

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CR,		: NO. 02-20,408
	Plaintiff	:
		: CIVIL ACTION - LAW
vs.		:
		:
MR,		:
	Defendant	: Exceptions

OPINION AND ORDER

Before the Court are Defendant's Exceptions to the Master's Report in Equitable Distribution, filed April 28, 2006. Argument on the exceptions was heard June 23, 2006. Defendant raises eight claims of error; each will be addressed in turn.

First, Defendant contends the Master erred in awarding Plaintiff a credit for rental value, and in the amount of that credit. Inasmuch as Defendant remained in the marital residence at the time of separation while Plaintiff left the residence, the Master awarded Plaintiff a credit for one-half the fair rental value of the residence (less one-half the taxes and maintenance paid by Defendant), in accordance with prevailing case law, specifically Trembach v. Trembach, 615 A.2d 33 (Pa. Super. 1992), and Ressler v. Ressler, 644 A.2d 753 (Pa. Super. 1994). In those cases, the Court indicated that the party out of possession of jointly-owned property is generally entitled to compensation for his or her interest in the property, except where there is an equitable defense to the credit. Defendant argues that the equitable defense raised in Hoover v. Hoover, Lycoming County No. 90-21,301 (Smith, P.J., August 27, 1993), should be applied in the instant case. The Court does not agree. In Hoover, the Court found an equitable defense to a claim for fair rental value where the party seeking the credit had willingly left the residence. In the instant case, the testimony indicates that Plaintiff did not willingly leave the residence. Indeed, she testified that she had asked Defendant to leave the residence but he refused to do so. N.T. March 23, 2005, at p. 27. She then moved into a separate bedroom and only after six months of Defendant's continued refusal to leave did she herself leave. Under these circumstances, the Court cannot find the application of the Hoover defense to be appropriate to prevent the awarding of a credit for fair rental value.

With respect to the amount of the credit, Defendant contends the Master erred in basing her finding of fair rental value of the residence on the opinion of Plaintiff's witness, BF, arguing his opinion was undeserving of any weight because he did not know the square footage of the residence or its condition at the time of the hearing. Mr. F did testify to knowing the residence has four bedrooms, however, and indicated he had last been there the previous summer. Defendant also points to the fact that Mr. F is not an expert in the field of rental properties, but the fact remains that Defendant presented no counter testimony, not even his own.¹ Therefore, the Court cannot find an error in the Master's reliance on the only evidence presented on the issue.

Next, Defendant contends the Master erred in awarding the residence to Plaintiff rather than to him. At the hearing, both parties had requested the marital residence be awarded to him or her. Plaintiff indicated she planned to sell it as she now lives in another residence where she planned to stay, and that she feared Defendant would not be able to make the necessary payment to her if the house were awarded to him, and that he would simply discharge the obligation in bankruptcy. In response, Defendant testified that to pay the obligation to Plaintiff, "it's possible that I could borrow the money from within my family."² Considering that Defendant would have to pay to Plaintiff over \$90,000 and that he currently has delinquent credit card debt of over \$70,000, the Court accepts as reasonable the Master's recommendation that the residence be awarded to Plaintiff.³ The Court also recognizes that Defendant separately owns a residence into which he can move if he so chooses.

Next, Defendant contends the Master erred in setting the increase in value of the Wallis Run property at \$40,000. This value was chosen as Defendant testified that the property was worth \$35,000 to \$40,000 at the time of separation but there was insufficient evidence to indicate the equity in the property at the time of marriage, other than Defendant's testimony

¹ When asked what he would charge to rent the marital residence, Defendant answered: "I don't know, I never really considered renting it. Just as guess (sic) I look at homes that are in the town and in the area seven (sic), eight hundred dollars see (sic) that in the paper for homes and houses." N.T. p. 94.

² The Court notes that even by the date of the argument in this matter Defendant had failed to come up with any plan for payment, in spite of the fact that he now had a good idea of what amount of payment might be required of him.

³ Should Defendant actually obtain the money from his family, he is certainly free to purchase the residence once it is listed for sale.

that at the time of marriage the property was valued at \$30,000 to \$35,000 and the original loan was in the amount of \$27,000 to \$28,000, although Defendant also testified he did not know when that loan was obtained, nor when it was paid off. Considering the paucity of evidence on the matter, the Court sees no error in the Master's determination.

Next, Defendant contends the Master erred in awarding him only 10% of the increase in value of Plaintiff's separate property. It appears the Master considered that the property was purchased by Plaintiff only a few months prior to separation, and thus the increase in value attributable to the efforts of the parties (as opposed to market forces) was minimal, contrasted with the Wallis Run property, to which marital assets were contributed for fifteen years or more, and which she divided more evenly. The Court sees no error in this reasoning and finds the award appropriate.

Next, Defendant contends the Master erred in "not considering the increase in value of Wife's property as a marital asset and distributing it in an appropriate distribution." The parties stipulated to the increase in value of Plaintiff's Ocean City house, and the only other evidence of separate property was that Plaintiff began receiving amounts of money from her father's estate in 1999, but that those amounts were placed into a separate checking account, from which Plaintiff continued to make contributions to the marital residence, and to pay other expenses. Any interest earned on the account appears minimal, and also seems to be more than offset by the contributions made from the account to the marital estate. Without anything more specific to go on, the Court cannot find error in the Master's recommendations with respect to Plaintiff's separate property.

Next, Defendant contends the Master erred in denying his request for alimony. He points to Plaintiff's separate estate and the fact that her investments earn her more than \$3000 per month. Defendant fails to account for his own earning capacity, however, of at least that much.⁴ Further, considering the distribution of the parties' marital estate, which provides Defendant with over 50% of the parties' assets, the Court believes alimony is not necessary to effectuate economic justice. Defendant is able to provide for his reasonable needs, and the

⁴ While the Court recognizes that Defendant is currently unemployed, and has been since 2002, it appears that such is of his own choosing; Defendant's testimony supports the Master's conclusion that although Defendant is skilled, he has made no consistent or persistent effort to obtain new employment.

Court sees no error in the Master's determination that alimony is not appropriate in this case. Defendant appears to place too much emphasis on Plaintiff's separate estate, minimizing his own dissipation of marital assets and the contributions made by Plaintiff from her separate estate during the marriage.

Next, Defendant contends the Master erred in requiring him to contribute to the costs of the proceedings. Considering the distribution of the marital estate in Defendant's favor, however, the Court believes it appropriate for the parties to share the costs. Since Plaintiff paid the Master's fee of \$375.00, and will be paying the filing fee to obtain the divorce decree, it is not unreasonable for Defendant to pay transcript costs, indicated by the Court Reporter to be \$196.25.

Finally, Defendant contends the Master erred in denying his request for counsel fees. As with his request for alimony, however, in light of the distribution, the Court believes it fair to require each party to pay his or her own counsel fees.

ORDER

AND NOW, this 3rd day of July 2005, for the foregoing reasons, Defendant's exceptions are hereby DENIED and it is hereby Ordered and Directed as follows:

Plaintiff is awarded the following property:

Residence at 1461 Northway Road, Williamsport, PA
Yamaha ATV
Jewelry in her possession

Defendant is awarded the following property:

WNB checking account
Nissan
Boat and trailer
ATV

Both parties shall execute whatever documents are necessary to effectuate this distribution, within thirty (30) days of the date of this Order. Also within thirty (30) days, Plaintiff shall pay to Defendant the sum of \$57,572.42.

Defendant's requests for alimony and counsel fees are hereby DENIED.

Within ten (10) days of this date, Plaintiff shall file the necessary paperwork and pay the filing fee to obtain a decree in divorce.

Defendant shall pay to the Prothonotary of Lycoming County the transcript costs of \$196.25, within thirty (30) days of this date. Should Defendant fail to pay these costs as directed herein, the Prothonotary may enter judgment against him.

Finally, the Prothonotary is directed to apply the \$375.00 previously deposited by Plaintiff to the costs in this matter.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Prothonotary
Family Court
Steven Hurvitz, Esq., 811 University Drive, State College, PA 16801
Janice Yaw, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson