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Hershberger v. Hershberger

STEPHEN L. HERSHBERGER, Plaintiff
SHANNON T. HERSHBERGER, Defendant
In the Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action — Law, No. 56 of 2009

Grounds for divorce; Appointment of Master; Equitable Division of Marital Property

1. A divorce may be obtained by four means: 1) through a finding of fault; 2) institutionalization of a spouse; 3) by mutual consent by both parties; or 4) separation for two years and by irretrievable breakdown. 23 Pa.C.S.A. §3301.
2. Where neither party asserts a fault basis, institutionalization, or mutual consent to obtain divorce, the parties must be separated for two years before being awarded a decree of divorce.
3. The Court is granted discretion to appoint a master in divorce to hear testimony on all or some issues, excluding custody and paternity issues. 23 Pa. C.S.A. §3321.
4. The Pennsylvania State Legislature has rejected any notion of automatic bifurcation of the divorce action and issues of equitable distribution and statutorily provides for bifurcation with the consent of both parties. 23 Pa. C.S.A. §3323(c.1).
5. Marital property not only includes property acquired by either party during the marriage, but also includes property acquired after final separation in exchange for marital assets and would also include any payments received for actions that accrued during the life of the marriage regardless of when the payment is received.
6. Where the parties in a divorce proceeding have not reached the two-year period for a divorce under 23 Pa. C.S.A. 3301 nor have abandoned all attempts at reconciliation, the Court will not grant a bifurcation to determine the value of marital assets or appoint a master.
7. A premature appointment of a master could result in an inaccurate valuation of marital assets by the master if distribution must be deferred until the divorce is awarded by the Court.

Appearances:

Julie G. Dorsett, Esquire, *Attorney for Plaintiff*

Stephen D. Kulla, Esquire, *Attorney for Defendant*

OPINION

Meyers, J., June 18, 2010

On February 26, 2010, the Plaintiff, Stephen K. Hershberger, filed a Motion for Appointment of Master. The Plaintiff wants the Master to make findings and recommendations to the Court as to the following claims: Divorce and Distribution of Property. As part of the motion, the Plaintiff asserted that the statutory grounds for the award of a divorce were irretrievable breakdown under 23 P.S. §331(d). Within the motion, the Plaintiff also asserted that no agreement was reached by the parties as to any of the cognizable claims under the Divorce Code. As required under the local rules of court, the Plaintiff filed the necessary inventory and appraisal, income and expense statements, and the master's fee check.

Upon receipt of the motion, this Court issued a Rule to Show Cause on March 9, 2010, directing the Defendant, Shannon T. Hershberger, to file an answer and further ordered that hearing and argument would be held on April 13, 2010. On March 31, 2010, the Defendant, by and through her counsel, Stephen D. Kulla, Esquire, filed an answer to the Plaintiff's motion. As part of that answer, the Defendant asserted that no affidavit had been filed under 3301(c) of the Divorce Code consenting to a divorce after ninety (90) days, nor had two (2) years passed since the parties had lived separate and apart as required under 23 P.S. §3301(d) for the Court to grant a divorce to the parties. The Defendant requested that this Court defer appointment of a master until one or both parties were able to assert they had been separated (2) years. At the hearing held on April 13, 2010, the Plaintiff testified that the Divorce Complaint was filed in January 2009, and served upon the Defendant on January 14, 2009. Plaintiff also testified he had absolutely no intention to reconcile with the Defendant. The Plaintiff testified that he believed that the two-year period of separation commenced in October of 2008, when he had moved from the marital bedroom and began sleeping in a twin bed in the furnished basement of the parties' marital residence. The Plaintiff testified he did not leave the marital residence until the time that the divorce was filed and ultimately served upon the Defendant. Following the hearing, the Court provided the parties with an opportunity to supply a brief to the Court on or before April 28, 2010, and serve copies of same upon opposing counsel. The Defendant supplied a brief to the Court on April 28, 2010. The Court now considers this matter ripe for a decision.

Discussion

Preliminarily this Court notes that under 23 Pa.C.S. §3301 Grounds for Divorce, a divorce may be obtained by four (4) means. First, through a finding of fault; second, institutionalization of a spouse; third, by mutual consent by both parties; or fourth, separation for two (2) years and by irretrievable breakdown. In the matter before the Court, the parties have reached a point of irretrievable breakdown and agree that the only option available is the granting of a divorce under §3301(d). Neither part is asserting a fault basis, institutionalization, or mutual consent to obtain a divorce under 3301(c) of the Divorce Code. Under §3301(d), the Court may grant a divorce where: (1) a complaint has been filed alleging that a marriage is irretrievably broken; (2) an affidavit has been filed alleging the parties have lived separate and apart for a period of at least two (2) years; (3) that the marriage is irretrievably broken; and (4) that even if the Defendant denies one (1) or more of the allegations in the Plaintiff's affidavit, the Court determines the parties have lived separate and apart for a period of at least two (2) years and that the marriage is irretrievably broken.

By the very nature of the language of §3301(d) either the Court, or in the alternative a master appointed by the Court, should make findings of facts that have occurred. The statutory language requires that "the parties have lived separate and apart for a period of at least two (2) years and that the marriage is irretrievably broken." Id. (Emphasis added). Neither the Court nor the Master should be making findings of prospective facts. It would be foolhardy for this Court to appoint the Master in Divorce to conduct a hearing to consider the issue of a prospective divorce, when by the very nature of the pleadings and the testimony offered by the Plaintiff, such facts could not occur until at least October 2010, and quite possibly as late as January, 2011. While the Plaintiff has indicated under oath that he has no intention of reconciling with the Defendant and has every intention of seeking an order of court or decree granting him a divorce at the conclusion of two (2) years of separation, that is still a fact in question which will have to be determined by the Court or the Master once it has occurred. Furthermore, the court notes that under §3301(d)(1)(ii) the court or in the alternative the master if appointed, must find that not only has two (2) years elapsed since the parties separated, but also that the marriage is irretrievably broken. This Court is cognizant that parties in a divorce action often have opinions of their marriage and their spouses that fluctuate throughout the course of the proceedings. It is not uncommon for couples to attempt reconciliation. Given the high level of speculation surrounding all divorce actions and the possibility of reconciliation and/or stepping back from the brink of irretrievable breakdowns, this Court finds it unwise to appoint the Master prospectively to determine whether or not the parties will complete the steps necessary to obtain a divorce.

Although not specifically addressed by either part in their arguments, the Court notes that under 23 Pa.C.S.A. §321, the Court is granted discretion to appoint a master to hear testimony on all or some issues, excluding custody and paternity issues. Within the 39th Judicial District, the Court has adopted rules for the creation of the standing Master in Divorce. The Master is authorized to hear all the matters authorized under §3321. This Court has gone beyond the initial inquiry and considered §3323 of the Divorce Code, Decree of Court. The general rule provides that in all matrimonial causes the Court may either dismiss the complaint or enter a decree of divorce or annulment of the marriage. 23 Pa.C.S.A. §3323(a). Under subsection (b) of 3323, a decree granting a decree or an annulment "shall include, after a full hearing where those matters are raised in the pleadings, an order determining and disposing of existing property rights and interests between the parties." 23 Pa.C.S.A. §3323(b). This Court has paid special attention to subsection (c.1) Bifurcation. The statute makes it quite clear that "with the consent of both parties" and only with the consent of both parties, the Court may enter a decree of divorce or annulment prior to final determination and disposition of the matters provided for in subsection (b). In the absence of the consent of both parties, the Court may enter a decree of divorce or

annulment prior to the final determination and disposition of matters provided for in subsection (b) if, and only if, "(1) grounds have been established as provided in subsection (g); and (2) the moving party has demonstrated that: (i) compelling circumstances exist for the entry of the decree of divorce or annulment; and (ii) sufficient economic protections have been provided for in subsection (b). 23 Pa.C.S.A. §3323(c.1). In the Official Comment to §3323(c.1), the legislature has rejected any notion of automatic bifurcation and statutorily provides for bifurcation with the consent of both parties. In the absence of consent, bifurcation is permitted only under the limited circumstances provided in Paragraphs 1 and 2. 23 Pa.C.S.A. §3323(c.1). Official Comment.

In order to properly understand how subsection (c.1) applies to the matter now before the Court, this Court looks to §3323(g)(3) which provides "that the grounds to establish a divorce under 3301(d), the court must find an affidavit has been filed and no counter affidavit has been filed or if a counter affidavit has been filed denying the affidavit's averments, the court determines that the marriage is irretrievably broken and the parties have lived separate and apart for at least two (2) years at the time of the filing of the affidavit." 23 Pa.C.S.A. §3323(g). The Official Comment notes that §3323(g)(3) is critical to the operations of (c.1) and (d.1). The Plaintiff, in this case, can not be expected to file an affidavit complaint with 3301(d) until the two (2) year period has passed and he is able to state within the affidavit that in his opinion the marriage is irretrievably broken. It is anticipated that if, and only if, such facts exist may such an affidavit be filed to which the Defendant will be given an opportunity to file a response in accordance with the Divorce Code.

As further explanation why this Court will not appoint the Master in Divorce at this time, the Court directs the parties to the statutory language of 23 Pa.C.S.A. §3501 regarding equitable division of marital property. Under 3501 of chapter 35, marital property is defined as all property acquired by either party during the marriage. However, marital property not only includes property acquired pursuant to Paragraphs 1 and 3, but also includes property acquired after final separation in exchange for marital assets and would also include any payments received for actions that accrued during the life of the marriage regardless of when the payment was received. 23 Pa.C.S.A. 3301(4) & (8). Furthermore, in Oaks v. Cooper, 638 A.2d 208, 536 Pa. 134 (Pa.Super. 1004) and Gordon v. Gordon, 647 A.2d. 530, 436 Pa.Super 126 (Pa.Super. 1004) re-argument denied appeal granted 655 A.2d. 515, 540 Pa. 583, reversed 681 A.2d. 732, 545 Pa. 391 amended on denial of re-argument, both the Pennsylvania Superior Court and Pennsylvania Supreme Court have affirmed that the preferred date of valuation of marital assets is as close to the date of distribution rather than separation. A premature appointment of the Master could result in an inaccurate valuation of marital assets by the Master if distribution must be deferred until the divorce may be awarded by the Court. Presumably under the Plaintiff's proposal, any party at the conclusion of the ninety (90) day waiting period, having failed to execute mutual consents under 3301(c), could assert that the marriage is irretrievably broken and ask for the appointment of the master to make the findings of valuation of marital assets well in advance of the ultimate issuance of the divorce and/or distribution thereof. This appears contrary to the intent of the legislature and the appellate courts.

As a final source of support for the Court's decision not to appoint the Master at this time, the Court looks to a prior opinion of former President Judge of the 39th Judicial District John Keller. In the case of Hockenberry v. Hockenberry, FR 198-359, Judge Keller was asked to permit "reverse bifurcation," that is to settle the property matters of the parties before the divorce decree was entered. Judge Keller correctly pointed out that "we can only speculate as to the chaos that would ensue if property rights of parties were determined before a divorce decree was entered and subsequent to such action." Hockenberry v. Hockenberry, FR 1980-359. As he correctly pointed out, if a divorce was not obtained whether it be due to reconciliation, the death or incompetency of a party, or any other one of the many reasons for which divorce actions may be terminated, valuable assets of the court and parties would be wasted.

For the foregoing reasons this Court will DENY the plaintiff's Motion for the Appointment of a Master in Divorce at this time.

ORDER OF COURT

June 18, 2010, the Court having considered the Plaintiff's Motion for the Appointment of a Master, the response filed by the Defendant; It is hereby ordered that Plaintiff's Motion for the Appointment for a Master is denied, and it is further ordered that the Prothonotary return the Plaintiff's check as payment for the anticipated appointment of the master be returned to the Plaintiff or his counsel.
