

ROY H. STONER,  
Plaintiff

vs.

HILDA C. STONER,  
Defendant

: IN THE COURT OF COMMON PLEAS OF  
: LYCOMING COUNTY, PENNSYLVANIA

:

: NO. 08-21,703

:

:

: DIVORCE

**Date: July 15, 2009**

**OPINION AND ORDER**

This Opinion and Order are entered in relation to various motions presented to the Court. An evidentiary hearing and legal argument of counsel was held on June 15, 2009. The most significant matter to be determined is the motion of Wife/Defendant/Hilda C. Stoner to rescind her Affidavit of Consent and To Seek Maintenance of Beneficiaries filed May 1, 2009. Also pending for disposition before the Court are the following motions: Wife's Motion to Strike Appointment of Master, filed May 8, 2009; Wife's Petition for Marital Counseling, filed June 4, 2009; Husband's Petition for Return of Filing Fee, filed May 4, 2009; and Husband's Counter Petition filed May 8, 2009 in which after responding to the Wife's Motion to Rescind Affidavit of Consent and Petition for Maintenance of Beneficiaries, Husband asserts that he is entitled to a fault divorce immediately without further hearing. Based upon the filings of this case and the testimony received we find the following facts:

1. Husband and Wife were married on August 22, 1951. After more than 57 years of marriage, they separated on November 24, 2008. Husband filed a divorce complaint on December 16, 2008.

2. Husband is age 80. Wife is age 75. They have 3 adult children.

3. The divorce complaint asserts as grounds that: the marriage is irretrievably broken

with the parties being estranged and no reasonable expectation or reconciliation, under section 3301(c) of the divorce code; indignities, under section 3301(a)(6) of the divorce code; the marriage is irretrievably broken with an expectation of living separate and apart for a period of two (2) years, under section 3301(d) of the divorce code.

4. The Wife filed an answer to the complaint on February 3, 2009, denying all three grounds.

5. By notice of December 18, 2008, a divorce only Master Hearing was scheduled to occur on the day before Valentine's Day, February 13, 2009.

6. On February 13, 2009, a hearing was not held and there is no Court record of the proceedings held that date, however, an order of that date was entered by the Family Court Hearing Officer which was filed on February 18, 2009. The order recites that at the time set for the hearing for the fault divorce an agreement was reached and in accordance with that agreement "...[I]t is ordered that Wife shall file her consent to the divorce on Mach 18, 2009. If Wife does not file her consent to the divorce on March 18, 2009, upon notification by the attorneys to the undersigned Family Court Hearing Officer, the Hearing Officer will issue an order granting a divorce on fault grounds, namely indignities".

7. On February 13, 2009, prior to the fault divorce hearing commencing the Wife was not certain, nor was her counsel, as to the nature of the indignities that Husband intended to present. The Wife, however, was told by her counsel that she would be made out by the Husband to "look like the wicked witch of the west".

8. In order to avoid proceeding with a fault hearing, the Wife agreed to the entry of the order of April 13, 2009.

9. At the time of entering into the agreement, the Wife was aware that if she failed to follow through with filing an Affidavit of Consent that without an evidentiary hearing a decree in divorce would be filed against her on the grounds of indignities.

10. The Wife went to the law office of her then counsel and signed an Affidavit of Consent on March 19, 2009. She was accompanied by an adult son. She did not meet with counsel but met with two staff members of counsel's office. Wife was presented with and signed an Affidavit of Consent consenting to the entry of a decree of divorce, subject to protective provisions to be contained in the divorce decree relating to a property separation agreement that was to be incorporated into the divorce decree. The Wife's consent was filed March 20, 2009.

11. At the time of signing the Affidavit of Consent, Wife understood that the divorce proceeding would soon be over. She acknowledges being told that by her then counsel's staff. She also acknowledges sitting down and reading the consent form "myself".

12. Husband signed an Affidavit of Consent on April 6, 2009 which was filed April 9, 2009. His consent does not consent to the entry of decree until all outstanding economic issues are resolved.

13. During the first week of April 2009, Wife was hospitalized for emotional issues. After that hospitalization and in the company of an adult child, Wife consulted present counsel who made a expanded and complete explanation to the Wife as to the status of the divorce proceedings including financial implications, specifically her loss rights as an insurance beneficiary and rights to inherit that could result upon the entry of a divorce decree.

14. The Wife then advised current counsel that she did not want a divorce and

requested that steps be taken to avoid the entry of a divorce decree.

15. Husband filed an Inventory and Appraisement on April 28, 2009.

16. Upon motion of the Husband filed May 4, 2009, on May 8, 2009, a Master was appointed, to determine the matters of divorce, equitable distribution, counsel fees, and costs. A Scheduling Order was filed by the Master on May 8, 2009 directing that a scheduling conference on the equitable distribution and financial matters would be held August 5, 2009, pre-trial statements were to be filed by September 23, 2009, and a pre-trial conference scheduled for October 7, 2009.

17. Wife's new counsel filed the motions currently under consideration, above referenced, the first being filed May 1, 2009 seeking to withdraw the affidavit of consent. Also, on June 4, 2009, Wife filed a counterclaim seeking APL, attorney's fees, alimony, health insurance, and equitable distribution of property.

18. At all relevant times, the Wife was a member of the Baptist faith although not regular in Church attendance. At all times, her religious beliefs were such that divorce was contrary to those beliefs.

19. Regardless of her religious beliefs the Wife voluntarily and understandingly signed the Affidavit of Consent on March 19<sup>th</sup> in order to avoid going through a factual hearing on the issue of indignities.

20. Wife understood as of February 13, 2009 that if she did not sign her Affidavit of Consent that Husband could proceed to obtain a fault divorce without further hearing.

21. The Wife wishes to reconcile and now believes that it is feasible through counseling to obtain reconciliation with the Husband. There has been a history of physical

abuse inflicted upon the Wife by the Husband, as recognized in the entry of a Protection from Abuse order in case number 08-21,624 in which an order was entered by agreement without findings of fact in favor of the Wife against the Husband on December 15, 2008. That order remains in effect except that Wife's exclusive possession of the marital premises was modified by a stipulated order entered in this divorce action on April 17, 2009, in connection with an agreement being made as to arranging for the sale of that real estate. Neither party resides in the marital residence, according to that stipulated order.

### **DISCUSSION**

Under the Court rules relating to a divorce, with permission of the Court an Affidavit of Consent may be withdrawn. Pa.R.Civ.P. 1920.42(c). The rule and its comments do not suggest the standards to be applied by the Court, however, the 1995 comment that accompanied the adoption of this rule "...notes that the law is unsettled as to whether a court has the authority to refuse leave to withdraw an Affidavit of Consent". Explanatory Comment – 1995, Ibid. Counsel, through letter briefs that have been filed with the Court, have contended that there is little controlling case law governing withdrawals of consent, however, both counsel have referred this Court to the following cases: *Lorson v Lorson*, #00-20,356 Lycoming County Common Pleas, Opinion of the Honorable Kenneth D. Brown (now President Judge), filed December 21, 2000; *McLaughlin v. McLaughlin*, Court of Common Pleas of Westmoreland County, Opinion of the Honorable Judge Blahovec, dated July 16, 1990, filed to No. 4659 of 1989 reported at 8 Pa.D. & C. 4<sup>th</sup> 176; *Teribery v Teribery*, 516 A.2d 33 (Pa. Super 1986).

While the subject of the withdrawal of an Affidavit of Consent is addressed in each of these opinions, we find that none of them involve the same issue now before this Court,

therefore these decisions are not controlling precedent. Specifically, contrary to Husband's argument we do not find that Judge Brown ruled in *Lorson v Lorson* nor does the Superior Court rule in *Teribery v Teribery* that an Affidavit of Consent can only be withdrawn if it was signed under conditions amounting to fraud, undue influence, or duress. Certainly if an Affidavit of Consent was obtained by fraud, undue influence or duress these cases would recognize that upon proper proof of such improprieties the withdrawal of the Affidavit of Consent must be allowed. We also agree with Judge Brown's analysis in *Lorson* as to what constitutes each of these factors and find that the Wife has not established that her Affidavit of Consent was procured through fraud, undue influence nor duress. It is not necessary, however, that one of the factors exist to allow the Affidavit of Consent to be withdrawn. Rather we believe that under Pa.R.Civ.P. 1920.42(c) the Court has equitable authority to permit the withdrawal of an Affidavit of Consent in order to effect justice among the parties and fulfill the intent and purposes of the Divorce Code. See, Pa.R.Civ.P. 126-128.

We have found that the Wife understandingly and voluntarily signed the Affidavit of Consent and also understandingly and voluntarily signed and agreed to the entry of the Family Court order on February 13, 2009. She understood that by doing so she would not have to go through a fault divorce proceeding where testimony concerning incidents that occurred throughout the marriage would be presented. She understood that a divorce decree would soon be entered based upon her making this agreement. We have not received sufficient evidence to make a determination as to whether she fully understood all the economic ramifications that would occur upon the entry of the divorce decree or that she had them explained to her, although it appears she was aware certain economic changes were going to occur when the

divorce was granted. The Wife has not asserted any deception was practiced as to her understanding of the divorce economic issues nor does she contend that if she had fully understood the economic consequences that she would not have entered into the agreement of February 13, 2009. Therefore her lack of understanding of the economic consequences, if there is any, is not a factor that affects our determination the Wife understood and voluntarily made her agreement.

We do believe the Wife's testimony that she now wants to have a reconciliation. The Wife's credibility regarding a desire to slow or reverse the divorce process is supported by evidence of her hospitalization for emotional issues which occurred in April. We think this adds to the legitimacy of her claim of a change of mind. It is also consistent with her initial response in her Answer to the Complaint (filed February 3, 2009) in which she denied grounds for a divorce existed, requested a divorce be denied and asserted there was a reasonable expectation of resolution. Wife's desire for reconciliation is obviously impacted somewhat by financial considerations but we also find her testimony to be credible that she believes this long term marriage should not now end in divorce. Given the length of the 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. At the time of filing the request to withdrawal the consent, the parties had been separated less than a year. We can not predict whether or not a reconciliation is certain to occur given the history of abuse that has occurred between the parties, apparently for a number of years. There is also evidence of a deep family division between the Husband and Wife, as well as their children, that was evident at the June 15, 2009 proceeding. Nevertheless, looking at the

length of the marriage and the total situation, including the relatively modest financial assets and income of the parties, it may be that a reconciliation could occur. We can not say as was stated in one or more of the above cited cases that there was no real likelihood of reconciliation. Instead there is a reasonable expectation of reconciliation.

The equitable justice question now presented to us under Rule 1920.42(c) is whether or not Wife should be permitted to withdraw the Affidavit of Consent. We believe she should be. Unlike the above referenced cases, cited to us by counsel, there has been no significant change in economic position, the status of the litigation, or significant expenditure of any attorney's fees arising based upon reliance on the filed consent. Nor has there been any other finalization of any rights in the divorce proceedings as of this stage of the proceeding which would be adversely affected or confused by the withdrawal of the Wife's consent. There is little, if any, detriment to the Husband through this withdrawal. The one obvious detriment may be that the divorce is delayed and/or that he would need to proceed with a fault hearing, if he desires the divorce decree be entered prior to the passage of two years of separation. We observe, however, that he does not want the decree to be entered until all economic issues are resolved. The pre-trial conference on equitable distribution will not be held until October 9, 2009, about 3 months in the future. A trial date has not been set. Neither of those detriments will result only from the Wife change of mind. In other words, whatever the financial consequences would be, or the result of a fault hearing would be, they will be the same now as if Wife had not filed an Affidavit of Consent. Further, the Wife has acted without delay and for what we believe to be appropriate motives, at least in so far as her desire to attempt further reconciliation is concerned. Given the ages and relative position of the parties even if Wife's

withdrawal is being requested for economic reasons such reasons are improper.

The foregoing determination that the Wife should be allowed to withdraw her Affidavit of Consent does not finally determine the matters before us. That is because of the wording of the order of the order of February 13, 2009. At that time, the Wife was represented by counsel. For whatever reason, the Wife, through counsel, made an agreement that if the Affidavit of Consent was not timely filed, the Husband would be entitled to request the entry of a decree of divorce on the basis of indignities without further evidentiary hearing. A Court order was entered in accordance with that agreement. As a result the scheduled hearing did not proceed. It appears to the Court that at the time of the February 13, 2009 proceeding the Husband and necessary witnesses were prepared to go forth with the evidentiary hearing. The Wife did not seek a continuance of the hearing. Instead, she agreed to this provision, which apparently and perhaps wisely was sought by Husband's counsel, which had the effect that if for some reason the Affidavit of Consent was not filed Husband would not have to reprepare and reschedule and go through the delay involved with having another evidentiary hearing on the issue of indignities.

Husband now argues that he needs to receive the benefit of the bargain reached on February 13, 2009 at least to the extent that if Wife's Affidavit of Consent is withdrawn that he should not have to again prepare for a hearing or take the time to go through a hearing and that as stated in the order of February 13, 2009 a fault divorce on the grounds of indignities should be entered upon his giving notice to the Family Court Hearing Officer of the consents withdrawal. It has also been advanced at argument that an order to preserve the dignity of the Court which accepted this agreement and gave up the time that was originally scheduled for the

hearing and now will have to find new time for a hearing that the automatic entry of a fault divorce decree as provided by the February 13, 2009 order should occur. The Wife has not presented significant arguments to the contrary, however, nevertheless we can not permit this to occur because such would be in violation of public policy since it could give rise to the obtaining of a divorce through collusion. We note that the divorce code envisions a hearing will be held when a fault divorce is asserted and only provides that no hearing is required in cases where there is mutual consent or the Court finds irretrievable breakdown under the provisions of Section 3301(c) or (d). 23 Pa.C.S. § 3301(e). While we are reasonably certain that collusion does not exist in this case, nevertheless, that often may not be able to be ascertained. At the same time, this Court did not, at any time, receive evidence or examine the parties to determine fully whether or not collusion may be involved. Regardless, as to the specifics of this case, however, it is improper for a fault divorce to be entered on the grounds of indignities or other grounds without the Family Court Hearing Officer conducting a hearing and receiving sufficient testimony of a credible nature which supports a finding that grounds for entry of a fault divorce decree actually do exist.

We do recognize that the Wife made an in Court counseled waiver of her right to an evidentiary hearing on the fault issue at the time of the entry into the order of February 13, 2009. The Court and the Husband thereafter acted in reliance on that agreement. Public policy of achieving regularity, finality and respect for its orders and proceedings also requires that to the fullest extent possible this Court now give effect to the February 13, 2009 order. Therefore, we believe it fair and just to further provide that at the evidentiary hearing for the fault divorce the Wife shall not be permitted to introduce testimony contrary to the evidence presented by

Husband, except if it be to contend that Husband or any witness, who testifies on behalf of Husband at the proceeding has committed perjury in the testimony presented to the Hearing Officer. The Wife, through counsel, shall be permitted to cross-examine any witness called to testify by the Husband at the evidentiary proceedings. Otherwise the Wife may not present testimony or argument at the hearing.

Accordingly, we enter the following order.

**ORDER**

1. The Wife's Affidavit of Consent filed March 20, 2009 and the accompanying Waiver of Notice filed that same date are hereby stricken and VACATED.

2. The Wife's request that beneficiaries be maintained is GRANTED so long as the parties remain married or until they otherwise reach an agreement both Husband and Wife shall maintain each other as beneficiaries of any account, insurance policy or other financial asset in which the other is beneficiary.

3. The counter petition to permit the entry of a decree of divorce on the grounds of indignities filed by the Husband on May 8, 2009 without evidentiary hearing is DENIED and Husband may proceed to schedule a fault divorce proceeding at which the testimonial limitations set forth in the foregoing opinion shall apply.

4. The Wife's petition for marital counseling is GRANTED and it is directed that counseling shall proceed as provided by the divorce code with three sessions of marital counseling to be scheduled. The parties shall cooperate in selecting an appropriate counselor and the scheduling of the counseling sessions without delay. Agreement as to the counselor can not be reached counsel may request a conference of the Court for determination thereof.

5. The motion to strike the appointment of a Master filed by the Wife on May 8, 2009 is GRANTED and the appointment of the Master through the order of May 7, 2009 and the subsequent scheduling order are VACATED.

6. All requests for counsel fees or costs to be paid by the other party are DENIED.

BY THE COURT,

William S. Kieser, Judge

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