

## SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

### **Hildegard Kay v. George Kay (A-93-08)**

**(NOTE: The Court wrote no full opinion in this case. Rather, the Court's affirmance of the judgment of the Appellate Division is based substantially on the reasons expressed in Judge Grall's opinion below.)**

**Argued October 13, 2009 -- Decided January 6, 2010**

#### **PER CURIAM**

Nearly two decades ago, in Carr v. Carr, 120 N.J. 336 (1990), the Supreme Court held that a surviving spouse could continue divorce litigation for the limited purpose of proving that the deceased spouse had diverted marital assets, because equity demanded that the innocent spouse have a forum through which to recover those assets for equitable distribution. This appeal presents a situation in which the roles of the parties are reversed. The deceased spouse was the one who had raised the claim that marital assets had been diverted. Thus, the issue in this appeal is whether the equitable principles that supported the relief granted in favor of the surviving spouse in Carr would also inure to the benefit of the estate of the spouse making a similar claim.

The parties were married in 1973. It was the second marriage for both, and no children were born of this marriage. Plaintiff Hildegard Kay has one daughter, Marion Jolly, and defendant George Kay had two children and four grandchildren. The Kays separated in March 2005. In May 2005, they sold the marital home, which was titled in both parties' names, although it was George's residence during his first marriage. The parties could not agree on a disposition of the proceeds, so each took one-quarter and placed the rest in escrow. They also jointly held a brokerage account. Between April 29 and July 1, 2005, Hildegard charged \$4,666 on George's credit card.

Hildegard filed a complaint for divorce in July 2006. George filed an answer and counterclaim in October 2006. He was then eighty-three years of age and retired. Hildegard, also retired, was seventy years of age and working part-time. She managed the family assets for many years and had accounts and certificates of deposits in her name, in her name and Jolly's name, and in Jolly's name alone. In May 2007, the court entered an order prohibiting dissipation of marital assets and compelling the parties to provide discovery. George identified the following assets held in his name and Hildegard's jointly: \$81,282.34 in escrow from the sale of the home; \$87,000 in the brokerage account; and stock valued at \$11,000. He acknowledged sole possession of assets valued at \$50,000 and estimated that Hildegard had assets with a value greater than \$650,000.

George died in August 2007. His will includes specific bequests to his grandchildren and a nephew, with the remainder of his estate devised to his brother and executor, Bernard Kanefsky. On September 25, 2007, Hildegard unsuccessfully tried to withdraw the remaining proceeds of the sale of the marital home from the escrow fund. On September 27, 2007, she submitted a stipulation dismissing the divorce action that was not signed by George's attorney. On October 3, 2007, she transferred the brokerage account to her name. George's estate did not include sufficient assets to cover his burial expenses and attorney's fees.

The executor of George's estate sought a constructive trust to prevent the unjust enrichment that would allegedly occur if Hildegard and her daughter retained marital property beneficially belonging to George. The trial court denied the estate leave to substitute for George and file amended pleadings, and it dismissed the divorce action. The estate appealed, arguing that the trial court erred by relying on Kruzdlo v. Kruzdlo, 251 N.J. Super. 70, 73 (Ch. Div. 1990). In Kruzdlo, the court held that the estate of a decedent spouse is not entitled to assert equitable claims against the marital estate sounding in constructive trust or unjust enrichment.

In a published opinion, Kay v. Kay, 405 N.J. Super. 278 (2009), the Appellate Division concluded that the trial court should have accepted the pleadings and considered whether the equities arising from the facts alleged call for relief from the strict legal effects of George's death during the pendency of the divorce action. To the extent that Kruzdlo provided a contrary rule, the panel disapproved it.

The Appellate Division reasoned that the same equitable principles that supported the Supreme Court's conclusion that relief was warranted in Carr would equally apply when the roles of the spouses are reversed. The panel considered the public policies embedded in the statutes governing equitable distribution, which include promoting equity and fair dealing as between spouses. The Appellate Division concluded that permitting an estate the opportunity to pursue its claim for relief would promote that policy by ensuring that marital property belonging to the decedent will be retained by the estate for the benefit of the deceased spouse's rightful heirs and by preventing the unjust enrichment of the surviving spouse.

The Court granted plaintiff's petition for certification. 199 N.J. 130 (2009).

**HELD:** The judgment of the Appellate Division is affirmed substantially for the reasons expressed in Judge Grall's opinion below. A trial court may not refuse to consider the equitable claims raised by the estate of a deceased spouse who, during the divorce litigation, was attempting to pursue a claim that the surviving spouse had diverted marital assets.

1. As Judge Grall observed, this matter arose in the context of the estate's unsuccessful effort to intervene and file pleadings in the divorce proceedings. Thus, the record is barren of the facts needed to evaluate the equities or the legal rights of the parties. (pp. 3-4)

2. The Court adds further important observations. First, the claim raised in this matter was not merely one for equitable distribution of agreed-upon marital property. It was a claim that marital assets had been wrongfully diverted by one spouse to the detriment of the other. Second, the deceased spouse himself was attempting to pursue that claim. The estate merely seeks to continue claims raised before death, which, in fairness, should not be extinguished lightly. Those considerations are central to the Court's agreement with the panel's conclusion. (p. 4)

3. Finally, in Carr, the Court commented on the anomalous results that might occur when the statutes governing equitable distribution and divorce collide with the probate statutes. Because of the way in which those statutory schemes operate and the very different purposes to be achieved by each, an innocent spouse might be left with no statutory remedy. The same observations might be made about the circumstances in this matter. The Court invites such further consideration of these matters as the Legislature deems appropriate. (pp. 4-5)

The judgment of the Appellate Division is **AFFIRMED**.

**CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, WALLACE, RIVERA-SOTO and HOENS join in this PER CURIAM opinion.**

SUPREME COURT OF NEW JERSEY  
A-93 September Term 2008

HILDEGARD KAY,

Plaintiff-Appellant,

v.

GEORGE KAY,

Defendant.

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BERNARD KANEFSKY, EXECUTOR OF  
THE ESTATE OF GEORGE KAY,

Respondent.

Argued October 13, 2009 - Decided January 6, 2010

On certification to the Superior Court,  
Appellate Division, whose opinion is  
reported at 405 N.J. Super. 278 (2009).

Thomas J. Hurley argued the cause for  
appellant (Hurley & Laughlin, attorneys).

Samuel Mandel argued the cause for  
respondent.

PER CURIAM.

Nearly two decades ago, this Court held that, in limited circumstances, equity permits one spouse to continue divorce litigation following the death of the other. Carr v. Carr, 120 N.J. 336, 349-50 (1990). More particularly, in Carr, supra, this Court concluded that a surviving spouse could continue divorce litigation for the limited purpose of proving that the

deceased spouse had diverted marital assets, because equity demanded that the innocent spouse have a forum through which to recover those assets for equitable distribution. Id. at 353-54.

This appeal presents the Court with factual circumstances in which the roles of the divorcing parties are reversed. That is, in this matter, the deceased spouse was the one who had raised the claim that marital assets had been diverted during the marriage; it is that spouse's estate that sought the right to intervene and to continue the divorce action to recover diverted assets for equitable distribution from the surviving spouse. Therefore, this matter requires an analysis of whether the equitable principles that supported the relief granted in favor of the surviving spouse in Carr would also inure to the benefit of the estate of a spouse making a like claim.

In addressing this novel question, the Appellate Division concluded that the same equitable principles that supported this Court's conclusion that relief was warranted in Carr would equally apply when the roles of the spouses are reversed, as they are in this matter. Kay v. Kay, 405 N.J. Super. 278, 285 (App. Div. 2009). In doing so, the Appellate Division considered the public policies embodied in the statutes governing equitable distribution, see id. at 282-83 (considering N.J.S.A. 2A:34-23h, -23.1), and reasoned that depriving the estate of the opportunity to pursue its claim for relief would

not serve the policy of promoting equity and fair dealing as between spouses that those statutes are designed to advance, see id. at 285 (citing N.J.S.A. 2A:34-23.1i).

Consistent with that analysis, the Appellate Division concluded that the principles expressed in this Court's decision in Carr, by implication, would afford relief on behalf of the estate in this case. The court reasoned that doing so would promote fair dealing between spouses by ensuring that marital property justly belonging to the decedent will be retained by the estate for the benefit of the deceased spouse's rightful heirs and by preventing unjust enrichment of the surviving spouse. Ibid. Finally, the Appellate Division considered an alternate analysis embodied in a Chancery Division decision, see Kruzdlo v. Kruzdlo, 251 N.J. Super. 70, 73 (Ch. Div. 1990), concluding that to the extent that it expressed a contrary view, it was disapproved. Kay, supra, 405 N.J. Super. at 281.

We affirm for substantially the reasons expressed by Judge Grall, who authored the Appellate Division's thoughtful decision on this novel question. We echo her observation that this matter came before the court in the context of the estate's unsuccessful effort to intervene in the divorce proceedings and that the motion court's denial of the estate's application to file pleadings left the record rather barren of the facts needed to evaluate the equities or the legal rights of the parties.

Id. at 287. Certainly, as Judge Grall noted, the incomplete record makes definitive resolution of those rights impossible and the appellate panel's holding, that the trial court may not refuse to consider the equitable claims raised by the estate, is an appropriately limited one. Ibid.

At the same time, we add two important observations to the several notes of caution that Judge Grall sounded. First, the claim raised in this matter was not merely one for equitable distribution of an agreed-upon universe of marital property. Rather, it was a claim, like that raised in Carr, that marital assets had been wrongfully diverted by one spouse to the detriment of the other. Second, this is not a case in which the estate sought to intervene in a post-death effort to assert a new claim. Instead, it is one in which the deceased spouse himself had raised and was attempting to pursue the claim that the marital assets had been diverted to his detriment over time by his spouse for the sole benefit of that spouse and her daughter. That this matter is one in which the estate merely seeks to continue claims raised before death and that those claims are ones which, in fairness, should not be extinguished lightly or prematurely, are both considerations that are central to our agreement with the Appellate Division's conclusion.

Finally, in Carr itself, this Court commented on the anomalous results that might occur when the statutes governing

equitable distribution and divorce collide with the statutes that make up our probate code. See Carr, supra, 120 N.J. at 344 (noting that N.J.S.A. 3B:8-1 precludes surviving spouse in “circumstances that would give rise to cause of action for divorce” from claiming elective share). Because of the way in which those very separate statutory schemes operate and because of the very different purposes to be achieved by each, an innocent spouse might be left with no statutory remedy. The same observations might appropriately be made concerning the circumstances presented in this matter as well.

As we commented in Carr, our Legislature has occasionally considered bills that have been designed to address some of the concerns that arise when the statutes governing divorce and equitable distribution and the statutes governing the matters pertinent to decedents’ estates appear to collide. See Carr, supra, 120 N.J. at 350 n.3 (explaining then-recent efforts to create statutory clarity through altering definition of “surviving spouse”). As this appeal highlights a further dimension of the way in which those statutory provisions may conflict, we invite such further consideration of these matters as our Legislature deems appropriate.

The judgment of the Appellate Division is affirmed.

CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, WALLACE, RIVERA-SOTO, and HOENS join in this opinion.

SUPREME COURT OF NEW JERSEY

NO. A-93

SEPTEMBER TERM 2008

ON CERTIFICATION TO Appellate Division, Superior Court

HILDEGARD KAY,

Plaintiff-Appellant,

v.

GEORGE KAY,

Defendant.

BERNARD KANEFSKY, EXECUTOR OF  
THE ESTATE OF GEORGE KAY,

Respondent.

DECIDED January 6, 2010  
Chief Justice Rabner PRESIDING

OPINION BY Per Curiam

CONCURRING/DISSENTING OPINIONS BY \_\_\_\_\_

DISSENTING OPINION BY \_\_\_\_\_

CHECKLIST	AFFIRM	
CHIEF JUSTICE RABNER	X	
JUSTICE LONG	X	
JUSTICE LaVECCHIA	X	
JUSTICE ALBIN	X	
JUSTICE WALLACE	X	
JUSTICE RIVERA-SOTO	X	
JUSTICE HOENS	X	
TOTALS	7	