

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CF, JR.,	:	NO. 04-20,264
Plaintiff	:	
	:	
vs.	:	
	:	
EF,	:	
Defendant	:	IN DIVORCE

ORDER

AND NOW, this 3rd day of **June, 2011**, after a hearing held on May 31, 2011, in regards to the Motion to Vacate Divorce Decree filed April 29, 2011 by Wife. At which time Wife was present with her counsel David Raker, Esquire and Husband was present with his counsel, Jeffery Yates, Esquire.

A Divorce Decree in the matter was entered on May 1, 2006. Wife’s motion requests that the Court vacate the divorce decree because of its failure to determine or dispose of existing property rights and interests between the parties. Wife cites to 23 PA C.S. § 3323 (b) which states: "A decree granting a divorce or an annulment shall include, after a full hearing, where these matters are raised in any pleadings, an order determining and disposing of existing property rights and interests between the parties . . ." During the hearing Wife also argued that by admitting in her answer to the Divorce complaint that there was shared property between the parties she was claiming economic issues. Wife further argues that even though the Divorce Decree was entered on May 1, 2006 she is not precluded from filing the Motion to Vacate Divorce Decree because the failure of the decree to determine or dispose of economic issues was a fatal defect on the face of the record. Wife cites to 23 PA C.S. § 3332 which

states in part: “A motion to vacate a decree or strike a judgment alleged to be void because of extrinsic fraud, lack of jurisdiction over the subject matter or a fatal defect apparent upon the face of the record must be made within five years after entry of the final decree.”

In both his Answer to Motion to Vacate Divorce Decree and at the hearing Husband, through his counsel, argued that in order for Wife to have the economic issues disposed of in the divorce proceeding or preserved for further litigation after the Divorce Decree was entered she was required to file a written claim for economic relief with the Prothonotary. Husband’s position is that when Wife filed an Answer and Counterclaim to the Petition for Divorce it did not contain a claim for economic relief. Husband concedes to the fact that on the Counteraffidavit Under Section 3301 (d) of Divorce Code signed on March 24, 2006 by Wife that she did check box (b) that states;

I wish to claim economic relief which may include, Alimony, division of property, lawyer’s fees or expenses or other important rights. (I understand that to claim economic relief, I must also file all of my economic claims with the Prothonotary in writing and serve them on the other party. If I fail to do so before the date set forth on the Notice of Intention to Request Divorce Decree, the Divorce Decree may be entered without further delay.

Husband argued that the Counteraffidavit signed by Wife clearly stated that she must file all economic claims with the Prothonotary in writing and that by failing to do so she waived her rights to economic relief. As for the claim of fraud or defect on the face of the record Husband states that the failure of the Divorce Decree to settle economic claims is not a fatal defect because a party must take action to initial the process. He points to 23 PA C.S. § 3502 (a) which states: “Upon the request of either party in an action for divorce or annulment, the court shall equitably divide, distribute or assign, in kind or otherwise, the marital property between

the parties . . .” and he argues that there is no defect because Wife never made a request for equitable distribution.

At issue is whether Wife is time barred from requesting economic relief or is there a fatal defect on the face of the record that triggers the fraud/defect exception.

The law is clear on the statute of limitations for the filing of a Motion to Vacate Divorce Decree. A motion must be filed within 30 days of the decree being entered if no fraud or defects are being claimed; if there has been intrinsic fraud, extrinsic fraud, lack of jurisdiction or a fatal defect on the face of the record the Motion to Vacate Divorce Decree must be filed within 5 years of the Divorce Decree being entered. 23 Pa. C.S. 3332, 42 Pa.C.S. § 5505, *Egan v. Egan*, 2000 Pa. Super 261, *Hassick v. Hassick*, 695 A.2d 851 (1997 Pa. Super).

In this instance the Divorce Decree was entered May 1, 2006 and the Motion to Vacate Divorce Decree was filed April 29, 2011; if there is no finding of fraud, lack of jurisdiction or fatal defect on the face of the record Wife is time barred from bringing this claim. Wife is not claiming fraud of any type and this Court does not find any fraud to have occurred. Lack of jurisdiction is not being raised as both parties resided in Lycoming County in 2006 when the Divorce Decree was entered. The question then becomes does the failure of the Divorce Decree to determine or dispose of the economic issues constitute a fatal defect on the face of the record.

In *Flowers*, the divorce complaint included a request for equitable distribution of the marital assets but neither party requested bifurcation and nothing was filed with the court until a Motion to Vacate Divorce Decree was filed 3 years later. *Flowers v. Flowers*, 417 Pa. Super

528, 530. The court looked at the question of "...whether a fatal defect apparent on the face of the record exists in a bifurcated divorce when no motion was ever made to bifurcate, no notice was given of the right to bifurcate, and the trial court failed to review the advantages and disadvantages of the bifurcation." *Id.* The court found that while the appellant plead fraud and or a fatal defect on the face of the record her argument was based on the equitable nature of the divorce proceedings and that was not reason to vacate the divorce. *Id.* at 533. The court further held that when a filing party has had adequate opportunity to file a claim for economic relief or to request a bifurcation of the proceeds and fails to do so they are deemed as having waived their rights in the matter. *Id.* at 533-34. In addition, "[a] party who never filed a counter-claim or any other type of pleading despite having notice and the opportunity to be heard cannot now complain that her rights are in jeopardy." *Id.* at 534.

This Court looks at the facts before it and the facts in *Flowers*. While the cases are not identical there are similarities. Before the Court is the claim that failure of the divorce decree to determine or dispose of the economic issues despite those issues having been properly raised effectuates a fatal defect on the face of the record. However, Wife has failed to show where her economic claims were properly raised. The issue was not raised in her Counter Claim to the Divorce Complaint and even though she did file a counteraffidavit indicating that she was seeking economic relief she did not follow up by filing anything in writing with the Prothonotary seeking economic relief. On November 30, 2007, Wife did file a Petition seeking the amount of \$3,500 for all her claims against the marital estate. That petition was DISMISSED by the Honorable Senior Judge Clinton W. Smith. 23 Pa. C.S. 3502 (a) states "[u]pon the request of either party in an action for divorce or annulment, the court shall

equitably divide, distribute or assign, in kind or otherwise, the marital property between the parties . . .” “A party who never filed a counter-claim or any other type of pleading despite having notice and the opportunity to be heard cannot now complain that her rights are in jeopardy.” *Flowers*, 417 Pa. Super 528, 534. This Court finds that Wife had both time and opportunity to act and failed to do so.

As this Court finds that there is no fraud or fatal defect on the face of the record and wife is precluded from vacating the Divorce Decree as a result of the statute of limitations, Wife’s Motion to Vacate Divorce Decree is **DENIED**.

By the Court,

Joy Reynolds McCoy, Judge

JRM/frs