like to build a home on the property. TRANSCRIPT August 19, 2009 P.72. Respondent had shown the personal representative plans of the house the parties were thinking of building. TRANSCRIPT August 19, 2009 P.72.

The law of divorce must no longer apply after a death of a party, and it is against

public policy to continue dissolution proceedings after death of a spouse, except for limited purposes of implementing stipulations, orders for judgments, or other ministerial acts. See Tikalsky and the cases cited above. The disposition of property after death is governed by probate law, not unilateral reservation of property issues by a trial court.

The difference here is that there was significant property division issues to be decided. After Ms. Miller's death there were more than "ministerial acts" that had yet to be decided. Such issues included those involving marital vs. nonmarital property and issues of gifting and intent. Such issues cannot be fully and fairly litigated by allowing a personal representative to stand in the place of a party and speculate and assume the purpose and use of funds and the intent thereof.

Ms. Miller's death must abate the dissolution matter, and it was error for the trial court to hold otherwise.

II. THE RECORD DOES NOT SUPPORT THE TRIAL COURTS FINDINGS AND CONCLUSIONS.

As argued above, the Appellant contends the trial court did not have jurisdiction to proceed to trial on the property division issues involved in the parties' dissolution action. It was inappropriate for the trial court to allow the personal representative to intervene and handle the significant and complex issues on behalf of the deceased at trial. Because Ms. Miller was not available to testify herself, the trial court relied upon the assumptions and speculation of Ms. Risk as Ms. Miller's personal representative. However, Ms. Risk was unable to testify about the intent or purpose of transfers and gifts,

which goes to the heart of the issues before the court. Therefore, the trial court erred in such reliance on such testimony. Therefore, the record cannot support the trial court's determinations in this matter.

A. THE COURT ERRED IN DETERMINING APPELLANT DISSIPATED ASSETS OF THE PARTIES.

In the Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree entered December 11, 2009, the trial court determined that Appellant dissipated, hid, secreted, or otherwise disposed of \$55,06.45 from the parties joint bank account. SEE APPENDIX A-68. The record lacks any evidence that Appellant dissipated this money in anticipation of marriage.

A party to a marriage subject to severance in divorce proceedings cannot be permitted to subvert the orderly processes of the courts by concealing, dissipating, or misusing assets in anticipation of divorce so as to reduce the property available for division. Bollenbach v. Bollenbach, 285 Minn. 418, 175 N.W.2d 148 (1970) as cited in Moore v. Moore, 391 N.W.2d 42 (Minn.Ct.App. 1986).

The record lacks any evidence showing Appellant knowingly dissipated assets in anticipation of the dissolution. Ms. Miller never told Appellant she intended to get a divorce from the time she left in April until the time she initiated dissolution proceedings in May 2008. TRANSCRIPT August 19, 2009 P.126. Other than the transfers themselves, the trial court lacked evidence of record regarding purpose or intent of the transfers.

The trial court clearly erred by assuming the Appellant dissipated assets in anticipation of divorce when the record lacks such evidence.

B. THE COURT ERRED IN MAKING FINDINGS AND CONCLUSIONS REGARDING NONMARITAL VS. MARITAL PROPERTY CLASSIFICATIONS.

By the Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree entered December 11, 2009, the trial court determined that \$44,636.59 of the amount Appellant allegedly dissipated was Ms. Miller's nonmarital money. SEE APPENDIX A-68. The only evidence the court could have relied upon in making such a finding is the personal representatives' testimony in the place of Ms. Miller herself.

In so finding and concluding, the trial court awarded Ms. Miller's estate all right, title, and interest in the homestead and the hunting property despite the facts the homestead was in Appellant's name during the entire marriage and the hunting property was jointly owned. SEE APPENDIX A-68.

Ms. Risk was allowed to intervene in the matter as personal representative and act in the place of the deceased Ms. Miller. She testified that her knowledge of Ms. Miller's acquisition of and transfers of assets came from her review of Ms. Miller's account records. She testified that in order to prepare for testimony that she reviewed Mary Elizabeth Miller's assets prior to trial. TRANSCRIPT August 19, 2009 P.9. She stated she received copies of bank and investment statements for the period of the marriage from 2002 through 2007. TRANSCRIPT August 19, 2009 P.10.

Based upon this testimony, the trial court determined that Ms. Miller had significant nonmarital assets, and notwithstanding numerous joint transfers with Appellant, that Ms. Miller was allowed to maintain the nonmarital status of the assets.

Minnesota law is extremely clear, that marital property is all property acquired any time during the marriage relationship and *all property acquired during this period is presumed to be marital*. Minn.Stat. § 518.54, subd. 5 (with emphasis added). Marital property is subject to division between the parties whereas a party's nonmarital property is subject to division only in limited circumstances and to a limited degree. Minn.Stat. § 518.58.

The presumption that property is marital is overcome only by introduction of evidence to show that the property is nonmarital. Minn.Stat. § 518.54, subd. 5. Nonmarital property is real or personal property that falls into any of the following categories:

1. property acquired as a gift, bequest, devise, or inheritance made by a third party to one but not to the other spouse;
2. property acquired before the marriage;
3. property acquired by a spouse after the valuation date;
4. property excluded by a valid antenuptial contract;
5. property acquired in exchange for nonmarital property;
6. the increase in value of nonmarital property.

A party asserting a claim that property is nonmarital has the burden of proving that the property was acquired either before the marriage or in exchange for property owned prior to marriage. *Coffel v. Coffel*, 400 N.W.2d 371, 373-374 (Minn.Ct.App.

1987); Kottke v. Kottke, 353 N.W.2d 633, 635-636 (Minn.Ct.App. 1984) with emphasis added. Whether property is marital or nonmarital is a question of law that the court of appeals may review with independent judgment, but the facts underlying the finding that property is marital or nonmarital will be set aside only if clearly erroneous. Swick v. Swick, 467 N.W.2d 328, 330 (Minn.Ct.App. 1991) review denied (May 16, 1991). A spouse claiming that property is nonmarital must prove the necessary underlying facts by a preponderance of the evidence. Johnson v. Johnson, 388 N.W.2d 47, 49 (Minn.Ct.App. 1986).

Here, understanding the burden of showing nonmarital property is on Respondent, the record is completely void of enough evidence to support the trial court's findings that Ms. Miller's assets are nonmarital. Again, the burden is on Respondent to show nonmarital character. The only evidence before the court was the personal representative's testimony. Ms. Miller was unavailable to testify about her intent or purpose of the transfers of her assets. Ms. Risk, as personal representative, is not in the position to testify about Ms. Miller's intent, and acknowledged she did not have an such direct knowledge. Appellant contended at trial that Ms. Miller transferred her assets into joint assets during the marriage for the benefit of both parties. He testified that she never asked to be paid back. The record is clearly void of any evidence showing that Ms. Miller's assets should retain nonmarital character.

The evidence showed that Ms. Miller received significant assets from a divorce

decree from a prior divorce in 2000. TRANSCRIPT August 19, 2009 P.12. At the time of marriage, Ms. Miller had \$331,106.70 in premarital investment money. SEE APPENDIX A-68.

Ms. Risk testified that Ms. Miller contributed significant amounts of her nonmarital assets to help support Appellant. She testified that her mother paid the mortgage payments on the homestead and other expenses. TRANSCRIPT August 19, 2009 P.21. However, the record is clear that the Appellant had purchased the parties' homestead on March 13, 1996, well before the marriage of the parties. The homestead remained in the Appellant's name only throughout the marriage. No evidence exists in the record regarding Ms. Miller's intent or purpose in making the payments.

Further, Appellant testified that the amounts Ms. Miller contributed toward mortgage payments, utilities, or other joint expenses were not kept track of nor did she ask for repayment. TRANSCRIPT August 19, 2009 P.120. Appellant testified that the parties shared their income, money, and accounts. TRANSCRIPT August 19, 2009 P.115-116.

Ms. Risk testified that one of the checks written for the homestead mortgage payment had Appellant's name written on it in Ms. Miller's handwriting. TRANSCRIPT August 19, 2009 P.21. She testified that she knew it was her mother's handwriting. When asked if she knew why her mother wrote Appellant's name on the check, she testified, "I think because the mortgage was in his name. I think she wrote his name on

the top of the check so that there wasn't any confusion as to whose payment it was going to or whose mortgage it belonged to." TRANSCRIPT August 19, 2009 P.22. The personal representative acknowledged there could be other reasons for Respondent to write Appellant's name on the check. TRANSCRIPT August 19, 2009 P.70. Ms. Risk's own testimony regarding Ms. Miller's intent is speculation and assumption at best.

Moreover, not all funds and transfers by Ms. Miller were accounted for by the personal representative. TRANSCRIPT August 19, 2009 P.70. The personal representative acknowledged not being able to verify a \$10,000.00 deposit. TRANSCRIPT August 19, 2009 P.73. The personal representative acknowledged only verifying a portion of the utility payments on the homestead. TRANSCRIPT August 19, 2009 P.74. The personal representative testified about an Ameritrade account and transfers to and from the account, however acknowledges she does not have a document showing an account number showing the transfers. TRANSCRIPT August 19, 2009 P.75. Of all the health insurance premiums the personal representative testified her mother paid for Appellant, she could only verify two. TRANSCRIPT August 19, 2009 P.77.

In regards to the hunting property, Ms. Risk testified and argues that Ms. Miller spent significant amounts of nonmarital assets to purchase the land and that it should be therefore traced and awarded to Ms. Miller's estate. However, the land was purchased during the marriage in 2005. SEE APPENDIX A-68. The property was placed into the names of both parties as it was jointly owned at the time of marriage. SEE APPENDIX

A-68. She acknowledged herself that she believed the parties were looking at probably building a homestead on the property. TRANSCRIPT August 19, 2009 P.30. She acknowledged that the parties represented to her that the parties would like to build a home on the property. TRANSCRIPT August 19, 2009 P.72. Ms. Miller showed Ms. Risk plans for the house the parties were thinking of building. TRANSCRIPT August 19, 2009 P.72.

Appellant testified that when the hunting land was bought, Ms. Miller stated to him, "it is a gift to you." TRANSCRIPT August 19, 2009 P.120. He testified she wanted to purchase the land for him so he did not have to be gone for weeks at a time to go hunting. TRANSCRIPT August 19, 2009 P.125. He testified she stated, "oh that's okay, I'll get it for you." TRANSCRIPT August 19, 2009 P.125.

Ms. Risk was not able to ascertain where the down payment was made from. TRANSCRIPT August 19, 2009 P.54. The deposit receipt and agreement of sale for the hunting property was executed by Ms. Miller and Appellant. TRANSCRIPT August 19, 2009 P.30.

Based on the evidence on the record it was error to find that Ms. Miller retained assets of nonmarital character in the hunting land. The record simply does not support such a finding.

In regard to the farm purchased and sold during the marriage, Ms. Risk again contends that Ms. Miller contributed nonmarital assets, and she should be awarded her

nonmarital interest in proceeds of the sale. The trial court found that the property was sold during the marriage resulting in net proceeds of \$35,847.00. SEE APPENDIX A-68. However, everything occurred during the marriage, the property was owned and sold jointly, and the proceeds were placed in the parties joint money market account.

TRANSCRIPT August 19, 2009 P.123. During the marriage, Ms. Miller received an inheritance from a death of a family member and deposited that amount into the same joint account. SEE APPENDIX A-68. No evidence exists regarding Ms. Miller's intent or purpose of the purchase, sale, or transfers of the funds. It is insufficient, inappropriate, and error for the court to speculate and assume the nonmarital character of the property is maintained when no evidence justifies such a finding. The burden is on Respondent to show nonmarital character. Appellant argues, without testimony from Ms. Miller, Respondent cannot satisfy the burden.

Respondent argues, and the trial court found, that the joint account of the parties contained a significant amount of money, that the majority of the funds were Ms. Miller's nonmarital assets, and that Appellant dissipated the assets. However, as argued above, the record does not justify such a finding based on the evidence presented without Ms. Miller's testimony. Ms. Miller never told Appellant she was getting a divorce from the time she left in April until the time she initiated dissolution proceedings in May 2008.

TRANSCRIPT August 19, 2009 P.126.

As argued above, it is error for the trial court to award the real property of the

parties to Ms. Miller's estate on the basis that Appellant dissipated Ms. Miller's nonmarital assets, when the trial court has no evidence to justify a finding that the assets are nonmarital in the first place.

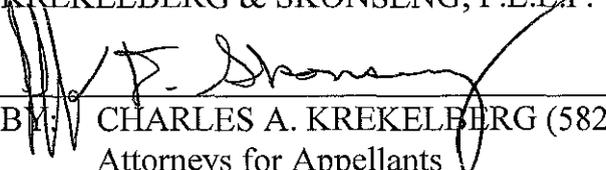
The opposing party failed to overcome the presumption of nonmarital property and could not satisfy their burden of showing nonmarital character without the testimony of Ms. Miller. *This is the inherent problem with allowing a significant and complex trial on property division issues to go forward following the death of a party. The abatement rule must be applied in this matter to alleviate such an issue.* See Tikalsky v. Tikalsky, 166 Minn. 468, 471, 208 N.W. 180, 181) (1926).

CONCLUSION

Based upon the foregoing, the Appellant respectfully requests that this Court determine reverse the trial court, order the trial court to enter judgment abating the dissolution matter at the time of Ms. Miller's death, OR IN THE ALTERNATIVE, reverse the trial courts findings and conclusions as argued above.

Respectfully submitted this 18th day of February, 2010.

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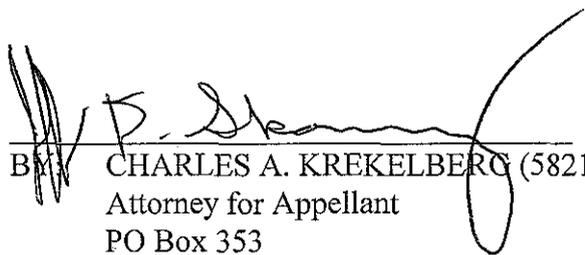
CERTIFICATE OF LENGTH COMPLIANCE

I, Charles A. Krekelberg, the attorney for Appellant, hereby state that Appellant's Brief complies with both the typeface requirements and word count limitations as set forth in Minnesota Rule of Civil Procedure 132 Sub. 3(a). Corel WordPerfect version 11 was used in the preparation of Appellant's Brief.

There are 7,390 words in the brief.

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