

Franklin County Legal Journal

Vol. 27, No. 21, pp. 39-49

Keller v. Keller

ANNETTE C. KELLER, now ANNETTE C. PINE, Plaintiff
v. ANTHONY W. KELLER, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action — Law, No. 2007-1817

Divorce; Exceptions to master's report and recommendation; Building erected by the parties during the marriage on land of a third party, the husband's father

1. A master's report is advisory only. The court must make an independent review of his findings and recommendations in order to determine whether they are supported by the record and will effectuate economic justice between the parties. The court must give substantial weight to the master's findings as to credibility, but the court is not bound by the master's credibility findings because in divorce cases, the evidence must be considered de novo at every stage of review. The court is limited in its review to the evidence which was available to the master.

2. A potential inheritance cannot be a factor in equitable distribution because it is merely speculative and cannot be accurately valued.

3. Where the parties invested substantial marital monies to erect a commercial building on husband's father's land with the understanding that husband would receive the land eventually from his father as an inheritance, and, in the interim, husband was permitted to use the property rent free for his business and paid all attendant costs, and the two men always had a good relationship, husband's interest in the property is more than just an expectation of an inheritance insofar as his interest had already been constructively received by husband and therefore excluding that asset from the marital estate would be unjust where the only evidence of the building's value of \$98,000 came from husband himself.

Appearances:

Julie Gray Dorsett, Esquire, *Counsel for Plaintiff*

Michael B. Finucane, Esquire, *Counsel for Defendant*

OPINION

Herman, P.J., June 29, 2009

Introduction

Before the court are husband's exceptions to the master's report and recommendation. The main bone of contention is the master's treatment of a building which was constructed by the parties during the marriage to house husband's carpentry business. The building was erected on land owned not by the parties but by husband's father. Husband also takes exception to the master's calculation of hypothetical costs associated with selling the marital home. Finally, husband alleges the master erred in his approach to cemetery plots owned by the parties. The parties agreed to forego oral argument and submitted their briefs to the court. The matter is ready for decision.^[1]

Background

The parties were married on August 23, 1986 and finally separated on May 12, 2007 when husband left the marital home which is located at 6994 Gehr Road, St. Thomas, Franklin County, Pennsylvania. Wife remains in the home while husband resides in Chambersburg. Wife prefers to stay in the marital home and husband does not object to that. As of the time of the master's hearing, the parties' son Austin who was born January 13, 1994 lived with wife, and husband was seeking primary residential custody. The parties later reached an agreement set forth in an Order dated November 10, 2008 that husband would have primary residential custody, with wife having partial residential custody. (No. 2007-3014.) Austin is now 15 years old. The particulars of Austin's living situation are not critical to this litigation before the master.^[2]

Preliminarily the following factors which the master was required to consider under 23 Pa.C.S.A. §3502 are not in contention: The parties are both in their mid-40's and in good health. This was a first marriage for both. Neither party contributed to the education, training or increasing earning power of the other party. The parties should be able to each maintain a standard of living comparable to what they had during the marriage. There are no unusual tax ramifications associated with the proposed distribution of the marital estate. In addition, the parties agree the master made a typographical error on page 10 of his report when he stated "[t]he parties agreed that the Master should consider that there is a 15% capital gains tax liability related to this asset." (Stipulation #19, Joint Exhibit 1.) This statement does not relate to this case and will be stricken from the master's findings.^[3]

Wife is employed by Electronic Data Systems and works at Letterkenny Army Depot in Franklin County on a government subcontract. She has worked for EDS since 1982. For the 2007 tax year, her gross income was \$55,310 and her net monthly income was \$3,437.87. Wife has health insurance through her employment which covers herself, husband and Austin for \$260 per month. Husband will have to purchase his own health insurance after the court signs the divorce decree.

Husband has worked a variety of jobs over the course of the marriage. His core income-producing skills lie in the fields of construction and building custom cabinetry and other office furniture. He went into business for himself as a cabinet maker in 2001. In May of 2004, the parties purchased and erected a 3,600 square foot steel building to house husband's business, A&K Industries located on Lincoln Way West/Route 30 in Chambersburg. Husband continues to use this building to operate his business. He currently has exclusive use of the building and the tools necessary to run A&K. For the tax year 2007, his monthly net income was approximately \$2,900 – \$3,300. According to the master, husband has the potential to earn a higher gross income of \$40,000 – \$50,000 per year.

To raise the capital needed to purchase and erect the steel building for the A&K workshop, the parties paid off the existing mortgage on the marital home in the amount of \$7,919.18 and borrowed \$80,884 against the home. Husband testified that he and wife spent approximately \$98,000 altogether to purchase and construct the metal commercial building. Wife disagrees with husband's estimate of those initial costs. More to the point, however, neither party had the building appraised or presented expert testimony as to its current fair market value. The master nevertheless adopted the \$98,000 figure as the building's fair market value.

Aside from the A&K workshop, the parties acquired other assets during this almost 20-year marriage. Those include the marital residence, motor vehicles, retirement accounts, tools/equipment, cemetery plots, guns, miscellaneous depreciating consumer goods, tax refunds, and insurance proceeds arising from the tragic death of their teenage daughter Alisha during a February 2007 car accident.

The parties also incurred debts during the marriage. Those include motor vehicle loans, an unpaid balance on the marital home's mortgage, and funeral and related costs associated with Alisha's death. Marital liabilities also include charges placed on credit cards for miscellaneous household expenses, including property taxes on the marital home. Wife took out a consolidation loan in September of 2006 ("the NOVA debt"). She did this without husband's signature after husband purchased a new 2007 Ford Mustang for \$24,000 without her foreknowledge. The NOVA debt was initially approximately \$40,000. Some of the NOVA debt accumulated during the marriage and consisted of household expenses such as groceries, clothes, and repairs to personal vehicles. Husband testified that when he bought the Mustang, he was unaware of the NOVA debt and believed that the only marital debt was the mortgage on the marital home.

It is clear from the evidence that poor communication and the lack of a coherent fiscal policy was a long-standing feature of this marriage at least as far back as the early 1990's when each party evinced displeasure with the spending habits of the other. The parties maintained separate checking accounts during the entire marriage and, despite the filing of joint tax returns through an accountant, neither party had full knowledge and/or advance approval as to how each was spending incoming monies and whether credit cards were being used to mask the true relationship between income and

expenditures on both the domestic and business fronts. Husband paid household utilities, insurance on family vehicles, and sometimes certain taxes. He also paid A&K's operating expenses. Some portion of the NOVA debt was incurred because husband stopped paying any expenses connected with the marital home in November 2007, approximately five months after he moved out. Wife, who had been the party to make most of the home mortgage payments during the marriage, began paying the interest on the mortgage after separation in order to prevent foreclosure. She began making payments on the NOVA debt of \$1,113 per month, reducing that debt to \$34,870.36 as of the master's hearing on June 3, 2008. Husband continued paying the loan on the Mustang after separation.

Based in part on pre-hearing stipulations reached by the parties, the master recommended that wife receive the following assets: the marital home on Gehr Road valued at \$125,000; life insurance proceeds of \$30,000 stemming from Alisha's death (most of which wife had already spent by the time of the master's hearing); a 401(k) plan in her name in the amount of \$9,089.25; a pension plan with EDS in the amount of \$45,041.51; and \$1,800 which is the value of three cemetery plots. The master recommended that wife receive credits as follows: \$8,750, which is the master's estimate of the typical costs of selling a piece of real estate like the marital home should wife choose to sell it or should such a sale become necessary; debts associated with Alisha's funeral and grave and crash site maintenance (e.g., fresh flowers) in the amount of \$8,203; the mortgage balance of \$69,540.16; and the NOVA debt in the amount of \$34,870.36.

Again based in part on certain stipulations, the master recommended husband receive the following assets: a 2001 Ford-250 valued at \$9,680; a 1990 Ford-250 valued at \$2,240; the 2007 Ford Mustang valued at \$24,095; auto insurance proceeds in the amount of \$2,500; an IRA in husband's name valued at \$13,776; a John Deere tractor and accessories with a value of \$650; a 2002 Ford Explorer valued at \$7,200; an excess tax payment for 2006 of \$2,432; various items of personal property valued at \$1,350; tools and equipment worth \$9,000; a car lift valued at \$2,950; a snow plow worth \$500; guns worth \$1,570; and the commercial steel building which houses A&K Industries, purchased and erected according to husband for \$98,000 in 2004. The master proposed that husband be credited with paying debt on the Explorer in the amount of \$2,282, as well as the \$18,611.22 owed on the Mustang. In addition, the master recommended husband pay cash to wife in the amount of \$28,000 if the court disagrees with the finding that the A&K building is a marital asset. We discuss this last issue more fully below. In sum, the master recommended a marital estate distribution of \$117,567.24 to wife and \$127,049.78 to husband.

Discussion

It is well-established that a master's report is advisory only. The court must make an independent review of his findings and recommendations in order to determine whether they are supported by the record and will effectuate economic justice between the parties. Tagnani v. Tagnani, 654 A.2d 1136 (Pa.Super. 1995). The court must give substantial weight to the master's findings as to witness credibility. Taper v. Taper, 939 A.2d 969 (Pa.Super. 2007). Nevertheless, the court is not bound by the master's credibility findings because in divorce cases, the evidence must be considered de novo at every stage of review. Rothrock v. Rothrock, 765 A.2d 400 (Pa.Super. 2000). The court is limited in its review to the evidence which was available to the master. Trembach v. Trembach, 615 A.2d 33 (Pa.Super. 1992).

Husband's Exceptions

I.

The main bone of contention was whether or not the steel building purchased and erected in 2004 to house husband's business is a marital asset. Husband asserts that despite the parties' investment of marital monies devoted to this undertaking, the building is not in actuality a marital asset at all and has no fair market value and therefore should not have factored into the master's equitable distribution scheme. According to husband, any interest he and wife have in the building is as tenants only. This dispute has its origins in the fact that the building was constructed on land which is owned by husband's father and not by the parties.

Husband estimated that he and wife spent a total of \$98,000 of marital monies to buy and erect the steel building and he acknowledged that the structure represents an improvement to the real estate. Neither party had the building appraised and therefore the record does not reflect its fair market value. The master nevertheless accepted \$98,000 as its fair market value and recommended this amount be imputed to husband.

The master found husband will continue to have unfettered access to the land and the building as long as he pays the taxes, insurances and utilities. This has been the arrangement between husband and father since the building was erected in 2004 and the credible evidence shows the men have a good relationship. Husband worked for his father for several years before becoming self-employed. His father then helped him obtain the permits from the township for the A&K

workshop, paid for some of the tap fees and helped lay the concrete foundation. Father told husband he could use the property rent-free if husband paid all the taxes, insurance and utilities, and husband has made these payments. Although the recession is negatively affecting his income, husband expects to stay in the business and anticipates receiving the land and the building from his father eventually. (Master's report, pp. 128-132; 170-172; 176-177.)

Pennsylvania law precludes a potential inheritance from being a factor in equitable distribution because such an inheritance is merely speculative and cannot be accurately valued. Gruver v. Gruver, 539 A.2d 395 (Pa.Super. 1988). The law recognizes a property owner has the right to convey his property to another person at any time and for any reason. An expectancy of an inheritance is merely a bare hope on the part of the heir-apparent. It lacks appreciable value and the interest to which it relates is nonexistent and indeed may never exist. Fielding v. Fielding, 685 A.2d 178 (Pa.Super. 1996); Oaks v. Cooper, 638 A.2d 208 (Pa. 1994); Powell v. Powell, 577 A.2d 576 (Pa.Super. 1990); Hutnik v. Hutnik, 535 A.2d 151 (Pa.Super. 1987).

Although he acknowledged these well-established principles, the master found husband's interest in the property to be "more than just an expectancy of an inheritance. It has already been constructively received by Husband...We can accurately assess the value of the building to which [husband] has full access. Access and use of this building has clearly been granted. The business has used, and will continue to use, the property according to the undisputed testimony of the parties. The master finds it would be unjust to exclude this asset from the marital estate." (Master's report, pp. 9; 13.)

It is clear the parties invested substantial marital monies into purchasing and erecting the building, thereby improving the land through their efforts. It is unfortunate that neither party presented the master with an appraisal of the building's current fair market value. In the absence of such information, the master was compelled to use the evidence available to him which most closely reflected fair market value, and this evidence came in large part from husband himself — \$98,000. It is disingenuous for husband to claim that all the marital monies invested in his workshop are now simply non-existent because his future receipt of the property from his father is less than 100% certain. Such an outcome would not reflect the practical realities of this particular marital situation nor would it effectuate economic justice between the parties. We will therefore overrule this exception and adopt the master's analysis and recommendation regarding this asset.

II.

The master goes on to state that "in the event that the master's characterization of this building as a marital asset is found to be in error, the master considers in the alternative husband to be guilty of dissipating marital assets by failing to obtain legally binding protection for the investment he asked his wife to make in his business. This dissipation warrants reimbursement payments to wife in order to effectuate economic justice." (Master's report, p. 9.) In the event the building is not considered a marital asset, "the exclusion of this valuable asset from the marital estate is a direct result of husband's irresponsible investment of marital assets and should be factored in as a substantial dissipation of the marital estate." (Id., p. 14.) Husband takes exception to this alternate view of this endeavor. The idea of dissipation was introduced by the master only as a secondary ground of support for his recommended distribution. Insofar as we have overruled husband's exception to the master's characterization of the commercial building as marital property, there is no need for us to address husband's argument as to dissipation.

III.

Husband alleges the master erred in recommending he make a \$28,000 cash payment to wife in connection with the award of the \$98,000 commercial building to husband. Although it is not completely clear from his report how the master arrived at the payback figure, we can fairly deduce the following: Husband himself testified the parties invested approximately \$98,000 to buy and erect the building and wife testified they saved approximately \$60,000 by not having to purchase the land on which the building sits. The total of those two figures is \$158,000. With only these estimated figures available to him, the master assigned a fair market value of \$130,000 to the property, which encompasses both the land and its improvements. By estimating the fair market value of the property at \$130,000, the master was able to divide the marital estate almost evenly between the parties. This is a reasonable outcome under all the circumstances of this case. Prompt resolution of this matter is in both parties' long-term best interests and remanding the matter for clarification on this one issue would needlessly add to litigation costs for both parties.

IV.

Wife testified to her preference to remain in the home, and husband did not object to the master's proposal to award her that asset. Husband and wife also agreed as of the time of the hearing that the home has a value of \$125,000. What husband finds objectionable is both the recommendation that wife be given credit for the costs of selling the home and

also that the master had no specific evidence before him to support his estimate of \$8,750 as being the cost of such a sale, which would include brokerage commissions and transfer taxes.

We find the master's cost calculation, which amounts to 7% of \$125,000, is wholly reasonable in light of his long experience as divorce master making recommended distributions involving marital homes which may need to be transferred. It is also reasonable in the absence of specific evidence presented by either party on this issue. However, despite the reasonableness of this estimated figure, we must sustain husband's exception. If wife is to receive the house, she must also pay all the costs associated with that asset. The master's proposal envisions wife assuming the debt associated with that asset, namely the mortgage balance and the home's upkeep, and therefore we find that any transfer costs which she may incur in the future should likewise be shouldered by her alone. We agree with husband it would be inappropriate to give wife advance credit for a purely theoretical cost when it appears from the record she has been willing to go to significant lengths to hold onto the home even when it contributed to her accruing debt post-separation.

V.

The master recommended that wife receive three unused grave plots located in Lincoln Cemetery in Chambersburg, each with a monetary value of \$600. Husband points out that there are actually four plots and the master erred in not awarding either party the fourth plot which contains the remains of the parties' two deceased children – their infant son Anthony who died shortly after birth in 1992, and Alisha who died in the February 2007 car accident. Anthony and Alisha are buried together in that same plot and there are three unused plots remaining. Husband would like the plot containing Anthony and Alisha to be awarded to him. He also wants to receive one of the unused plots for himself. At a minimum, he wants a one-half interest in all four plots. Wife agrees that there are in fact four plots and this is borne out by the evidence. (Master's report, pp. 48-50; 103-104; plaintiff's exhibit #9.) She would like the court to defer to the master's recommendation that she be awarded the plot containing Anthony and Alisha and also to have the court direct that she receive the deed to that plot.

Section 3507 of the Divorce Code governs the division of entireties property between divorcing parties. Subsection (a) provides as a general rule, "[w]henever married persons holding property as tenants by the entireties are divorced, they shall, except as otherwise provided by an order made under this chapter, thereafter hold the property as tenants in common of equal one-half shares in value, and either of them may bring an action against the other to have the property sold and the proceeds divided between them."

That section cannot be mechanically applied to this case because the importance of the four plots lies not in their monetary value but in their emotional meaning to the parties. Although wife routinely buys flowers and places them on Alisha's grave, there is no substantial evidence that wife attaches greater emotional significance than husband does to that plot. That same plot contains the remains of Anthony, their infant son who died in 1992. Again, the court is not in a position to assume that Anthony's death holds less meaning for husband than it does for wife. We find the parties should each receive a one-half interest in the occupied combination plot. We also find that husband is entitled to receive the unused plot worth \$600 which the master overlooked in his recommended distribution.

An Order of Court is attached which reflects the in-kind distribution of marital assets and liabilities in light of our review of the master's report, the available record, and husband's exceptions. The final distribution will be \$129,931.78 to husband and \$126,314.24 to wife.

ORDER OF COURT

June 29, 2009, upon review and consideration of the Report and Recommendation filed by the Master in Divorce, the record, husband's exceptions to the Master's Report and Recommendation, wife's response thereto, the parties' written argument and the relevant law, the court hereby orders and decrees as follows:

A. Divorce: The parties are hereby divorced from the bonds of matrimony.

B. Economic Matters:

1. The plaintiff shall receive sole right, title and interest in the following assets:

- a. The marital residence located at 6994 Gehr Road, St. Thomas, Franklin County, Pennsylvania.
- b. All life insurance proceeds payable as a result of her daughter's death.
- c. The 401(k) in her name.
- d. An EDS pension.
- e. Two unused cemetery plots in Lincoln Cemetery and one-half interest in the combination grave plot containing the remains of the parties' two deceased children.

- f. All personal property currently within her possession and control unless otherwise specified in this Order. It is noted that a Winchester 243 Lever Action gun was given to her by her father and is not a marital asset.
2. The defendant shall retain sole right, title and interest in the following assets:
 - a. 2001 F-250 truck.
 - b. 2007 Ford Mustang.
 - c. All automobile insurance proceeds payable as a result of the accident involving the parties' daughter.
 - d. An IRA in his name.
 - e. The John Deere tractor and accessories.
 - f. The 1990 F-250 truck.
 - g. A 2002 Ford Explorer
 - h. All monies received which were to be allocated for the 2006 taxes, including any excess received therefore.
 - i. All personal property currently within his possession and control.
 - j. Personal property to be transferred to him within 30 days of this Order, including a dining table and four chairs; Polk audio speakers; a 60-inch TV; a Pioneer receiver elite; and various TV speaker cables.
 - k. Tools and equipment.
 - l. All marital guns.
 - m. A car lift.
 - n. A snowplow.
 - o. All assets and interests related to the marital cabinet-making business known as A&K Industries.
 - p. One unoccupied cemetery plot in Lincoln Cemetery and one-half interest in the combination grave plot containing the remains of the parties' two deceased children.
3. Plaintiff shall be solely responsible for the mortgage balance and the NOVA debt.
4. Plaintiff shall refinance the mortgage on the marital residence within 60 days of her receipt of the \$28,000 payment she is to receive under this Order, or within one year of the signing of this Order, whichever occurs first.
5. Defendant shall be solely responsible for all debt related to the Ford Explorer and the Ford Mustang.
6. Within 60 days of the signing of this Order, defendant shall pay \$28,000 to plaintiff. Defendant shall have the option to make payments in accordance with the following schedule: \$541.32 for a period of 60 months which represents 6% rate of interest on the unpaid balance. Interest will not accrue on the unpaid balance for the first 60 days following the signing of this Order. This payment is equitable reimbursement and is not to be characterized as alimony.
7. Any items of personal property to be transferred under this Order shall be transferred within 30 days of the signing of this Order. Any costs associated with this transfer shall be borne by the party to be receiving said asset.
8. Unless otherwise specified in this Order, the parties shall be solely liable for any debt attached to any asset they are to receive in distribution.
9. The parties shall bear the cost of preparing and recording documents, including deeds or titles for assets they are to receive under this Order for distribution.
10. The parties shall execute all releases or other documents presented by opposing counsel within 10 days of their presentation which are reasonably necessary to effectuate this Order.
11. The current Order for payment of alimony pendent lite is hereby terminated effective this day.
12. Jurisdiction is retained by the Court of Common Pleas of the 39th Judicial District of Pennsylvania to the fullest extent necessary to enforce this Order.

[1]The master was commissioned to decide matters pertaining to divorce, equitable distribution, and husband's request for alimony pendente lite. By the time of the hearing, the parties had consented to the divorce. The master declined to award APL to either party, and insofar as husband's exceptions do not address that ruling, neither will the court.

[2]Parenthetically we note the master finds that wife was the children's primary caregiver and the primary homemaker during the marriage. Aside from the fact that husband was the party who physically left the marital home in May of 2007 where his

then 14-year-old son was living, we can find no substantial, credible support in the record for the master's finding on that issue.

[³]Husband refers to this typographical error in his exception #6.