IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DLR,	:	
Plaintiff	:	
	:	**NO. 15-20,966**
vs.	:	
	:	
LR,	:	
Defendant	:	

O P I N I O N A N D O R D E R

AND NOW, this **27th** day of **June, 2016**, after argument heard on April 22, 2016, to Wife's Exceptions filed on February 9, 2016, and Husband's Cross-Exceptions filed on February 17, 2016, to the Master's Report dated January 21, 2016, at which time Wife was present with her counsel, Janice Yaw, Esquire, and Husband was present with his counsel, Christina Dinges, Esquire. Wife has raised three distinct Exceptions, which will be addressed individually below. Husband has raised one distinct Exception in his Cross-Exceptions.

Wife's Exceptions 1 – 3 – Cohabitation and Alimony

1. The Master erred in her finding that Defendant, hereinafter referred to as "Wife", cohabitated as the evidence clearly demonstrated that the parties did not reside together in the manner of husband and wife, mutually assuming rights and duties, dependent upon the marital relationship, which must be proven by a preponderance of the evidence.

2. The Master erred in not considering crucial unrebutted testimony that Wife was not cohabitating which included Social Interdependence; Mutual Interdependence; Financial Interdependence; and Permanency in Relationship.

3. The Master erred in not awarding alimony.

Cohabitation and Alimony

Wife raised Exceptions alleging that the Master erred in finding that Wife cohabitated, and avers that the evidence clearly demonstrated that the Wife and her paramour did not reside together in the manner of husband and wife, mutually assuming rights and duties, dependent upon the marital relationship. Wife argues that the Master erred in failing to consider unrebutted testimony when making her determination that wife was cohabitating with her paramour, which would have proven that Wife and her paramour were not socially and financially interdependent, and that there was no permanency in their relationship.

The Divorce Code lacks a specific definition of "cohabitation," but for purposes of barring alimony, one must *at least* be doing so "with a person of the opposite sex who is not a member of the family of the petitioner [alimony recipient] within the degrees of consanguinity." 23 Pa.C.S.A. § 3706. Courts have further elaborated by holding that cohabitation, for purposes of barring alimony, occurs when:

> two persons of the opposite sex reside together in the manner of husband and wife, mutually assuming those rights and duties usually attendant upon the marriage relationship. Cohabitation may be shown by evidence of financial, social, and sexual interdependence, by a sharing of the same residence, and by other means. . . . An occasional sexual liaison, however, does not constitute cohabitation. Miller v. Miller, 508 A.2d 550, 554 (Pa.Super. 1986).

When initially questioned, Wife provided the address of the marital residence as her address of record but then admitted she spends her nights at the home of her paramour Jason Sones in Watsontown. (N.T. 19). Wife indicated that she spent Christmas Eve and approximately 30 nights at the marital residence since the spring of

2015. (N.T. 24). Husband denies this and indicates that Wife hasn't spent 30 nights at the marital residence in the past two years. (N.T. 65). Wife testified that she considers her home to be the marital residence in South Williamsport and that she is just staying at Mr. Sones' home until the divorce is resolved because she can't afford to rent a place of her own. (N.T. 119). She testified that she has only a small amount of clothes and a "few things to live off of" at Mr. Sones' home, and that she does not consider it to be a permanent place to reside. (N.T. 120). Mr. Sones testified that Wife "moved in" three or four months after Husband confronted the two of them in December of 2012 and accused them of having an affair. (N.T. 29). Husband testified that for several years Wife had tubs of clothing that filled their spare bedroom, and he estimated that, as of the date of the Master's hearing, approximately two-thirds of it has been removed. (N.T. 106).

Mr. Sones testified that Wife does not pay rent to stay in his house and does not contribute to any of the household bills. (N.T. 30). He has given Wife an extra cell phone of his and allowed her to drive his truck when her car was in the shop. (N.T. 34, 37). When they grocery shop, they usually each purchase separate items but on occasion they comingle groceries and one person would purchase them (N.T. 40). Mr. Sones testified that they shared meals together and each was free to eat the food purchased by the other. (N.T. 48). Mr. Sones testified that Wife has not moved furniture into his residence and that she keeps a bag in her car on a regular basis (N.T. 41, 43).

In support of her assertion that the Master erred in finding that Wife was cohabitating, Wife's counsel relied heavily on the dissenting opinion in Lobaugh v. Lobaugh, which argued:

> A party shall not be entitled to alimony if he or she has established a marital-like relationship with another that has qualities of stability, permanence, and mutual interdependence. Such interdependence is reflected in the way two persons share their life together as a couple: it encompasses not only the social, emotional and sexual, but also the economic aspects of a relationship. Thus, determination that a relationship akin to marriage has been established requires a careful weighing of all the circumstances in each case. No single factor should obscure the assessment of whether there has been sufficient change in the life of the party receiving alimony to warrant its denial. 753 A.2d 834, 838 (Pa. Super. 2000).

Wife argues that she and paramour are not socially, mutually, and financially interdependent, because Wife did not move her furniture into Mr. Sones' home, they do not vacation together, do not say "I love you," and do not comingle their finances. These facts are not indicative of whether Wife and Mr. Sones are cohabitating, as many married couples are unable to afford to vacation together, and it is assumed that Mr. Sones already had a fully furnished house when Wife began staying there.[1] The evidence reflects that Wife's arrangement with Mr. Sones is more than an occasional sexual liaison. Although both Wife and Mr. Sones have indicated that they do not intend to marry, their relationship is clearly more than just "friends with benefits." They have shared a bedroom and meals, both at the home and out in the community, for at least two years. Mr. Sones has allowed Wife to use an extra cell phone of his as well as his truck when necessary. Wife keeps clothes and toiletries at Mr. Sones' house. There was no testimony that Mr. Sones had provided a date when Wife would no longer be welcome to stay at his home, and he indicated that she may come and go as she pleases. While Wife testified that she often has lunch and does her laundry at the marital residence, it is clear that she does not live there.

[1] Additionally, the Court notes that Wife's furniture could have been marital property of which they only reached an agreement regarding the division at the Master's hearing.

In fact, the situation between Wife and Mr. Sones is quite akin to the marriage between Wife and Husband. When Husband and Wife were married, they did not combine their finances. Husband paid the mortgage, utilities, and phone bills, while Wife would pay for groceries and their daughter's clothes (N.T. 67). Comingling of funds is clearly not a prerequisite to cohabitation. The purpose of alimony is to establish economic justice between divorcing spouses and the amount awarded is based on the needs of the dependent spouse. *See* Musko v. Musko, 668 A.2d 561, 565 (Pa. Super. 1995) *rev'd on other grounds*, 697 A.2d 255 (Pa. 1997). Because she is cohabitating with Mr. Sones, and does not have to pay rent or contribute to his household expenses because they are paid for by Mr. Sones, it would be inequitable to expect Husband to continue to pay for her living expenses.

Given the length and nature of Wife's relationship with Mr. Sones, this Court finds that the Master did not err in holding that they were cohabitating and therefore properly denied Wife's request for alimony. Wife's Exceptions 1, 2 and 3 are therefore DISMISSED.

WIFE'S EXCEPTION 4 – Unaccounted Funds from the 2011 Refinancing

The Master erred in not distributing the unaccounted funds from the 2011 refinancing of the marital residence and in not holding the record open for missing information.

Wife argued that the Master erred in not distributing unaccounted funds from the 2011 refinancing of the marital residence and did not hold the record open for missing information. The parties separated on December 21, 2012, according to Husband and on February 6, 2013, according to Wife. The Master found that there was no basis to

determine that the parties' separation was pre-planned. In August, 2011, over a year prior to Husband's date of separation and 18 months prior to Wife's date of separation, Husband refinanced the marital residence taking approximately $15,000 in cash from the residence. Husband testified that he placed the funds into his bank account and used it to pay various bills over a period of time. At the conclusion of the Master's Hearing, the record was left open for Husband to provide copies of his bank account statements and money market statements from July 13, 2011, through November 11, 2012. The documents were provided to the Master to consider. The Master found that the withdrawals occurred 17 months prior to separation, and as the separation did not appear to be pre-planned, there was no strong evidence that Husband withdrew the sums in any attempt to hide cash. The withdrawals in question total $2,422.00 for the months of September and October, 2011.

The Court does not find that the Master erred in failing to distribute the funds from the refinancing or in holding the record open further for missing information. It is clear that the Master accepted Husband's testimony that he refinanced simply due to the fact of obtaining a lower interest rate. The withdrawals of cash are not significant and the withdrawals occurred at least a year and up to 18 months prior to the parties' separation. Wife's Exception 4 is therefore DISMISSED.

WIFE'S EXCEPTION 5 – <u>Health Insurance</u>

The Master erred in not awarding health insurance to Wife.

Wife argues that the Master erred in failing to award health insurance to Wife. The Master found that Wife is currently in good health, though she did suffer from breast cancer and underwent a single mastectomy in January, 2010. Wife is also a diabetic.

Wife testified that she could obtain health insurance at a premium of $167.80 per month through her employment. Her total cost for medical, including the insurance premium, is $393.01 per month. The Master awarded Wife 60% of the marital estate including a substantial lump sum payment of cash. The Master found in denying Wife's request for health insurance that she is able to obtain health insurance through her employment at a very reasonable cost of $167.80 per month and was receiving a large lump sum award that would enable her to pay the premium, as well as unreimbursed medical expenses. The Court does not find that the Master erred in her determination to deny Wife's request for health insurance. Wife's Exception 5 is therefore DISMISSED.

HUSBAND'S CROSS-EXCEPTIONS 1-3

1. The Hearing Officer erred in determining that the parties stipulated that the marital value of Husband's Northwestern Mutual Annuity as of February 8, 2013, was $55,732.27. The parties stipulated that that was the value on February 8, 2013 and that there was $4,112.85 of non-marital funds in the account that were earned prior to the marriage. Therefore, the correct marital portion of the account based upon the Master's date of separation is $51,619.42.

2. Based upon the above, the Hearing Officer erred in determining the total assets in Husband's possession in the amount of $213,501.00. To the contrary, Husband has total marital assets in his possession of $209,388.42.

2. Based upon the above, the Hearing Offer erred in determining the total marital estate and Wife's 40%. After adjusting for the correct annuity number, the Master should have determined that Husband would owe Wife the sum of $122,306.65 after considering the assets Wife has in kind and consideration of payment of the debts.

Husband's Cross-Exceptions allege that the Hearing Master erred in determining the correct marital portion of the Husband's Northwest Mutual Annuity account based on the date of separation which in turn caused the calculations of the total marital estate and Wife's 40% to be incorrect. Husband argued the correct marital value of the Northwestern Mutual Annuity was $51,619.42, not the $55,732.77 found by the Master. At the argument, counsel for Wife agreed that the Master's calculations were erroneous, and stipulated that $122,306.65 is the total amount Husband would owe Wife in equitable distribution. However, there was disagreement between the parties as to whether the adjustment should reduce the amount of cash paid to wife or be deducted from the rollover payment. Wife's counsel argues the reduction should be from the rollover amount awarded to Wife and Husband's counsel argues that the amount of cash awarded to Wife should be reduced. After careful consideration, this Court finds that based upon the parties' agreement, Husband owes to Wife the sum of $122,306.65 in equitable distribution. In keeping with the Master's determination to split the tax consequences of the Northwestern Mutual account equally between the parties, twenty-five thousand eight hundred dollars of the $122,306.65 may be paid through a rollover from the Northwestern Mutual account. Wife shall be responsible for penalties and tax consequences for the funds once they are rolled over to her and Husband shall be

responsible for penalties and tax consequences of the funds remaining in his account after the rollover. The remaining $96,506.65 shall be paid to Wife in cash.

Based upon the above, Husband's Cross-Exceptions 1, 2 and 3 are GRANTED.

By the Court,

Joy Reynolds McCoy, Judge