

# Kay vs Kay Estate-Estate Of Divorcing Spouse Has Equitable Claim

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In a unanimous decision, the New Jersey Supreme Court recently ruled that the estate of a deceased spouse who died while her divorce matter was pending, was entitled to assert equitable claims against the surviving spouse. The case of *Kay v. Kay*, 405 N.J. Super 278 (App. Div. 2009), *aff'd*, \_\_\_\_ N.J. \_\_\_\_ (2010), was a logical extension of the Supreme Court's decision in *Carr v. Carr*, 120 N.J. 336 (1990) and a rejection of the case of *Kruzdlo v. Kruzdlo*, 251 N.J. Super. 70 (Ch. Div. 1990).

Mrs. and Mrs. Kay were married in 1973. It was a second marriage for both of them and each had children from their first marriages. There were no children born of this marriage. Mrs. Kay filed a complaint for divorce in July 2006, when she was 70 years old. Mr. Kay was 83 years old. In August 2007, Mr. Kay died leaving a will with specific bequests to his grandchildren and a nephew, with the remainder of his estate devised to his brother. After Mr. Kay's death, Mrs. Kay withdrew assets from joint accounts which she owned with Mr. Kay, leaving Mr. Kay's estate with insufficient assets to pay for his burial or attorney's fees.

The executor of Mr. Kay's estate sought a constructive trust to prevent the unjust enrichment that would allegedly occur if Mrs. Kay retained marital property beneficially belonging to Mr. Kay. The trial court denied the estate leave to substitute for Mr. Kay and file amended pleadings, and it dismissed the divorce action. The trial court determined that the result of Mr. Kay's death required the divorce action to terminate and left his estate with no recourse, under a strict reading of the law. On appeal, Mr. Kay's estate successfully argued that the trial court should have accepted the pleadings and considered whether the equities arising from the facts alleged warranted relief. The Appellate Division relied upon the reasoning in *Carr*, *infra*, where 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. The Supreme Court, in *Kay*, also rejected the holding of *Kruzdlo*,

where it was held that the estate of a deceased spouse was not entitled to assert equitable claims against the marital estate sounding in constructive trust or unjust enrichment

The Kay case was, basically, a reverse-Carr case. In Carr, the surviving spouse sought equitable relief. In Kay, the estate of the deceased spouse sought similar relief. Just as 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. The two separate statutory schemes sometimes leave one party with no statutory remedy through no fault of his or her own. In those cases, the Courts may fashion an equitable remedy.