William H. Kaye, Esquire, Attorney for Defendant

OPINION AND ORDER

EPPINGER, P.J., November 7, 1983:

This is an action for a declaratory judgment brought to determine who should pay the principal and interest on a mortgage on property of the decedent, James M. Shaw, Jr. The plaintiff is Maryann Strait, the executrix of decedent's will, and the defendant is Patricia A. Slayton, who has a defeasible life estate. The condition in the decedent's will is that the life tenant must reside in the house as a sole, single adult. The will provides:

> I give, devise, and bequeath a conditional life estate in my residential property and my personal property contained therein to Patricia A. Slayton conditioned upon her residing in my house as a sole, single adult. Upon her leaving the house to reside elsewhere, cohabiting in my house with another adult, or her marriage, whichever comes sooner, then the remainder of my interest in my house and personal property shall pass into the rest, residue and remainder of my estate.

The remainder of decedent's estate is to be distributed to his heirs per stirpes.

The case was argued upon the complaint and facts stipulated between the parties. There was no answer filed.

The question of who should pay the interest can be disposed of easily. The law is clear that "Unless otherwise provided, as by will provision, a life tenant of property subject to encumbrances must pay the interest accruing during the continuance of his estate." 14 P.L.E. 75, Estates in Property, Sect. 69. The only remaining question is who has the obligation to reduce the principal debt. There has not been any distribution of the estate, so the executor contends the issue is between the executor and the life tenant. But a decision at this point would also have at the minimum a precedential effect upon the remaindermen. If for no other reason than for the sake of judicial economy, we find that the remaindermen should have been joined in the case. Should we decide that the life tenant is excused from paying any principal, the remaindermen may attempt to relitigate the matter, since they are not parties to this case.

It seems clear from the will that theirs is a vested interest. In *In re Thorne's Estate,* 344 Pa. 503, 25 A.2d 811 (1942), our Supreme

Court said "if there is a present right to a future possession, though that right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate. An unpossessed estate is vested, if it is certain to take effect in possession, by enduring longer than the precedent estate." *Id.,* at 517, 818. And under *Mains v. Fulton,* 423 Pa. 520, 523, 224 A.2d 195, 196 (1966), any party with an interest in a dispute must be joined as a party to the case. See also *Mohney Estate,* 416 Pa. 107, 204 A.2d 916 (1964); *Carlson v. Pa. General Insurance Co.,* 417 Pa. 356, 207 A.2d 759 (1965); *Bracken v. Duquesne Electric & Mfg. Co.,* 419 Pa., 493, 215 A.2d 623 (1966).

Since the remaindermen are indispensable to this action and neither plaintiff nor defendant has joined them as a party, we conclude that plaintiff should move for the compulsory joinder, of the remaindermen, pursuant to Pa. R.C.P. 2227(b). This is necessary because "the absence of an indispensable party goes absolutely to the court's jurisdiction and the issue should be raised sua sponte." *Tigue v. Basalyga,* 451 Pa. 436, 304 A.2d 119, 120 (1973); *Patwardhan v. Brabant,* 294 Pa. Super. 129, 439 A.2d 784 (1982).

ORDER OF COURT

November 7, 1983, the action for a declaratory judgment is denied because parties having an interest in the issue are not joined as parties plaintiff.

The plaintiff is ordered to move for the compulsory joinder of the holders of the remainder interests within twenty (20) days from this date unless the persons holding such interests voluntarily join in these proceedings.

LERIE V. LERIE, C.P. Fulton County Branch, No. 31 of 1982 - C

Divorce - Equitable Distribution - Remand to Master

1. A remand to a Master to reopen the record is entirely appropriate when material new evidence has been discovered, which could not have been discovered with reasonable diligence prior to the hearing.

2. Following a Petition to reopen, a Master's recommendation should not be set aside, but the record should be reopened to consider the new evidence.

David C. Cleaver, Esquire, Attorney for Plaintiff

William Jon McCormick, Esquire, Attorney for Defendant

Stanley J. Kerlin, Esquire, Master

OPINION AND ORDER

EPPINGER, P.J., November 9, 1983:

Ruth Lerie, plaintiff, filed a complaint for divorce from her husband, Robert Lerie, defendant, with this Court on February 18, 1982. Plaintiff then moved for the appointment of a Master to receive testimony on the issues of grounds for divorce, equitable distribution of the marital property, alimony, alimony pendente lite, counsel fees, and expenses. We appointed a Master, Stanley J. Kerlin, Esquire, of McConnellsburg, Fulton County, on March 29, 1982.

A hearing was scheduled for and held on July 12, 1982, by the Master. Appropriate notice was mailed to defendant because he had no attorney of record.

At the hearing on July 12, plaintiff appeared with counsel and witnesses. Defendant appeared without counsel, chose to represent himself, and presented no witnesses.

On May 5, 1983, the Master issued his report which recommended the following: First, that the plaintiff be granted a divorce a v. m. from defendant on the grounds of indignities to the person. Second, that the plaintiff be awarded as her equitable share of the marital property the parties' motel business, its furnishings, and 80 acres of land, which were determined to have a value of $90,000.[1] This award was made to plaintiff subject to all the liens, bills, and outstanding debts. Third, that the plaintiff's request for alimony, alimony pendente lite, counsel fees, and expenses be denied.

[1]Other items of marital property were also distributed between the parties but the motel, its furnishings, and the surrounding land are the focus of this disposition.

Prior to this hearing, on October 1, 1981, defendant was injured as a passenger in an automobile accident receiving among other injuries skull and face fractures. As a result, defendant had still not returned to work on the date of the hearing. He had been receiving monthly payments from his No-fault carrier since the accident, but these benefits were scheduled to cease in two months from that date. His doctor had determined that at that time he would be well enough to return to work. This information was considered by the Master by making the equitable distribution. The Master reasoned:

> The motel is Plaintiff's only source of income while the Defendant can presumably earn future income as a truck driver.[2] The economic circumstances of the parties, together with their present needs, the Master believes, justifies this award. (footnote added)

Since the hearing it has developed that defendant's injuries are apparently more severe than were thought at that time. It appears that defendant's injuries have resulted in a condition known as significant organic brain syndrome from injury to the deep peroneal nerve of the brain. His treating neurologist is of the opinion that defendant is now totally and permanently disabled from doing any kind of work.

Therefore, defendant has filed three exceptions to the report of the Master. The first is that the Master erred in recommending that plaintiff be awarded as her share of the marital property the motel business and the surrounding 80 acres. The second and third exceptions involved objections to the valuation of the motel and property at $90,000.

We turn first to defendant's exception to the equitable distribution of the marital property. In this regard, defendant petitions that we remand this issue to the Master in order to reopen the record to consider the change of circumstances and what effect this may have upon the Master's recommendation. We agree with defendant that it would be appropriate in this situation to remand to the Master in order to reopen the record to determine the extent of defendant's disability and if this should affect the Master's prior recommendation.

[2]Prior to the accident, defendant had been employed as a truck driver for Arrow Trucking.

The Pennsylvania Supreme Court determined that a remand to reopen the record is entirely appropriate when material new evidence has been discovered which could not have been discovered with reasonable diligence prior to the hearing. *Mishkin v. Temple Beth El of Lancaster,* 429 Pa. 73, 79, 239 A.2d 800, 804 (1968). See also *In re Seidel Estate,* 10 D&C 3d 794, 796 (Berks 1979).

Since the petition to open lies within the equitable discretion of the court, the recommendations of the Master should not be set aside but rather the record should be opened for the purpose of considering the new evidence, when sufficient cause exists for such action. *Nixon v. Nixon,* 329 Pa. 256, 263, 198 A. 154, 158-9 (1938). As was stated in *Ragazinsky v. Ragazinsky,* 78 Schuylkill L.R. 81, 83 (1982):

> It is academic that the court cannot consider factual allegations contained in legal memoranda of the parties. The purpose of this basic and fundamental rule is that the factual allegations are unverified and the opposing party has no opportunity to cross examine or otherwise test the validity of the statements.
>
> We have no choice in this matter but to remand the matter of the Master to develop testimony regarding the alleged change of circumstances which occurred subsequent to the Master's hearing.

We are of the opinion that the extent of defendant's injuries could not reasonably have been determined prior to the hearing and that sufficient cause exists to remand this issue to the Master to reopen the evidence.

We turn now to defendant's second and third exceptions. In these, defendant argues that the Master erred in finding the value of the motel and land to be $90,000 and in the factors considered in reaching this conclusion.

Generally, the reviewing court has a duty to make "a complete and independent review of all the evidence," however, the court should give the Master's report the fullest consideration. *Rorabaugh v. Rorabaugh,* 302 Pa. Super. 1, 11, 448 A.2d 64, 69 (1982). This is so because the Master as the one hearing all the testimony and evidence is in the best position to make a proper evaluation. Id.

While the Master had no reason not to accept the value placed on the motel by the plaintiff's testimony, since it was

uncontradicted, it remains that at the time of the hearing the defendant has no reason to believe that he could not work and therefore that he had a source of income. The alleged new evidence if proven would materially affect his earning ability and there is cause now to permit the introduction of additional evidence to establish the value of the property. Its true value may be more important because it may be the only income resource available to both parties.

The Master should require expert testimony on the value of the property, received testimony of the operating income and expenses for the last five years, together with all other pertinent information that would help the Master and the court to determine the true value of the property. Under the present circumstances the defendant should be permitted to introduce valuation evidence and the plaintiff given the right to supplement her evidence if she desires to do so.

ORDER OF COURT

November 9, 1983, the cause is remanded to the Master for the purpose of taking additional testimony to determine the defendant's health and earning capacity and additional testimony on the value of the motel property and make supplemental recommendations.

KETO v. SCHAEFER, ET AL, C.P. Franklin County Branch, Volume 7, Page 257

Equity - Incorrect Deed Description - Rules of Priority - Intention of Parties

1. When it is clear that mistakes have occurred somewhere in a deed description, the normal rules of construction and priority become irrelevant.

2. When the normal rules of construction are irrelevant, a court may render a decision which is most consistent with the apparent intent of the original grantor.

3. Where there is a clash of boundaries in two conveyances from the same