

No. 2004-175

AN ACT

SB 95

Amending Titles 20 (Decedents, Estates and Fiduciaries) and 23 (Domestic Relations) of the Pennsylvania Consolidated Statutes, further providing for right of surviving spouse to elective share; further defining "separate and apart" for purposes of divorce; providing for premarital agreements; further providing for decree of court in actions for divorce; further defining "marital property" for purposes of certain property rights; and further providing for equitable division of marital property, for disposition of property to defeat obligations and for statement of reasons for distribution.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 2203(a) of Title 20 of the Pennsylvania Consolidated Statutes is amended and the section is amended by adding a subsection to read:

§ 2203. Right of election; resident decedent.

(a) Property subject to election.—[When] *Except as provided in subsection (c), when* a married person domiciled in this Commonwealth dies, his surviving spouse has a right to an elective share of one-third of the following property:

(1) Property passing from the decedent by will or intestacy.

(2) Income or use for the remaining life of the spouse of property conveyed by the decedent during the marriage to the extent that the decedent at the time of his death had the use of the property or an interest in or power to withdraw the income thereof.

(3) Property conveyed by the decedent during his lifetime to the extent that the decedent at the time of his death had a power to revoke the conveyance or to consume, invade or dispose of the principal for his own benefit.

(4) Property conveyed by the decedent during the marriage to himself and another or others with right of survivorship to the extent of any interest in the property that the decedent had the power at the time of his death unilaterally to convey absolutely or in fee.

(5) Survivorship rights conveyed to a beneficiary of an annuity contract to the extent it was purchased by the decedent during the marriage and the decedent was receiving annuity payments therefrom at the time of his death.

(6) Property conveyed by the decedent during the marriage and within one year of his death to the extent that the aggregate amount so conveyed to each donee exceeds \$3,000, valued at the time of conveyance.

In construing this subsection, a power in the decedent to withdraw income or principal, or a power in any person whose interest is not adverse to the decedent to distribute to or use for the benefit of the decedent any income or

principal, shall be deemed to be a power in the decedent to withdraw so much of the income or principal as is subject to such power, even though such income or principal may be distributed only for support or other particular purpose or only in limited periodic amounts.

* * *

(c) Nonapplicability.—*Pursuant to 23 Pa.C.S. § 3323(d.1) (relating to decree of court), this section shall not apply in the event a married person domiciled in this Commonwealth dies during the course of divorce proceedings, no decree of divorce has been entered pursuant to 23 Pa.C.S. § 3323 and grounds have been established as provided in 23 Pa.C.S. § 3323(g).*

Section 1.1. The definition of “separate and apart” in section 3103 of Title 23 is amended to read:

§ 3103. Definitions.

The following words and phrases when used in this part shall have the meanings given to them in this section unless the context clearly indicates otherwise:

* * *

“Separate and apart.” **[Complete cessation]** *Cessation of [any and all] cohabitation, whether living in the same residence or not. In the event a complaint in divorce is filed and served, it shall be presumed that the parties commenced to live separate and apart not later than the date that the complaint was served.*

* * *

Section 2. Title 23 is amended by adding a section to read:
§ 3106. *Premarital agreements.*

(a) General rule.—*The burden of proof to set aside a premarital agreement shall be upon the party alleging the agreement to be unenforceable. A premarital agreement shall not be enforceable if the party seeking to set aside the agreement proves, by clear and convincing evidence, that:*

(1) the party did not execute the agreement voluntarily; or

(2) the party, before execution of the agreement:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) did not have an adequate knowledge of the property or financial obligations of the other party.

(b) Definition.—*As used in this section, the term “premarital agreement” means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.*

Section 3. Sections 3323(c), 3501(a) and 3502(a) of Title 23 are amended and the sections are amended by adding subsections to read:

§ 3323. Decree of court.

* * *

(c) Bifurcation.—In the event that the court is unable for any reason to determine and dispose of the matters provided for in subsection (b) within 30 days after the report of the master has been filed, it may enter a decree of divorce or annulment. Upon the request of either party and after a hearing, the court may order alimony pendente lite, reasonable counsel fees, costs and expenses and may make a temporary order necessary to protect the interests of the parties pending final disposition of the matters in subsection (b).]

(c.1) Bifurcation.—*With the consent of both parties, the court may enter a decree of divorce or annulment prior to the final determination and disposition of the matters provided for in subsection (b). In the absence of the consent of both parties, the court may enter a decree of divorce or annulment prior to the final determination and disposition of the matters provided for in subsection (b) if:*

- (1) grounds have been established as provided in subsection (g); and*
- (2) the moving party has demonstrated that:*
 - (i) compelling circumstances exist for the entry of the decree of divorce or annulment; and*
 - (ii) sufficient economic protections have been provided for the other party during the pendency of the disposition of the matters provided for in subsection (b).*

* * *

(d.1) Death of a party.—*In the event one party dies during the course of divorce proceedings, no decree of divorce has been entered and grounds have been established as provided in subsection (g), the parties' economic rights and obligations arising under the marriage shall be determined under this part rather than under 20 Pa.C.S. (relating to decedents, estates and fiduciaries).*

* * *

(g) Grounds established.—For purposes of subsections (c.1) and (d.1), grounds are established as follows:

- (1) In the case of an action for divorce under section 3301(a) or (b) (relating to grounds for divorce), the court adopts a report of the master or makes its own findings that grounds for divorce exist.*
- (2) In the case of an action for divorce under section 3301(c), both parties have filed affidavits of consent.*
- (3) In the case of an action for divorce under section 3301(d), an affidavit has been filed and no counter-affidavit has been filed or, if a counter-affidavit has been filed denying the affidavit's averments, the court determines that the marriage is irretrievably broken and the parties have lived separate and apart for at least two years at the time of the filing of the affidavit.*

§ 3501. Definitions.

(a) General rule.—As used in this chapter, “marital property” means all property acquired by either party during the marriage[, **including the increase in value, prior to the date of final separation,**] **and the increase in value** of any nonmarital property acquired pursuant to paragraphs (1) and (3)[, **except:**] **as measured and determined under subsection (a.1). However, marital property does not include:**

(1) Property acquired prior to marriage or property acquired in exchange for property acquired prior to the marriage.

(2) Property excluded by valid agreement of the parties entered into before, during or after the marriage.

(3) Property acquired by gift, except between spouses, bequest, devise or descent **or property acquired in exchange for such property.**

(4) Property acquired after final separation until the date of divorce, except for property acquired in exchange for marital assets.

(5) Property which a party has sold, granted, conveyed or otherwise disposed of in good faith and for value prior to the date of final separation.

(6) Veterans’ benefits exempt from attachment, levy or seizure pursuant to the act of September 2, 1958 (Public Law 85-857, 72 Stat. 1229), as amended, except for those benefits received by a veteran where the veteran has waived a portion of his military retirement pay in order to receive veterans’ compensation.

(7) Property to the extent to which the property has been mortgaged or otherwise encumbered in good faith for value prior to the date of final separation.

(8) Any payment received as a result of an award or settlement for any cause of action or claim which accrued prior to the marriage or after the date of final separation regardless of when the payment was received.

(a.1) Measuring and determining the increase in value of nonmarital property.—The increase in value of any nonmarital property acquired pursuant to subsection (a)(1) and (3) shall be measured from the date of marriage or later acquisition date to either the date of final separation or the date as close to the hearing on equitable distribution as possible, whichever date results in a lesser increase. Any decrease in value of the nonmarital property of a party shall be offset against any increase in value of the nonmarital property of that party. However, a decrease in value of the nonmarital property of a party shall not be offset against any increase in value of the nonmarital property of the other party or against any other marital property subject to equitable division.

* * *

(c) Defined benefit retirement plans.—Notwithstanding subsections (a), (a.1) and (b):

(1) In the case of the marital portion of a defined benefit retirement plan being distributed by means of a deferred distribution, the defined benefit plan shall be allocated between its marital and nonmarital

portions solely by use of a coverture fraction. The denominator of the coverture fraction shall be the number of months the employee spouse worked to earn the total benefit and the numerator shall be the number of such months during which the parties were married and not finally separated. The benefit to which the coverture fraction is applied shall include all postseparation enhancements except for enhancements arising from postseparation monetary contributions made by the employee spouse, including the gain or loss on such contributions.

(2) In the case of the marital portion of a defined benefit retirement plan being distributed by means of an immediate offset, the defined benefit plan shall be allocated between its marital and nonmarital portions solely by use of a coverture fraction. The denominator of the coverture fraction shall be the number of months the employee spouse worked to earn the accrued benefit as of a date as close to the time of trial as reasonably possible and the numerator shall be the number of such months during which the parties were married and not finally separated. The benefit to which the coverture fraction is applied shall include all postseparation enhancements up to a date as close to the time of trial as reasonably possible except for enhancements arising from postseparation monetary contributions made by the employee spouse, including the gain or loss on such contributions.

§ 3502. Equitable division of marital property.

(a) General rule.—**[In] Upon the request of either party in an action for divorce or annulment, the court shall[, upon request of either party,] equitably divide, distribute or assign, in kind or otherwise, the marital property between the parties without regard to marital misconduct in such [proportions] percentages and in such manner as the court deems just after considering all relevant factors[, including:]. The court may consider each marital asset or group of assets independently and apply a different percentage to each marital asset or group of assets. Factors which are relevant to the equitable division of marital property include the following:**

- (1) The length of the marriage.
- (2) Any prior marriage of either party.
- (3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.
- (4) The contribution by one party to the education, training or increased earning power of the other party.
- (5) The opportunity of each party for future acquisitions of capital assets and income.
- (6) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits.
- (7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.
- (8) The value of the property set apart to each party.

(9) The standard of living of the parties established during the marriage.

(10) The economic circumstances of each party[, **including Federal, State and local tax ramifications,**] at the time the division of property is to become effective.

(10.1) The Federal, State and local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and certain.

(10.2) The expense of sale, transfer or liquidation associated with a particular asset, which expense need not be immediate and certain.

(11) Whether the party will be serving as the custodian of any dependent minor children.

* * *

(f) Partial distribution.—The court, upon the request of either party, may at any stage of the proceedings enter an order providing for an interim partial distribution or assignment of marital property.

Section 4. Sections 3505(d) and 3506 of Title 23 are amended to read:

§ 3505. Disposition of property to defeat obligations.

* * *

(d) Constructive trust for undisclosed assets.—If a party fails to disclose information required by **[subsection (b)] general rule of the Supreme Court** and in consequence thereof an asset or assets with a fair market value of **[\$500] \$1,000** or more is omitted from the final distribution of property, the party aggrieved by the nondisclosure may at any time petition the court granting the award to declare the creation of a constructive trust as to all undisclosed assets for the benefit of the parties and their minor or dependent children, if any. The party in whose name the assets are held shall be declared the constructive trustee *unless the court designates a different trustee*, and the trust may include any terms and conditions the court may determine. The court shall grant the petition upon a finding of a failure to disclose the assets as required **[under subsection (b)] by general rule of the Supreme Court.**

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§ 3506. Statement of reasons for distribution.

In an order made under this chapter for the distribution of property, the court shall set forth *the percentage of distribution for each marital asset or group of assets and* the reason for the distribution ordered.

Section 5. This act shall apply as follows:

(1) The amendment of the definition of “separate and apart” in 23 Pa.C.S. § 3103 shall apply to complaints served before, on or after the effective date of this paragraph.

(2) The addition of 23 Pa.C.S. § 3106 shall apply to premarital agreements executed on or after the effective date of this paragraph.

(3) The amendment or addition of 23 Pa.C.S. § 3323(c) and (c.1) shall apply to bifurcation proceedings commenced on or after the effective date of this paragraph.

(4) The amendment or addition of 20 Pa.C.S. § 2203(a) and (c) and 23 Pa.C.S. § 3323(d.1) shall apply to the death of one of the parties on or after the effective date of this paragraph irrespective of whether the divorce proceeding was commenced before, on or after the effective date of this paragraph.

(5) The addition of 23 Pa.C.S. § 3323(g) shall apply to bifurcation proceedings commenced on or after the effective date of this paragraph and cases in which one of the parties dies on or after the effective date of this paragraph.

(6) The amendment or addition of 23 Pa.C.S. § 3501(a)(3) and (a.1) shall apply to all equitable distribution proceedings irrespective of whether the proceeding was commenced before, on or after the effective date of this paragraph.

(7) The amendment of 23 Pa.C.S. § 3501(c) shall apply to all equitable distribution proceedings commenced on or after the effective date of this paragraph.

(8) The amendment or addition of 23 Pa.C.S. § 3502(a) introductory paragraph, (10.1) and (10.2) shall apply to all equitable distribution proceedings irrespective of whether the proceeding was commenced before, on or after the effective date of this paragraph.

(9) The addition of 23 Pa.C.S. § 3502(f) shall apply to all divorce proceedings irrespective of whether the action was commenced before, on or after the effective date of this paragraph.

(10) The amendment of 23 Pa.C.S. § 3505(d) shall apply to all equitable distribution proceedings irrespective of whether the proceeding was commenced before, on or after the effective date of this paragraph.

(11) The amendment of 23 Pa.C.S. § 3506 shall apply to all orders made on or after the effective date of this paragraph.

Section 6. This act shall take effect in 60 days.

APPROVED—The 29th day of November, A.D. 2004.

EDWARD G. RENDELL