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LEIGH ANN FRAZER, Plaintiff vs. LARRY D. FRAZER,
Defendant, Franklin County Branch, CIVIL ACTION - LAW F.R.
1994 - 701

Frazer v. Frazer

discharge of equitable distribution in bankruptcy as basis for modification of alimony

1. Alimony may be modified upon changed circumstances of a substantial and continuing nature.
2. Question of whether discharge of equitable distribution constitutes a change in circumstances permitting modification of alimony is novel issue in Pennsylvania.
3. Wisconsin court has held that state's power to modify alimony does not frustrate fresh start objective of bankruptcy laws.
4. The divorce master in this case intended to give wife opportunity to obtain economic independence; both equitable distribution and alimony award were part of that scheme.
5. Fairness requires that wife's alimony be extended beyond period of four years to allow her to reach economic independence which was frustrated by bankruptcy discharge of equitable distribution.
6. Amount of alimony will be increased in deviation of support guidelines based on three factors: (1) discharge in bankruptcy decreased wife's assets and increased her liabilities, while it decreased husband's liabilities; (2) wife is left only with alimony which is taxable to her and deductible by husband; (3) due to the discharge of equitable distribution, wife lacks sufficient property to support herself and the children.

Bradley Griffie, Esquire, Attorney for Plaintiff

Deborah K. Hoff, Esquire, Attorney for Defendant

Timothy Wilmot, Master

OPINION AND ORDER

Walker, P.J., April 2, 1998:

Factual and Procedural Background

This case involves a petition by Plaintiff Leigh Ann Frazer ("plaintiff") to modify alimony and child support. Plaintiff and Defendant Larry Douglas Frazer ("defendant") were married on June 29, 1985. During the marriage, two children were born. On July 27, 1994, the parties separated and plaintiff filed for a divorce. Following a conference before a domestic relations hearing officer, a court order was entered awarding plaintiff \$39 per week in alimony and \$124.50 per week in child support. This was based on the support guidelines applied to defendant's net monthly income of \$2,075 and plaintiff's income of \$767.50 per month.

A hearing was held before Kathleen Walsh Cramer, Master, and on April 12, 1996, the master's report and recommendation was filed. (Plaintiff's exhibit 1). No exceptions to the report were filed, and the master's recommendation was accepted by court order dated April 25, 1996. (Plaintiff's exhibit 2). This order was amended on April 30, 1996 to correct the amount awarded in attorney's fees. (Plaintiff's exhibit 3). The order directed defendant to pay plaintiff, as equitable distribution of the marital assets, a sum of \$13,337. He was ordered to pay \$3,500 within ninety days of the order, and to pay the remaining amount in monthly installments over a period of twenty-four months. To ensure payment of these sums, defendant was ordered to execute a promissory note with a confession of judgment clause. In addition, defendant was ordered to pay the sum of \$4,975 to compensate plaintiff for her attorney's fees. The order furthermore continued the alimony award of \$39 per week, which was to terminate on the last day of November, 1997.

Defendant paid a total amount of \$1,546.14 on the sum due in equitable distribution and attorney's fees. As a result of defendant's failure to comply with the court order, he was found in contempt on December 6, 1996, and was ordered to pay the remaining sum of the equitable distribution, plaintiff's attorney's fees, and an additional \$400 in attorney's fees to prosecute the contempt petition, and to sign a wage attachment. (Plaintiff's exhibit 4). Three days later, on December 9, 1996, defendant filed a petition for bankruptcy. Both the equitable distribution award and the amount of \$4,975 owed in plaintiff's attorney's fees were discharged by the Bankruptcy Court. The alimony, child support and the obligation to pay plaintiff \$400 in attorney's fees were not discharged.

By order of court dated September 8, 1997, plaintiff's alimony was reduced from \$39 per week to \$33 per week, because of her increased earning capacity. Defendant's earning capacity remained the same at a net monthly income of \$2,075. Defendant's actual earnings are \$1,200 net per month, but because defendant voluntarily left his employment, his earning capacity was not changed by Domestic Relations. The child support was reduced from \$124.50 to \$120 per week. Defendant also pays \$18 per week to pay for the children's orthodontic expenses. Furthermore, defendant has to pay \$315 per month to the Bankruptcy Court for non-discharged debts.

Plaintiff is currently employed as a medical assistant earning \$520 net biweekly. She had to borrow \$5,292 in student loans to pay for her education as a medical assistant (plaintiff's exhibit 8), for which she is now paying \$65 per month. She also borrowed \$1,640 from her mother and \$3,150 from her sister, and she has not been able to pay her attorney's fees. (See plaintiff's exhibit 10).

On October 22, 1997, when the alimony payments were about to end, plaintiff filed a petition to modify alimony, seeking to extend the alimony indefinitely, and to increase it. The petition also sought to consolidate the appeal of the order modifying the child support. Pending a decision by this court, the alimony was extended. A hearing was held on February 2, 1998, after which counsel for both parties submitted letters setting forth their positions.

Discussion

1. Extension of Alimony Award

An order for alimony may be modified or reinstated "upon changed circumstances of either party of a substantial and continuing nature." 23 Pa.C.S.A. §3701(e). Plaintiff argues that the discharge of the equitable distribution award and attorney's fees constitutes a substantial change in circumstances entitling her to alimony for an extended period of time.

The Bankruptcy Code provides that certain debts are not dischargeable in bankruptcy. 11 U.S.C. §523. The federal code does not permit alimony, maintenance, and support to be discharged. 11 U.S.C. §523 (a)(5). However, it does not make an exception for an equitable distribution award. In this court's view, that is a serious flaw in the bankruptcy law. An equitable distribution award is as much a part of the whole scheme of support as alimony and child support. This is evidenced by the factors which the court must take into account in determining the amount of support, such as the relative assets and liabilities of the parties, and whether the party seeking alimony lacks sufficient property, including property awarded as equitable distribution. To discharge that obligation in bankruptcy leaves one of the spouses not only without his or her share of the assets acquired during the marriage, but also with a lower amount of support than otherwise may have been awarded. While the discharge in bankruptcy in the underlying case was, as argued by counsel for

defendant in this case, a perfectly legal way to seek a solution to defendant's debt problems, it resulted in the deprivation of plaintiff's fair share of her investment in the marriage. However, since this court cannot change the bankruptcy law or the discharge, this court must look at whether it can modify the alimony award based on that discharge.

The question of whether alimony may be modified because the equitable distribution was discharged in bankruptcy appears to be a novel issue in Pennsylvania. This court has been unable to find, nor has counsel for plaintiff cited any authority in Pennsylvania that has dealt with this issue. However, plaintiff has cited several decisions of other states. In a New Jersey case, the payment of an equitable distribution award to the plaintiff was stayed when the defendant filed for bankruptcy. *Siegel v. Siegel*, 243 N.J. Super. 211, 578 A.2d 1269 (1990). Plaintiff in that case filed for an increase in alimony because of the loss of income from the equitable distribution. The New Jersey court held that "every notion of fundamental fairness" lead the court to the conclusion that the bankruptcy discharge constituted a change in circumstances that dictated an increase in the plaintiff's alimony. *Siegel*, 578 A.2d at 1271. In a case from Wisconsin, cited by the New Jersey court, the wife was awarded alimony for 18 months and, as part of the equitable distribution, the husband was ordered to pay her a sum of money, her attorney's fees, and her credit card debts. *Eckert v. Eckert*, 144 Wis.2d 770, 424 N.W.2d 759 (1988). The equitable distribution award was subsequently discharged in bankruptcy. The Wisconsin court addressed the question of whether a state court may modify alimony solely because the bankruptcy court has discharged the property division obligations of the payor spouse without major damage to the "fresh start" objective of the federal bankruptcy law. *Eckert*, 424 N.W.2d at 761. The Wisconsin court stated that state courts have traditionally had the power to make, modify, and terminate provisions for spousal support, and that the exercise of that power does not frustrate the bankrupt's "fresh start." *Eckert*, at 762. Thus, the court held that a state court may increase a support obligation based upon discharge in bankruptcy of an equitable distribution award. *Eckert*, at 763.

This court agrees with the precedents set by other states that a discharge of an equitable distribution award in bankruptcy constitutes

a substantial change in circumstances permitting a modification of alimony. The master in her report stated that she recommended a disproportionate distribution of marital assets, giving 60% to plaintiff and 40% to defendant, based on the present disparity of income between the parties, the disparity in earning capacity, plaintiff's responsibility as a custodian of the two minor children, the uncertainty of plaintiff's income level after she completed her education, her contribution to the assets during the marriage, defendant's dissipation of marital assets since the separation, and age, health and education of both parties. (Master's report, p. 32-33). In addition, plaintiff was awarded alimony for a period of four years to give her time to obtain an education and employment. The master stated in her report that plaintiff's "economic independence is key to providing a healthy environment in which to rear the parties' two children." (Master's report, at 39). Both the equitable distribution and the temporary alimony award were part of this scheme. Thus, when the equitable distribution and attorney's fees were discharged in bankruptcy, the master's intent that plaintiff reach economic independence in four years could not be carried out. It is this court's opinion that the master would have awarded more alimony to allow plaintiff to obtain that independence had she known that plaintiff would receive virtually nothing of the equitable distribution award. Thus, this court finds that fairness dictates that the award of alimony be extended for an additional period of five years to allow plaintiff to reach the independence the master intended her to have but which was frustrated by the bankruptcy discharge. This court finds a period of an additional five years to be a reasonable period of time to allow plaintiff to pay off her debts and earn a sufficient income to support herself and the children.

2. Amount of Alimony

Plaintiff is currently receiving \$33 per week in alimony. This amount was determined based on the earning capacity of both parties which was applied to the support guidelines. Plaintiff argues that in addition an extension of the period for which alimony must be paid, she is also entitled to an increase in the amount of alimony.

Generally, the amount of alimony is based on a percentage of the differences between the incomes of both parties. Pa.R.C.P. 1910.160-3. Plaintiff argues that because the guidelines allow for

defendant's child support payments to be deducted from the income, her share of expenses for the children must also be deducted. This would increase the difference between the net incomes of both parties, and thus increase plaintiff's alimony. This court finds plaintiff's argument to be a novel one and very innovative. However, the guidelines are very specific in the computation of support, and do not mention the obligee's child care expenses. Thus, this court does not feel, in absence of any other authority supporting such a deduction, that it can increase plaintiff's alimony on that basis.

However, the Rules do permit the court to deviate from the support guidelines based on "relevant and appropriate factors." Pa.R.C.P. 1910.16-4(8). Such relevant factors have been set forth by the Divorce Code. 23 Pa.C.S.A. §3701(b). There are three factors in particular this court took into consideration in determining the amount of alimony. First, this court looked at the relative assets and liabilities of both parties. 23 Pa.C.S.A. §3701(b)(10). This court took into consideration that defendant owed plaintiff a debt of \$18,312 (equitable distribution and attorney's fees) which was discharged in bankruptcy. Plaintiff's assets thus are substantially less than they would have been without the bankruptcy discharge. Additionally, her liabilities are substantially higher because she is still responsible for her attorney's fees. On the other hand, defendant is now no longer obligated to pay that amount to plaintiff, and thus his liabilities are lower.

Secondly, this court considered the tax consequences of the alimony award. 23 Pa.C.S.A. §3701(b)(15). After the bankruptcy discharge plaintiff is left only with alimony to help her obtain economic independence. The alimony is taxable to plaintiff, but it is deductible from defendant's income.

Lastly, this court considered whether plaintiff, as the party seeking alimony, lacks sufficient property, including the property distributed as part of equitable distribution. 23 Pa.C.S.A. §3701(b)(16). The master in her report found that both parties contributed equally during the marriage to the acquisition, preservation, and appreciation of the marital assets. (Master's report, at 8). However, because of the bankruptcy discharge, plaintiff did not receive any of those assets. Furthermore, the master found that defendant failed to pay the mortgage on the marital home, resulting in a mortgage foreclosure

and a substantial financial loss on the sale of the home. (Master's report, at 9). Additionally, the master found that defendant took \$8,500 from a joint bank account, leaving only \$855 for plaintiff. (Master's report, at 8; 10). Thus, it appears to this court that plaintiff is left without any property from the nine-year marriage, while defendant dissipated marital assets and had his obligations to his wife discharged. Taking all these factors into account, this court finds it warranted to increase the amount of alimony to the level originally determined by the master at \$39 per week. This court realizes that the alimony and child support originally set by the master were based on a higher earning capacity than defendant is currently earning. However, this court will not reduce defendant's earning capacity because he has voluntarily taken a low paying job. If defendant cannot afford to pay the alimony and child support, this court suggests that defendant find a second job.

3. Child Support

This court finds that the amount of child support, based on the support guidelines, is sufficient. Because this court does not see any reasons to deviate from the child support guidelines, the child support in the amount of \$120 per week and \$18 weekly for orthodontic expenses will remain in effect.

ORDER OF COURT

April 2, 1998, after consideration of the evidence presented at the hearing and the letters submitted by counsel, this court enters the following order:

1. The alimony awarded to Leigh Ann Frazer will be extended for a period of five (5) years, from the first day of December 1997, until the last day of November 2002.
2. The alimony is increased from \$33 per week to \$39 per week, retroactively to October 22, 1997.
3. The child support order dated September 8, 1997, will remain in effect, requiring Larry Frazer to pay \$120 per week in child support and \$18 per week in orthodontic expenses.
4. Larry Frazer is ordered to pay Leigh Ann Frazer's attorney's fees incurred in this proceeding.