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Kuhlwind v. Kuhlwind

JEFFREY L. KUHLWIND, Plaintiff,
v. NOREEN KUHLWIND, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Civil Action — Law, No. 53–2002

Exceptions to master's report

1. A master's report is advisory only; the court must make an independent review of the record to determine whether the master's findings and recommendations are appropriate, while at the same time, the court's scope of review is limited by the evidence received by the master.
2. Husband's exception that the master failed to divide certain items of personal property and wife's pension according to the terms of a post-separation agreement, was dismissed where husband waived his equitable distribution claims by not raising them before the master.

Appearances:

Jeffrey L. Kuhlwind, *pro se*

Barbara B. Townsend, Esq., *Counsel for Defendant*

OPINION

Herman, J., May 14, 2003

Introduction

Before the court are plaintiff/husband's exceptions to the report and recommendation of the divorce master. The parties submitted briefs and appeared for oral argument. This matter is ready for decision.

Background

Husband filed a complaint seeking divorce, APL and alimony. Wife petitioned for the appointment of a master to hear those claims, as well as the issue of counsel fees and expenses. Neither party requested the master to address division of property or any separation agreement between them.

The master recommended that husband's alimony claim be denied based on his health, earning capacity and other relevant factors. He also recommended that wife's obligation to pay APL under a May 7, 2002 Order terminate as of November 19, 2002, the date on which husband's counsel was allowed to withdraw from the case. Wife had appealed the Order and the support proceeding was stayed and payments deposited into escrow pending the master's recommendation on that issue. The master recommended that all deposits made between and including May 7 and November 18 be released to husband, minus half the

transcript preparation fee. Wife was to be remitted all payments she deposited after November 19.

The master further recommended that each party retain any items of personal property currently in their respective possession, with the exception of property titled to a specific party, in which case the titled party should receive that item.

Discussion

Before the court are husband's three exceptions. The first is that the master erred in finding that husband resides in York County when in fact he resides in Adams County. This is a non-material error which we will correct in the Final Order.

Husband next takes exception to the fact that the master did not address issues of equitable distribution. Specifically, husband faults the master for failing to enforce an agreement signed by the parties shortly after separation. He attached the agreement to his brief. It states which party is to receive certain items of personal property and also indicates that wife's pension is subject to division. Husband requests a hearing de novo on these matters, which he characterizes as matters of equitable distribution.

It is well-established that a master's recommendation is advisory only. The court must make an independent review to determine whether the master's findings and recommendations are appropriate. *Tagnani v. Tagnani*, 654 A.2d 1136 (Pa.Super. 1995). At the same time, the court's scope of review is limited by the evidence received by the master. *Cunningham v. Cunningham*, 548 A.2d 611 (Pa.Super. 1988); *Trembach v. Trembach*, 615 A.2d 33 (Pa.Super. 1992). A de novo hearing at this juncture is inappropriate.

In reviewing this matter, we note that evidence was presented to the master about a dog breeding and exotic animal sales business which husband (and, to a lesser extent, wife) operated during the marriage. Husband asserted at the hearing that he and wife had reached an agreement after separation which divided between them certain items related to the business. He told the master that wife did not abide by the agreement and retained some animals and equipment and that her refusal to relinquish them compromised his ability to support himself, prompting him to seek alimony and APL. He now objects to the recommendation that whichever party currently has possession of an item should retain it, aside from property titled in a particular party's name. He requested at oral argument that five dogs and five kennels be awarded to him as part of equitable distribution.

It is clear from the record that the master heard evidence about the breeding and sales business only insofar as it was relevant to determining whether husband was entitled to alimony based on his assertion that he is unable to fully support himself because of health problems and lack of job skills. That evidence was also relevant to whether husband was entitled to any of the funds placed in escrow in connection with his APL claim and wife's support appeal.

Despite ample opportunity, husband did not preserve the issue of equitable distribution or any separation agreement during the master's proceedings. That issue was not included in his complaint or with the wife's petition for the appointment of the master and husband did not petition to amend his complaint or the appointment to include a claim of equitable distribution in the master's commission. Husband himself testified that his goal was simply to recoup the financial losses he suffered when wife allegedly denied him access to business-related items. (N.T. January 7, 2003, pp. 13-14.) Although the master denied husband's claim for alimony, the master did address husband's APL claim by recommending that he receive all monies deposited into escrow between May 7 and November 18, 2002, minus his share of the transcript fee. The court will not now consider the specific item-by-item division contained in a separation agreement which was not properly brought before the master. Furthermore, we see no reason to disturb the master's recommendation that all personal property not titled to a particular party's name remain with the party currently in possession.

Husband's final exception is to the master's failure to address the division of wife's pension from her job with the Pennsylvania Department of Agriculture in violation of the separation agreement which refers to his right to a share of the pension. However, as discussed above, husband did not raise this issue in his complaint and did not petition to amend the master's commission to include this issue, nor did he even attempt to present evidence on it at the hearing. Husband therefore waived any rights to this asset and is not entitled to revisit it at this stage of the proceedings.

The court hereby dismisses husband's exceptions and adopts the findings and recommendations of the master, with the exception of correcting the findings as to husband's county of residence and the master's error in stating that the issue of counsel fees and expenses was not an item before him.

Now this 14th day of May 2003, this matter having come before the court pursuant to plaintiff's exceptions to the report and recommendation of the master in divorce, and the court having reviewed the record and considered both written and oral argument of the parties, hereby orders and decrees that:

1. Plaintiff Jeffrey L. Kuhlwind and defendant Noreen Kuhlwind are hereby divorced from the bonds of matrimony.
2. Plaintiff's request for alimony is denied.
3. The court's Order of May 7, 2002 directing defendant to pay alimony pendente lite in the amount of \$249.47 per month is affirmed from the date of plaintiff's filing for APL through and including November 18, 2002. The court terminates defendant's obligation to pay APL effective November 19, 2002.
4. The Domestic Relations Office of Fulton County is directed to reimburse to defendant all amounts held in escrow which are not owed to plaintiff pursuant to the preceding paragraph of this Order. The court further directs that defendant receive an additional \$246.00 from the APL held in escrow as reimbursement for one-half of the master's commissioning fee and one-half of the cost of the transcript. The remaining balance shall be released to plaintiff.
5. The parties shall retain all personal property currently in their respective possession and control, except that any items of personal property or exclusively titled assets, including but not limited to motor vehicles, guns, or exotic animals for which the Commonwealth issues specific titles, shall be returned to the titled owner immediately. The titled owner of said property shall be solely responsible for the transport and pick up of any item to be received under this Order.
6. All items received under this Order shall be free and clear of any claims from the opposing party.
7. Any liability to any third party associated with any asset received or retained by a party under this Order shall be the sole obligation of the party receiving/retaining said asset.
8. All debts shall be the sole responsibility of the party in whose name said debt was incurred.
9. This court retains jurisdiction to enforce the provisions of this Order.
10. The court shall impose counsel fees and costs upon either party if same are incurred in the enforcement of this Order.
11. The court approves the master's report and recommendation with the following modifications:
 - a. Paragraph I(1) of the report which states that husband's county of residence is York County is hereby corrected to state that husband lives in Adams County.
 - b. Paragraph II(14) of the report which states that the master could not hear the issue of counsel fees, costs and expenses "since no claim was ever filed by either party" for those fees and expenses, is a misstatement insofar as the master did in fact address that issue through his findings and recommendations in connection with husband's APL claim.

The parties filed their affidavits of consent and waivers of notice at the hearing, and therefore the master was not required to hear evidence on the issue of divorce.

23 Pa.C.S.A. section 3701(b).

Husband was initially represented by Attorney Clinton Barkdoll, Esquire. Attorney Barkdoll was permitted to withdraw as counsel after following the appropriate petition procedure as set forth in 39 th Jud.Dist.C.R. 39-1012. Husband represented himself thereafter.

Husband also initially objected to the finding that the date of final separation was December 31, 2001 and not January 16, 2002. This objection has no merit insofar as husband testified at the master's hearing that he left the marital residence on or about January 1, 2002. (N.T. January 7, 2003, p. 16).

Husband also objected to the master's comments that he could not resolve the claim for counsel fees and expenses insofar as the master did in fact address that issue and made a recommendation as to husband's APL claim. This is a minor inconsistency in the master's report. At any rate, husband indicated at oral argument that he does not object to the master's proposed division of the escrow account, including the deduction of half of the transcription fee chargeable to husband.

Pa.R.C.P. 1920.55-3(c), which provides that a party aggrieved by a master's findings and recommendations has the right to demand a hearing de novo before the court, does not apply to this case insofar as this

Judicial District has adopted Rule 1920.55-2, with subsection (c) providing for **argument** on exceptions, not a hearing de novo. Although under Rule 1920.55-2 the court does need to make a complete and independent review of the report and recommendation, the court is confined to reviewing whatever evidence was presented to the master.

We are also constrained to point out that the very agreement which husband now wants to use to obtain a portion of wife's pension contains a provision whereby each party foregoes their right to seek spousal support or alimony from the other party. It is disingenuous for husband to now demand enforcement of the agreement after he himself made claims for alimony and APL and was successful in obtaining APL.