

MC,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 09-21, 536
	:	
DC,	:	CIVIL ACTION - DIVORCE
	:	
Defendant	:	
	:	

OPINION & ORDER

AND NOW, this 1st Day of February, 2010, after hearing and argument on Husband's Petition for Special Injunctive Relief, filed January 19, 2010, the same is hereby DENIED. If relief exists for Husband, it exists under Husband's support case which is properly filed to a different docket number in this Court, and should be pursued in that forum.

Husband's petition requests that Wife immediately cooperate in listing the marital residence for sale, in which she currently resides alone. During oral argument, Husband also requested, in the event that the court did not award the relief requested, that Wife be forced to sign her affidavit of consent immediately after ninety days elapsed from the date Husband filed the divorce complaint against her, November 20, 2009.

Husband's petition alleges, and Wife's response admits, that Wife receives a mortgage contribution from Husband as part of a spousal support order dated April 24, 2009, and that the total expenses for the residence are \$1,615.85 per month. Husband goes on to argue, and Wife denies, that Wife will not be able to afford the expenses associated with the residence once the divorce is finalized. Husband contends that his mortgage contribution, \$506.87, together with his spousal support obligation, \$1,150.04, is burdensome to him.

The Court does not follow, from Husband's argument, that the equities would require nor that the Court should force a sale of the marital residence when Wife desires to and will make every effort to remain in the marital residence while the divorce is pending. Wife has to-date kept up with all the expenses related to the marital residence and made an appropriate payment schedule regarding the taxes.

The underlying motivation of Husband to force a sale of the marital residence lies with his allegedly burdensome support obligation. This is most obviously evidenced by his request that Wife be compelled to sign her affidavit of consent; assumingly, Husband anticipates that a divorce decree would in effect terminate the spousal support that he is currently paying along with the mortgage contribution. The Court cannot and will not compel Wife, the defendant in this divorce action, to sign and file an affidavit of consent.

The purpose of the affidavit of consent is to evidence a present intention by the party to finalize the divorce. The court cannot order a party to acquire that intention, and, therefore, cannot order a party to sign the affidavit. The court can, and has, conditioned the ability of a claimant to pursue a divorce action or obtain alimony pendente lite on that party's executing an affidavit of consent; however, the failure of the party to execute the affidavit will result only in the termination of alimony pendente lite or the dismissal of claims which the party who fails to file the affidavit is pursuing." *Armstrong v. Armstrong*, 34 D.&C. 3d 571, 572-3 (1985), quoting, *Norris v. Norris*, 10 Pa. D. & C.4th 207 at 213 (1991).

The legislature has included a provision in the Divorce Code, 23 §201(c), whereby a party may unilaterally obtain a divorce without the consent of, and, indeed, even over the objection of, the other party, even where the other party is in no way at fault. The condition precedent to such unilateral action is that the parties shall have lived separate and apart for a period of at least two years. Until that condition is met, or some other provision of the Divorce Code somehow becomes applicable, there would not appear to be any basis upon which this court may grant a divorce unless and until defendant voluntarily files her affidavit of consent.

If compelled because Wife will not acquiesce to the Court entering a divorce decree by way of signing and filing her affidavit of consent, Husband must either wait two years or pursue divorce under another ground in order to obtain a divorce decree in this matter. The Court will not compel Wife to sell the marital residence as long as she is making timely payments associated with the marital residence. If Husband's motivation is to lower his support payment, he may seek remedy in the proper forum, under the support case filed to a support docket number.

BY THE COURT,

Joy Reynolds McCoy, Judge

(JRM/trk)

cc: Patricia Bowman, Esquire
Christina Dinges, Esquire
Gary Weber, Esquire
Terra Koernig, Esquire
Jerri Rook, Executive Secretary to Judge McCoy
Family Court Hearing Officer Diane Turner
Family Court Hearing Office Dana Jacques