Arizona Court of Appeals
Division One

LINDA VAN EMMERIK,

Petitioner,

vs.

THE SUPERIOR COURT OF MARICOPA COUNTY, and the Hon. Robert A. Colosi, a judge *pro tempore* thereof,

Respondents, and

PAUL M. SHAPIRO, as Personal Representative of the Estate of Jerry Lee Todd, Deceased, and KATHY JO TODD,

Real Parties-Respondent in Interest.

No. _____

Maricopa County Superior Court No. DR 97-17899

SPECIAL ACTION PETITION

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July 27, 1998

Arizona Court of Appeals

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No. 1 CA-SA _____

VanEmmerik. vs. Superior Court (Hon. R. A. Colosi, J. pro tem.*) and Shapiro & Todd*

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SPECIAL ACTION PETITION

JURISDICTION AND REASONS FOR ACCEPTING SPECIAL ACTION

The Court has jurisdiction of this action under A.R.S. § 12-120.21 (A) (4).

This case presents a startling procedural situation, and one for which Arizona's appellate courts should provide clear instruction. An action for the dissolution of the marriage of the late Jerry Lee Todd and Respondent Kathy Jo Todd had been commenced, but no decisions or rulings of any kind had been made therein, when Jerry Lee died on December 19, 1997. Jerry Lee left a will (under which Kathy Jo is not a devisee) which has been admitted to probate. The trial court has refused to dismiss the divorce action, but has proceeded with it exactly as if Jerry Lee were still alive, apart from ordering that the personal representative of Jerry Lee's estate be "substituted as the Petitioner" in the divorce action.

QUESTIONS PRESENTED

1. Is an action for dissolution of marriage under A.R.S. § 25-311 et seq. personal in nature?

2. Specifically, where such a marital dissolution action is commenced but before any court hearings, rulings or decisions the petitioning spouse dies, does the divorce action abate or does it survive?

FACTUAL BACKGROUND

Jerry Lee Todd filed an action for the dissolution of his marriage to Respondent Kathy Jo Todd in September, 1997. She filed an answer to his divorce petition, together with papers seeking temporary orders regarding spousal maintenance, etc., on December 18, 1997. Next morning (December 19, 1997) an order to show cause was issued, setting a hearing on Kathy Jo's request for temporary orders in the following month. Early in the afternoon of December 19, 1997, Jerry Lee died. Other than the automatic preliminary injunction against both spouses provided for by A.R.S. § 25-315, and the December 19 order to show cause (returnable in January, 1998), no orders were made prior to Jerry Lee's death.

The attorney who had been representing Jerry Lee Todd in the divorce action promptly suggested his former client's death. The trial court proceeded with the order to show cause hearing, stating:

> [T]he Court's interpretation of *Allen v. Allen* [129 ARIZ. 112, 628 P. 2D 995 (App. 1981)] gives the Court continuing jurisdiction on orders which were in effect prior to Petitioner's death, which orders include the [statutory] Preliminary Injunction and [the] Order to Show Cause issued on December 19, 1997.

The order to show cause proceeding continues today. Apart from entering an order naively "substituting" Jerry Lee's probate personal representative as the Petitioner in the divorce action, the trial court has refused to assign any significance to Jerry Lee's death. The OSC proceeding has widened to embrace, under the aegis of the divorce-case "temporary orders" hearing, such diverse issues as: (1.) the effect of a quitclaim deed given by Jerry Lee Todd to a third party (the Petitioner in this special action, who is also the residuary legatee under Jerry Lee's probated will) in an attempt to sever the spousal joint-tenancy title to the marital residence when it became obvious that he would not obtain a divorce before his cancer claimed his life; and (2.) the probate estate's liability

for child support payments, where no award of child support – permanent or temporary – had been made during decedent's lifetime.

ARGUMENT

I. An action for dissolution of marriage is personal in nature, and abates upon the death of a spouse-party.

Curiously, there appear to be no reported Arizona cases addressing this issue, apart from a brief dictum in *Allen v. Allen*, 129 ARIZ. 112, 628 P. 2D 995 (App. 1981) which seems to acknowledge abatement as the general rule. However, it is broadly accepted in American marital law generally that an action for divorce is personal to the spouses and abates upon the death of a spouse. *Jahnke v. Jahnke*, 526 N.W.2D 159 (Iowa 1994); *Cox v. Williams*, 177 WIS.2D 433, 502 N.W.2D 128 (1993); *In re Marriage of Hilke*, 14 CAL.RPTR.2D 371, 841 P.2D 371 (1992); *Ex rel. Rivera v. Conway*, 106 N.M. 260, 741 P.2D 1381 (1987); *Koester v. Administrator of Estate of Koester*, 101 NEV. 68, 693 P.2D 569 (1985); *Howsden v. Rolenc*, 219 NEB. 16, 360 N.W.2D 680 (1985); *Nelson v. Davis*, 592 P.2D 594 (Utah 1979); *Tiedman v. Tiedman*, 400 MICH. 571, 255 N.W.2D 632 (1977); *Butler v. Hicks*, 189 S.E.2D 416, 229 GA. 72 (1972); *Wood v. Parkerson*, 163 COLO. 261, 430 P.2D 467 (1967); *Daywalt v. Bertrend*, 10 OR.APP. 418, 500 P.2D 484 (1972); see also 24 AM.JUR.2D Divorce and Separation § 177.

Allen v. Allen, supra, is not an exception. In that case, after a full bench trial of a divorce case had been completed, and the court's decision on all issues announced and reflected in minute entries, but before the actual signing and filing of a formal decree of dissolution, one of the spouses died unexpectedly. It was admitted that if a formal written order reflecting the court's announced decision had been presented before decedent's death, it would properly have been entered and become effective at once. The Court of Appeals held that under A.R.CIV.P. 54 (e) and 58 (a), the "decision rendered" would provide an appropriate basis for entry of the decree *nunc pro tunc* – meaning that

the issue of abatement or survival was sidestepped because in contemplation of law the decree was issued before decedent's death.

II. Since final relief in the form of a decree of dissolution or separation is no longer a possible outcome of the divorce action, ancillary relief intended to protect the trial court's ability to provide such final relief is neither necessary nor appropriate, and cannot afford an independent basis for the exercise of ongoing jurisdiction in the divorce action.

What the trial court has been entertaining, at tragic cost and futility, is a preposterous attempt to tug on the bootstraps of *ad interim* relief so hard that the (nominally temporary) footwear provided by an order *pendente lite* might be suspended in mid-air forever, untroubled by the impossibility of ever contacting the *terra firma* of final adjudication.

The argument that the automatic preliminary injunction of A.R.S. § 12-315 is the equivalent of an *Allen v. Allen* completed-plenary-trial-resulting-in-announced-judicial-decision-of-issues is preposterous. The automatic preliminary injunction is obviously not in any conceivable sense a Rule 54 (e) "verdict or decision upon an issue of fact." And since the automatic statutory injunction exists by definition from the first moment of every divorce case, such reading of *Allen v. Allen* would cause the narrow exception of Rule 54 (e) finalization (or the Rule 58 (a) provision for *nunc pro tunc* entry of judgement, properly even more restrictively applied) to swallow up the general rule of abatement-upon-death-of-a-spouse. The Order to Show Cause which Respondent procured on the day Petitioner died provides even less basis for non-abatement. Properly speaking, an order to show cause is not an order at all; it is merely notice that the court will entertain some party's application for particular relief, and whatever opposition other parties may wish to present, at a specific date and time.

Moreover, it should be obvious that the power to grant ancillary and interim relief, which is only for the purpose of protecting, on an interim basis, the Court's jurisdiction and power to grant effective final relief, cannot continue to exist but instead

becomes a naked absurdity if, through extraneous and uncontrollable circumstance, the power to grant final relief is taken away from the Court. Perhaps this may be seen more clearly by considering the example of one of the "issues to be addressed," according to the trial court, at the continued hearing upon the return of the Emergency Order to Show Cause: "Whether Ms. VanEmmerik or Ms. Todd will be permitted to reside at the 5007 W. Piedmont residence pendente lite."

Pendente what *lite*? The probate proceeding is not a *lis*, and in any event the Laveen real property is not a probate asset and the probate proceeding will not involve or result in any determination, "final" or otherwise, as to the ownership of that property. The dissolution-of-marriage action, on the other hand, cannot result in a decree of dissolution since the marriage is already dissolved. It therefore cannot be finalized or brought to a close at all, except by order of dismissal. And if the death of Petitioner was not sufficient occasion for such dismissal, what shall be? The death of the other spouse? Or will the divorce action remain pending in perpetuity?*

RELIEF REQUESTED

The Respondent Court and Judge should be ordered to dismiss Maricopa County Superior Court cause number DR 97-17899 upon grounds of abatement.

DATED: July 27, 1998.

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Brian K. Stanley
Attorney for Petitioner Linda VanEmmerik

* Since VanEmmerik first pointed out that an action under A.R.S. § 12-1251 et seq. would provide an obvious, orthodox forum for determining the effect of the quitclaim deed given by Mr. Todd to Ms. VanEmmerik.. Kathy Jo has commenced such an action – but she still insists on her right to obtain a pendente lite determination of the entitlement to possession (pursuant to A.R.S. § 25-315 (B) and (C), presumably) in the *divorce* action.