Family Law Attorney Natalie Sears for the Journal Record - Impact of Death During Divorce

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Divorce rates for individuals 65 years of age and older have been on the rise over the past 10 years. Some of these cases end in a tragic way, where one spouse dies before a divorce can be finalized. In Oklahoma, if a spouse dies before a divorce is finalized (or legally pronounced by a Judge), the divorce case is legally abated, and the Court loses jurisdiction to finalize a divorce. See *Swick v. Swick*, 1993 OK 151, ¶ 6; see also *Pellow v. Pellow*, 1985 OK 88. The case then, as needed, is transferred to the probate court. The surviving spouse will retain their full inheritance rights under probate law. Surviving spouses are entitled to certain legal protections under Oklahoma law, including, but not limited to, electing a spousal share, homestead rights, and widow (spousal) allowance.

In the event that the deceased spouse passes without a will, the rules of intestate succession govern the amount of the deceased spouse's estate the surviving spouse will receive. *See* 84 O.S. § 213. There will then be a similar analysis of separate versus marital property as a couple has throughout the divorce process in order to ascertain the true value the surviving spouse is entitled to receive. Conversely, if a deceased spouse passes with a will and the surviving spouse is a devisee or legatee, that bequest will be honored. If the deceased spouse attempts to disinherit the surviving spouse, or provide less than what the surviving spouse would have been entitled to receive through intestate succession, then the surviving spouse has the opportunity to elect a spousal share, and take a one-half (1/2) interest in joint industry property. *See* 84 O.S. § 44.

If there is property held in the deceased spouse's name alone, it does not mean that the surviving spouse is not entitled to certain rights regarding said property. For example, a surviving spouse is entitled to remain in their homestead, so long as it remains their primary residence. *See* 58 O.S. § 311. Plus, any assets held within joint tenancy with the right of survivorship will automatically transfer to the surviving spouse, bypassing any will or the probate court. The same is true for accounts with specific beneficiary designations such as life insurance or retirement plans. However, this can be complicated by any ERISA based retirement plan. ERISA based retirement plans have specific rules and regulations that preempt

state law.

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