

THE COSTS OF A DIVORCE CAN SURVIVE A DEATH

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ATTORNEY'S FEES, COURT COSTS and the fees and costs of expert witnesses are an important part of domestic litigation. They are important to both the attorney, as well as the parties. When any litigation becomes contentious, it is not unusual for attorney's fees, court costs and expert fees to soar, especially when children issues are involved. Clients, understandably, experience a wide range of emotions as they go through a divorce. If they're the monied spouse, they worry about how much they're going to be required to pay; how much of their property they'll have to transfer to their spouse in a property division; what will their relationship with their children be after the divorce and, how much it will cost them overall.

If they're the non-monied spouse, they worry about the same issues, only from the opposite perspective. They worry about such issues as, "How will I live; where will I live; what will happen to the marital home; how will this affect the children; what will the division of property be; how will my debts be paid and, again, who will pay for the expenses of the divorce?" In the great majority of cases, the non-monied spouse will request the court to order the monied spouse to pay attorney's fees, expert fees and the cost for them.

If no fee order has been entered and fees are substantial because the attorney has performed a lot of work for which they haven't been paid, as is frequently the case, what will happen if the monied spouse dies? Will the surviving spouse or their attorney collect the fees and costs awarded by the court?

Normally, when one of the spouses dies during the pendency of a divorce case, and before a divorce judgment is entered, the law mandates that the case is abated. That means, in practical terms, the case is over, since there are no longer two spouses who can get divorced, property needn't be divided, and the children issues are no longer a problem. Thus, many property issues are automatically resolved, depending on the title to property.

Since the case is abated, what can the lawyer representing the surviving spouse do to get paid for all the work they have done? Usually, the deceased spouse's estate will be liable to pay the fees and costs, so that the surviving spouse can pursue fees incurred prior to death. The critical issue is the timing of the request for fees. If the request for fees was part of the original petition seeking dissolution of the marriage (which virtually every one does), or there was a subsequent motion filed prior to death asking for attorney's fees, the spouse is permitted,

by virtue of the probate statutes, to sue the estate for fees and costs. The lawyer may also pursue fees and costs, which were requested prior to death. The reason, the court's say, is that the court in which the fees had been requested retains jurisdiction to award those already requested fees and costs.

In order for the surviving spouse to attempt to collect prior incurred and requested attorney's fees and costs, the estate must be substituted as a party in the place of the deceased spouse.

Therefore, death during the pendency of a divorce does not necessarily prohibit collection of attorney's fees, as there is a remedy. ■■■

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