

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ROY H. STONER,
Plaintiff

VS

HILDA C. STONER,
Defendant

Date: August 26, 2009

: CIVIL ACTION - LAW

: IN DIVORCE

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: NO. 08-21, 703

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ORDER

Plaintiff, Husband's, Motion for Reconsideration/*En Banc* Review of the Opinion and Order of July 15, 2009 granting Defendant, Wife's request to withdraw her Affidavit of Consent is hereby denied.

OPINION

In explaining the reasoning underlying the above Order, we will first review the most recent procedural history in this matter. On July 30, 2009, Husband filed this Motion for Reconsideration/*En Banc* Review; on July 29th he had filed two other motions; an Amended Petition for Contempt and a Petition for Special Relief. All three motions requested that each matter be heard on an expedited basis simultaneously with Husband's Petition for Contempt of a July 9, 2009 Order, filed July 24, 2009. A scheduling order had been issued pursuant to Husband's July 24, 2009 Petition for Contempt directing that the matter be heard on August 17, 2009 at 3:00 before the Honorable Judge Richard A. Gray. In receipt of the three new motions, Judge Gray rescheduled the Petition for Contempt for one hour later on the same day, August 17, 2009 at 4:00 p.m., and scheduled the three new motions along with the Petition for Contempt before the undersigned in order that there was sufficient time to hear this expedited matter. Then, on August 7, 2009 Husband filed a Continuance Request, citing that his main

witness would not be available on August 17, 2009. As the Request was not opposed the Continuance was granted, and all four matters were rescheduled before this Court on October 6, 2009, the first available hearing date before the undersigned, or any other judge, of the Lycoming Court of Common Pleas. Most recently, Husband submitted another continuance request, this time requesting the hearing date be moved up. Wife was, this time, opposed to any change in hearing date. This Court accommodated Husbands' request by utilizing cancelled court time and scheduled the matter for August 31, 2009 at 2:00 p.m. Respective counsel were immediately notified.

This Order, however, fully disposes of the Motion for Reconsideration/*En Banc* Review, one of the four motions. The reconsideration motion asserts that the undersigned erred by granting Wife's Motion to Rescind Affidavit of Consent/Petition for Maintenance of Beneficiary which was granted in an Opinion and Order dated July 15, 2009 after a evidentiary hearing and legal argument on the matter. Husband asserts that our opinion and order in this case is contrary to the Court's decision in *Lorson v. Lorson* made by the Honorable President Judge Kenneth D. Brown. This contention was argued by counsel and explored by the court in making our findings and reasoning set forth in our July 15, 2009 Opinion and Order, which granted the Wife's request to withdraw her Affidavit of Consent. We stand by those findings and reasoning in now denying the reconsideration request. Our prior determination granting Wife's request is not in conflict with *Lorson v. Lorson*, and was based upon the specific facts of this case. Therefore, *en banc* review is not warranted. Further, no new facts have been asserted in the reconsideration petition which would warrant a new factual hearing.

This Court has again undertaken careful review of the *Lorson v. Lorson* decision issued by the Honorable President Judge Kenneth D. Brown, and we find no conflicts with Judge

Brown's opinion and order in *Lorson* which would now supports Husband's request for *en banc* review. Relying on *Lorson*, Husband now argues, just as he had on July 15, 2009, that Withdrawals of Affidavits of Consent are limited to situations involving duress, fraud, or undue influence. To the contrary that limitation is not the holding of *Lorson*. In *Lorson*, Husband attempted to withdraw his Affidavit of Consent citing that he signed it under duress, fraud or undue influence, citing *Teribery v. Teribery*, 516 A.2d 33 (Pa. Super. 1986) as authority for withdrawal in such cases. After finding that duress, fraud, nor undue influence were present in Husband's case in *Lorson*, the opinion and order explicitly states, "[E]ven if withdrawals of affidavits of consent are not limited to situations involving duress, fraud or undue influence, the facts and circumstances of this case do not warrant a withdraw of the affidavit of consent." By providing the cautionary limiting language "even if," Judge Brown recognized that limiting withdrawals to these three situations may not be the case.

Upon review of *Lorson* and the cases provided by both Husband and Wife, we have determined that a Court's exercise of its discretion under Pa.R.C.P. 1920.42(c) allowing a withdrawal of an Affidavit of Consent is to be based upon the particular facts incident to a particular marriage and is not limited to situations involving fraud, duress, or undue influence. In *Lorson*, Judge Brown held that the Court has the inferred power to deny a petition for withdrawal of an affidavit of consent, under Pa.R.C.P. 1920.42(c), and that the allowance or denial of withdrawal is a fact based determination for the court to make. In *Lorson*, Judge Brown determined that he would not grant the Petition for Withdrawal of Affidavit of Consent because under the particular facts underlying that relationship "[a]lthough [Husband] was sincere in his desire to reconcile with [Wife], there was no hope for this occurring." Judge Brown explained that not only was Wife vehemently opposed to reconciliation with Husband,

but there was a Protection From Abuse Order issued against Wife that Husband had no plans of withdrawing which precluded Wife from speaking to Husband about any matters other than those that related to their children. Under these circumstances reconciliation was not likely and on that basis, the petition for withdrawal of the affidavit of consent not granted. Highlighting the Court's power to allow for withdrawals of Affidavits of Consent when the facts do warrant such a withdrawal, Judge Brown did state as a proviso that "[i]f there were any possibility of reconciliation efforts being fruitful, perhaps the Court's ruling would have been different." This Court's decision based on the facts in the current case is entirely consistent with Judge Brown's holding in *Lorson*.

In the case *sub judice*, under the same fact based reasoning Judge Brown applied in *Lorson*, this Court allowed withdrawal of Wife's Affidavit of Consent because we found that efforts at reconciliation may be successful. Significantly, the parties celebrate their 59th wedding anniversary this month. In Wife's answer to Husband's divorce complaint she initially denied that the marriage was irretrievably broken. Although the Wife's decision to sign the Affidavit of Consent was not made under duress it was made in a brief period of time (less than 1 hour), just prior to the start of a fault divorce hearing, without prior discussion with her counsel and when the Wife was experiencing emotional distress due to factors relating to the fault divorce hearing which was about to begin. These distress factors included that neither she nor her counsel had knowledge as to what testimony Husband intended to present at the fault hearing, except a reference made to the Wife by her counsel that Husband intended to make her out to be a "wicked witch." After signing the Affidavit of Consent Wife underwent hospitalization due to emotional issues which concluded in her fermenting her intention to seek new legal counsel to pursue withdrawal of the Affidavit of Consent.

As was the case in *Lorson*, a Protection From Abuse Order is currently in effect protecting Wife from potential abuse by Husband. Although we considered this factor we do not believe that the protective order conclusively denies the potential of reconciliation in this case. Rather we believe, as stated in our prior opinion, “Given the length of marriage and the storms of physical abuse and other unspecified indignities the marriage has already survived, it is reasonable to believe that through mutual efforts at counseling a basis for reconciliation could result.” Opinion and Order of July 15, 2009. To this end, the July 15, 2009 order also directed that the parties undergo marriage counseling in the hopes that if the marriage can be salvaged, it will be. Husband’s Motion for Reconsideration/*En Banc* Review being denied, the October 6, 2009 hearing will be limited to review of Husband’s other three motions not yet disposed of.

BY THE COURT,

William s. Kieser, Senior Judge
Specially Presiding

cc: William J. Miele, Esquire
Janice R. Yaw, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)