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Daversa v. Daversa

TANYA LYNNE DAVERSA, Plaintiff,
v. JAMES RAYMOND DAVERSA, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action — Law, F.R. 1997-545

Modification of a Final Order of Equitable Distribution

1. The Divorce Code makes no provisions for a "modification" of a final decree of equitable distribution and in fact it is settled law that such a decree is non-modifiable. However, 23 Pa.C.S. §3104(a)(1) grants the courts continuing jurisdiction over the determination and disposition of property rights and interests between spouses.
2. 23 Pa.C.S. §3104(a)(1) allows the court to modify a final order of equitable distribution to effectuate its original intent and equity for the parties.
3. Equitable adjustments can be made to the manner in which assets are distributed or payments are made, to effectuate the court's intention in the original award of equitable distribution, but the basic terms of the award itself may not be changed.
4. The value of any asset, which is the subject of the original equitable distribution award, cannot be modified.

Appearances:

Samuel Andes, Esq., *Counsel for Plaintiff*

William Cramer, Esq., *Counsel for Defendant*

OPINION

Van Horn, J., April 2, 2004

Background

1. On September 16, 1997, this action began with the filing of a Complaint in Divorce.
2. On February 27, 2002, after years of litigation detailed in the Court's Opinion of February 6, 2002, the Court entered a Final Order of equitable distribution.
3. The Order of February 27, 2002, was appealed and the Superior Court issued an Opinion and Order dated October 24, 2003, which was filed with the trial court on December 3, 2003.

4. On September 26, 2003, Wife filed a Petition to Enforce the Order of February 27, 2002.
5. On October 16, 2003, Husband filed an Answer to Wife's Petition and a Counterclaim for modification of the February 27, 2002 Order.
6. On October 29, 2003, Wife filed an Answer to Husband's Counterclaim.
7. On February 4, 2004, the parties filed a Joint Petition for Resolution of Pending Petitions and Issues Upon Remand.
8. On February 4, 2004, an Order was issued, which instructed the parties to file briefs with the Court addressing the legal issue raised in the Joint Petition. The parties agreed to have the Court decide the legal issue based on the briefs.

Discussion

The parties raised numerous issues in the Joint Petition for Resolution of Pending Petitions and Issues Upon Remand. However, only one issue was to be briefed by the parties and only that issue is presently before the Court. The issue is whether the Court has the authority to modify now its final equitable distribution order dated February 27, 2002, on the basis of economic changes which have occurred since that date.

The Divorce Code makes no provisions for a "modification" of a final decree of equitable distribution, and in fact it is settled law that such a decree is non-modifiable. *Romeo v. Romeo*, 611 A.2d 1325, 1327 (Pa.Super. 1992). However, the Code provides the following:

The courts shall have original jurisdiction in cases of divorce ... and shall determine, in conjunction with any decree granting a divorce ... the following matters, if raised in the pleadings, and issue appropriate decrees or orders with reference thereto, **and may retain continuing jurisdiction thereof:**

1. the determination and disposition of property rights and interests between spouses ...

23 Pa.C.S. §3104(a)(1)(emphasis added), *Id.*

The parties both agree the above section of the Divorce Code provides the Court with continued jurisdiction over the matter of equitable distribution. However, the parties dispute the extent to which the Court, acting pursuant to 23 Pa.C.S. §3104(a)(1), can modify a final order of equitable distribution. Both parties rely on the same precedent to support their respective positions.

In *Romeo*, *supra*, the trial court modified certain aspects of the equitable distribution provisions incorporated into the divorce decree upon the request of Wife. *Id.* at 1326. Wife was ordered to pay the first and second mortgages, taxes and insurance of the marital residence until both parties wanted to sell. Also, a commercial lot, which the parties owned, was to be listed for sale at a price both parties agreed upon. *Id.* When the properties were sold, the proceeds were to be split 66.66% in favor of Wife and 33.33% in favor of Husband. *Id.* Neither party appealed the Order, and the trial court did not retain jurisdiction of the case. *Id.* at 1326, 1327. Eight months after the original Order was entered, Wife filed a motion to modify it, claiming the parties had listed both properties but the asking prices were no longer realistic and she could not afford to pay the mortgages, taxes, interest and insurance. *Id.* at 1327.

Wife claimed Husband would not agree to lower the asking prices and asserted that Husband's refusal to list the marital residence at a reasonable price had, in effect, denied her the benefit of the equitable distribution. *Id.* at 1328. In resolving Wife's motion, the trial court conveyed title of the commercial property to Husband and the marital residence to Wife which, in essence, effectuated the same split as before without requiring the parties to work together. *Id.*

The Superior Court *sua sponte* raised the question of whether the trial court improperly modified a final equitable distribution order where jurisdiction was not reserved. *Id.* The Superior Court determined the trial court acted consistent with 23 Pa.C.S. §3104(a)(1) and affirmed the trial court's decision, saying "it provides an equitable resolution of the parties' dilemma." *Id.*

In *Wagoner v. Wagoner*, 648 A.2d 299 (Pa. 1994), Husband asked for modification of alimony payments because he could no longer afford the payments due to his loss of a job when his employer filed bankruptcy. *Id.* at 300. The trial court denied his request and the Superior Court affirmed. *Id.* at 301.

The Supreme Court stated that while described as alimony, the payments from Husband to Wife really were part of an equitable distribution scheme. *Id.* at 302. The court then said, "absent the availability of such payments, the planned equitable distribution lost the flavor of equity, leaving the court no alternative

but reexamination of the original distribution.” Id.

The Supreme Court determined that based on (1) the limited time between the entry of the order and change in circumstances, nine months, (2) the fact that a major asset remained undistributed at the hearing, and (3) because the lower court’s directions were still not finalized, the directions of the lower court could be “molded to overcome the threat to its original intention.” Id.

The court remanded and said Husband’s petition should be treated as a petition for special relief and the trial court should look at “the stock holdings which had not yet been distributed ... along with the payment order, to determine the viability of applying 23 Pa.C.S. Section 3502(a)(4), or some other section of the statute which would achieve the equity sought after by the court.” Id. at 303. The court said, “equity provides that the court treat as done that which should have been done.” Id.

In *Lowenschuss v. Lowenschuss*, 683 A.2d 1214 (Pa. Super. 1996), the trial court, in distributing marital property, granted Wife 38.7% of Husband’s pension plan. Id. at 1215. Husband did not pay Wife and after filing for bankruptcy Husband said the pension plan was exempt from Wife’s claim under ERISA. Id. Wife asked the trial court to restate the equitable distribution order as a QDRO so as to preserve her interest in the pension plan. Id. The trial court did not feel it was within its jurisdiction to modify the order as the order was entered four and one-half (4½) years before Wife’s request. Id.

The Superior Court said the trial court did have jurisdiction as “our own Supreme Court has held that such a petition can be heard and equitable modifications can be made to the decree in order to effectuate the court’s intention in distributing the marital property.” Id. at 1216. The Superior Court cited *Romeo*, *supra*, and *Wagoner*, *supra*, in saying “the modification was necessary to carry out the equitable distribution order and give the parties the benefits they were entitled to under the equitable distribution order.” Id. The court concluded that, “conditionally modifying the equitable distribution order to alleviate that problem [Wife’s problem of potentially losing her interest in bankruptcy court] is within the trial court’s jurisdiction.” Id.

In *Simeone v. Simeone*, 1998 WL 295551 (Bank.E.D.Pa.), the Bankruptcy Court refers to its earlier decision, *Simeone 1*, in which the court issued an Opinion and Order, which provided an equitable distribution of the parties’ property. The parties, at the time of their separation, owned three parcels of real estate purchased in joint names during their marriage. Id. at 1. In equitable distribution, Wife was awarded the two triplexes (referred to as “Windemere” and “Union”) and Husband was allowed to retain the business property. Id. Husband would not give Wife the deed to Union which included a small garage (“the Garage”). Id. at 2. The Garage was part of the present Union property description but it adjoined Husband’s business and he had used it as part of the business for years. Id. Husband’s use of the Garage had not been relayed to the court originally. Id. Husband filed to have the original equitable distribution order modified such that his business would be kept intact. Id. Wife claimed the change would be an impermissible “modification” of an equitable distribution order. Id. at 5.

The court cited *Wagoner*, *supra*, and *Romeo*, *supra*, in saying that “an equitable distribution order can be modified, but only under the standards applicable to allowance of ‘special relief’ under Pa.R.C.P. 1920.43(a).” Id. With this in mind, the court, after considering having Husband compensate Wife for the value of the Garage, then thought about its original intentions in *Simeone 1* and acknowledged that if it knew then what it knew now in regards to Husband’s use of the Garage for his business, it would have awarded Husband the Garage as the court “meant for the Debtor to retain his business intact.” Id. at 4. Because that is what the court would have done in the first place had it known all the facts, that is what it deemed fair to do at this point. However, the court did not clarify its order from *Simeone 1* because the court wanted Husband to have the chance to exercise an option to buy which was part of the original order. Id. at 5. The court did state, however, if it did modify the order, it would be “simply clarifying and adding to the order ... in light of subsequent developments which have been brought to our attention.” Id. The court would not be reallocating property awarded to Wife but rather would be clarifying its intentions with respect to the Union property and the Garage. Id.

Based on the above cases, both parties agree basic terms, such as the percentage of distribution, cannot be changed and the parties agree adjustments can be made. However, the parties dispute the meaning of the term “adjustments.” Wife claims “equitable adjustments can be made to the manner in which assets are distributed or payments are made, to ‘effectuate the court’s intention’ in the original award of equitable distribution, but the basic terms of the award itself may not be changed.” Brief at 3.

Wife points out the following about the above cases in support of her claim. In *Lowenschuss*, *supra*, the Superior Court, knowing the trial court originally intended for Wife to benefit from Husband’s pension plan, remanded the case to the trial court in order for the trial court to rename the award so Wife would receive the benefit the court intended. In *Simeone*, *supra*, the Bankruptcy Court had originally intended that Husband keep his business intact so were ready to restate the order to effectuate such a result. In both

Wagoner , *supra* , and Romeo , *supra* , where a party could not make cash distributions as originally intended, the courts called for adjustments. However, as Wife points out in this case, it is important to note that none of the courts in any of the above cases discussed revaluing any assets.

Husband claims the courts have made more than minor adjustments to effectuate equity between the parties. Husband claims that in Wagoner the trial court was instructed to reexamine the current state of Husband's situation and suggests that that may mean the court is to revalue assets if necessary to effectuate economic justice. However, while a reexamination was called for in Wagoner, the court directed the reexamination by instructing the trial court to look at assets yet undistributed and at the payment order.

In the present case, the Court knows of no asset yet undistributed. Furthermore, Wife does not disagree that the manner in which payment is distributed is a legitimate issue.

Also, Husband claims that in Romeo , a basic term was changed in that it went from a liquidation of marital property to a split of assets. He claims it is within this Court's power do what the court in Romeo did by flipping the method of distribution. In the present case, Husband says the Court should consider changing this distribution from in kind to a liquidation of marital property. Husband fails to take into consideration a huge difference between the present situation and the situation in Romeo. In Romeo, the change from a liquidation of marital property to a split of assets still provided each party with essentially the same split, not only in terms of percentage but also in terms of value, as the court had originally intended.

In the present case, the major asset, the marital corporation, was assigned a value based on the most concrete information the Court received, which resulted in a 1997 valuation date. Furthermore, the amount of money Husband was ordered to pay Wife was determined based on the 1997 valuation. In asking the Court to now liquidate the corporation and split the proceeds, Husband is in effect asking the Court to revalue and split the proceeds of the corporation based on its current value as there is no way to liquidate that which was there in 1997. There is nothing equitable about such a revaluation because if the Court is to accept Husband's representation of the current value of the marital corporation, the current value is much less than in 1997.

It is clear that underlying Husband's request that the Court modify the final order of equitable distribution is his desire to have a revaluation of the marital corporation. He asks for a revaluation based on the cases as set forth above, in particular Romeo and Wagoner. The Court, in considering whether it will modify its Order, will not hear anything dealing with the revaluation of the marital corporation for several reasons. First, the Superior Court, in its Opinion of October 23, 2003, stated that this Court did not abuse its discretion in applying the 1997 valuation date. Second, none of the cases as set forth above allow the Court such broad power in modifying a final order of equitable distribution. Third, while Husband claims he is not benefiting from the equitable distribution scheme, if a party could come in and request that an equitable distribution order be modified every time life's circumstances change, the courts would be overwhelmed. This is the primary reason why final equitable distribution orders are generally not modifiable. Furthermore, if the order were modified to reflect the current value of Husband's assets and in a year or so business was to pick up, Wife could then argue that she should be allowed to petition, as equity is not then being done for her, and a potentially never-ending cycle of litigation would be set in motion.

Conclusion

The Court has authority, pursuant to 23 Pa.C.S. §3104(a)(1), to modify its final equitable distribution order dated February 27, 2002, on the basis of economic changes which have occurred since that date. However, the Court does not have unrestrained authority and can only modify its order of February 27, 2002, to effectuate the intent of the original order. In that vein, the Court will consider testimony regarding Husband's ability to pay the equitable distribution award and Husband's proposals on how to restructure payments. However, the Court will not consider revaluing the marital corporation.

ORDER OF COURT

And now this 2nd day of April, 2004, upon consideration of the parties' Joint Petition for Resolution of Pending Petitions and Issues upon Remand, the parties' briefs, a review of the record, and a review of the applicable law, it is hereby ordered as follows:

1. The Court will not revalue the marital corporation.
2. Counsel for Husband is directed to request, within fourteen (14) days of this Order, the scheduling of a Pre-Trial Conference to define all outstanding issues to be resolved at the hearing scheduled for June 7, 2004, including issues on remand from the Superior Court. Each party shall submit a Pre-Trial Memorandum in compliance with 39-212.3, detailing the specific relief sought by each party.

3. At the hearing scheduled for June 7, 2004, the Court will hear the following:

A. Testimony related only to Husband's ability to pay the amount awarded Wife in the Order of February 27, 2002; and

B. Alternative payment plans offered by Husband; and

C. Matters for remand.

1. Whether the Court can modify its Final Equitable Distribution Order on the basis of the facts and circumstances which occurred after the Order was entered and, if so, what procedures and/or hearings are appropriate for the adjudication of such modification.
 - Whether the value of the marital corporation distributed to Husband should be adjusted on account of possible sale discounts and, if so, what adjustments should be made and what procedures followed for the adjudication of this issue.
1. Whether the Court should continue Wife's alimony payments until Husband has paid the final equitable distribution award to which Wife is entitled or should those payments cease at some other time.
 - Whether the Superior Court's remand Opinion requires the Court to recalculate the value of the corporation, or, alternatively, Wife's distribution from the corporation based upon a rate of return of thirteen and three tenths (13.3%) percent and, if so, for what period of time.