

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

R.E.,	:	
Plaintiff	:	
	:	
v.	:	No. 02-21,172
	:	
C.E.,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses two issues, both involving Pennsylvania Tuition Account Program (TAP) and Scholars Choice accounts, titled in the name of Wife. These accounts were created by the parties during their marriage, for the education of their sons, A.E. and E.E. The first matter is Husband’s petition to reconsider his request for the imposition of a constructive trust, which was denied by our order of November 12, 2004. The second matter is the petition to intervene filed by the parties’ child, E.E.

Regarding the petition for reconsideration, the court affirms our order of November 12, 2004, for the following reasons. After extensive and lengthy court proceedings, this case was ultimately settled. The settlement was made an order of court dated August 23, 2004. That order did not specifically mention the TAP or Scholars Choice accounts, but contained broad mutual release language, a waiver of estate claims, and an acknowledgment of awareness and full disclosure of property. Now Husband suspects that Wife, who has exclusive control of the funds invested for use in E.E.’s education, will not use the funds for that purpose. He has therefore asked the court to declare a constructive trust over those funds.

Under the Divorce Code, the court may declare the creation of a constructive trust when a party fails to disclose information in his or her inventory and appraisal, and as a result of that nondisclosure the asset is omitted from the distribution of property. 23 Pa.C.S.A. §3505(d). The court cannot declare a constructive trust in this case because clearly, Husband has not met these two criteria.

While it is true Wife did not list the accounts on her inventory and appraisal, that omission was not the cause of the funds' absence from the settlement order. Husband was fully aware of the existence of the funds and knew the accounts were titled in Wife's name. In fact, Wife testified about the existence of the accounts at the equitable distribution hearing. N.T., July 28, 2003, p. 32-33. Furthermore, Wife provided financial statements for the accounts, which showed that the accounts were titled in her name, listed one of the children as beneficiary, and showed the existing balances. These documents were introduced into evidence by Husband. Plaintiff's Exhibits #62, 62A, and 65. Therefore, there is no question that at the time of the settlement agreement, Husband knew of the existence of the accounts and the balance of the accounts, and was also aware that Wife controlled the accounts. In fact, the Master's neglect to mention the accounts in her report was the subject of one of Husband's exceptions, which stated that each child's account should be awarded to the custodial parent.¹ (Exception #38).

Therefore, the case of Major v. Major, 518 A.2d 1267 (Pa. Super. 1996), cited by Husband, is unpersuasive, as that case involved a deliberate or negligent failure to disclose a military pension. Id. at 1273. The court believes Ratorsky v. Ratorsky, 551 A.2d 23 (Pa. Super. 1989), is more instructive. There, the court upheld a property

settlement agreement where the asset was disclosed but there was doubt regarding the value of the asset. The court noted that the agreement was entered into after counseled negotiation. Id. at p. 26. Here, the court's order of August 23, 2004 was entered into after counseled negotiation, and must be upheld.

This is not to say that E.E. has no hope of gaining access to the funds for his use in pursuing his higher education. E.E.'s guardian may certainly file a separate action in equity, requesting the imposition of a constructive trust. That is precisely what occurred in the case of Robbins v. Kristofic, 643 A.2d 1079 (Pa. Super. 1994), where the Superior Court upheld the lower court's decision to impose a constructive trust on money a couple had placed in a trust fund for their children's education. Although there are significant differences between Robbins and the case before this court, E.E. certainly has an arguable claim for a constructive trust. However, that should be the subject of an equity action, filed by E.E.'s guardian on E.E.'s behalf, and does not belong in this divorce action.

Our decision in this regard is bolstered by the Robbins case, where the court rejected the father's argument that the issue of the trust account had been waived or was precluded by res judicata or collateral. The court stated,

In the equitable distribution proceedings, the court allocated marital property. In the present action, however, appellee is not seeking an interest in reversion of the trust as marital property but is acting as the guardian on behalf of the children. Furthermore, the issue before us is not equitable distribution or who should be trustee but the propriety of the imposition of a constructive trust. Thus, there is not an identity either of the parties or of the issues.

Id. at 1082.

¹ Husband has primary physical custody of E.E. and Wife has primary physical custody of A.E.

Although the court may certainly impose a constructive trust in a divorce action under 23 Pa.C.S.A. §3505(d), that ability is governed by the non-disclosure issue, which is not present here. In short, Husband has waived any right to the accounts at issue in the settlement agreement. E.E., however, has not, and may have a cause of action against his mother.

That brings us to the question of whether E.E., who is now represented by a guardian, should be permitted to intervene in this action. The issue of intervention is a matter within the sound discretion of the court. AAA, Inc. v. Allegheny General Hospital, 826 A.2d 866 (Pa. Super. 2003). Pa.R.C.P. §2329 provides for refusal when the interest of the petitioner is already represented. Such is the case here, where Husband is fully and competently representing E.E.'s interest in the accounts. Similarly, in Frank v. Frank, 833 A.2d 194 (Pa. Super. 2003), the Superior Court denied intervention by children in their parents' custody case, stating that the boys' interests were presented to the court by their parents.

Furthermore, E.E. has not yet established a right to the funds in question. His potential claim against his mother is nothing more than an unproven and vaguely stated cause of action at this time, asserted after the divorce case has been settled. For a similar reason, the Superior Court denied intervention by a party with a potential tort court claim against the wife in a divorce proceeding to attach assets, stating, "Appellant's interest is nothing but an inchoate and unproven cause of action which has remained unlitigated for more than a decade. This is not an adequate basis on which to allow appellant to compel intervention." Luiziaga v. Psolka, 637 A.2d 645, 647 (Pa. Super. 1994).

And finally, to permit children to intervene in their parents' divorce proceedings does not appear to be sound policy, as it could invite a flood of litigation, with highly disturbing implications. For these reasons, the court will deny E.E.'s petition, without prejudice to him to file a separate action in equity.

ORDER

AND NOW, this _____ day of December, 2004, plaintiff's Petition for Clarification/Reconsideration/Petition for Hearing/Argument, filed on November 10, 2004, is denied. The court's order of November 3, 2004, denying special relief, is affirmed and the order of November 12, 2004, denying a constructive trust, is likewise affirmed. E.E.'s petition to intervene for intervention, filed on November 15, 2004 is also denied.

BY THE COURT,

Richard A. Gray, J.

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