

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

NOURREDINE DESLAM

Appellee

v.

ELLEN DESLAM

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1237 WDA 2012

Appeal from the Decree July 23, 2012
In the Court of Common Pleas of Westmoreland County
Civil Division at No(s): Case No. 568 of 2009-D

BEFORE: DONOHUE, J., MUNDY, J., and PLATT, J.*

MEMORANDUM BY MUNDY, J.:

Filed: March 15, 2013

Appellant, Ellen Deslam (Wife), appeals from the July 23, 2012 decree entered by the Court of Common Pleas of Westmoreland County, divorcing Wife and Appellee, Nourredine Deslam (Husband), from the bonds of matrimony and awarding Wife temporary alimony in the amount of \$150.00 per month, payable for six months. Wife contends that the trial court erred in granting the divorce and, alternatively, that the alimony award is insufficient. After careful review, we affirm.

The certified record discloses the following procedural history in this case. Husband and Wife were married on November 1, 2002. This was Wife's third and Husband's second marriage. Husband filed a complaint in divorce on March 27, 2009, alleging the parties had been separated in

* Retired Senior Judge assigned to the Superior Court.

excess of two years and the marriage was irretrievably broken. On July 13, 2010, Wife filed a counter-affidavit under 23 Pa.C.S.A. § 3301(b), denying the parties had been separated for two years. On December 1, 2010, Husband filed a petition for special relief, seeking court determination of the parties' date of separation. Following a hearing on Husband's motion for special relief, the trial court determined the parties' date of final separation was February 12, 2007. The trial court summarized the subsequent procedural history of this case as follows.

A Master's Hearing was conducted on January 13, 2012 at the law offices of O'Connell & Silvis, before Master James R. Silvis, Esq. Thereafter, a Master's Report was generated and forwarded to [the trial court]. The Master recommended that the parties be divorced and that Husband shall pay alimony to Wife.

Specifically, the Master recommended that the parties be divorced as they had already been separated for more than two years and the marriage was irretrievably broken. The Master further recommended that Wife be awarded alimony in the amount of \$150 a month for six months.^[1] According to the Master's recommendation, this was also to serve as contribution to Wife's health insurance or medical bills. This recommendation was based on the Master examining all 17 factors as set forth in Section 3701 of the Divorce Code, specifically finding that the marriage was short in duration, the parties were already separated for a period of five years with Wife receiving medical

¹ The parties stipulated that there were no issues of equitable distribution to be resolved by the Master. **See** Master's Report, 2/3/12, at 2.

benefits through Husband's employer, and the parties' had similar net incomes.

Wife filed exceptions to the Master's recommendations on February 22, 2012. Thereafter, Wife's counsel filed a Brief in Support of Exceptions on May 23, 2012. Husband's counsel filed a Brief in Opposition on May 31, 2012. Oral argument was held on July 23, 2012 before [the trial court]. Thereafter, upon careful consideration, [the trial court] issued an Order of Court denying [Wife's] Exceptions on July 23, 2012.

Wife filed a Notice of Appeal on August 8, 2012. Thereafter, this Court issued an Order of Court dated August 8, 2012 directing counsel for Wife to file a Concise Statement of the Errors Complained of on Appeal in accordance with Pa.R.C.P. 1925[(b)]. Counsel for Wife filed said Concise Statement on September 6, 2012.^[2]

Trial Court Opinion, 9/14/12, at 1-2.

On appeal, Appellant raises the following issues for our review.

1. Whether the [trial] court abused its discretion and committed reversible error by granting a decree in divorce, thereby terminating [Wife's] medical insurance coverage provided as a benefit of [Husband's] employment when, due to [Wife's] physical and mental conditions, [Wife], presently age sixty[-]two (62) will be unable to attain sufficient medical insurance coverage for less than seven hundred dollars (\$700.00) per month until receiving Medicare at age sixty[-]five (65).
2. Whether the [trial] court abused its discretion and committed reversible error by only awarding

² The trial court entered its Rule 1925(a) opinion on September 14, 2012. Therein the trial court incorporated the February 3, 2012 Master's Report as containing additional reasons for its determinations.

alimony to [Wife] in the amount of one hundred and fifty dollars (\$150.00) per month for a period of six (6) months immediately following the date of the Decree in Divorce when [Wife] presented competent evidence that 1) comparable medical insurance coverage would cost [Wife] approximately seven hundred dollars (\$700.00) per month because of her pre-existing medical conditions, and 2) [Wife] could remain on [Husband's] employer-provided medical insurance coverage for approximately fifty[-]six dollars (\$56.00) per month until attaining age sixty[-]five (65), at which time [Wife] would become eligible for Medicare.

Wife's Brief at 3.

Wife first argues the trial court abused its discretion in granting Husband a divorce in this matter. *Id.* at 8. Our standard of review of a trial court's determination of a divorce claim is clear.

[I]t is the responsibility of this [C]ourt to make a *de novo* evaluation of the record of the proceedings and to decide independently of the ... lower court whether a legal cause of action in divorce exists. However, in determining issues of credibility, the [lower court's] findings must be given the fullest consideration for it was the [lower court] who observed and heard the testimony and demeanor of various witnesses.

Frey v. Frey, 821 A.2d 623, 627 (Pa. Super. 2003) (internal quotation marks and citations omitted). Instantly, the trial court granted the divorce pursuant to 23 Pa.C.S.A. § 3301(d).³ Wife does not challenge the trial

³ The statute provides as follows.

(d) Irretrievable breakdown.--

(Footnote Continued Next Page)

court's determination that Husband established a legal cause of action for the divorce. Wife offers no argument that the master or the trial court erred in finding the parties had been separated for over two years and that the marriage was irretrievably broken. Rather, Wife argues that the trial court should have denied Husband's complaint for divorce because the divorce "resulted in [Wife] becoming ineligible for coverage under [Husband's] employer-provided medical insurance plan." Wife's Brief at 8. The trial court acknowledged the economic hardship Wife would experience as a result of losing medical coverage under Husband's family plan but noted that due to the length of the separation, Husband was entitled to a divorce.

Master's Report, 2/3/12, at 5.

(Footnote Continued) _____

(1) The court may grant a divorce where a complaint has been filed alleging that the marriage is irretrievably broken and an affidavit has been filed alleging that the parties have lived separate and apart for a period of at least two years and that the marriage is irretrievably broken and the defendant either:

(i) Does not deny the allegations set forth in the affidavit.

(ii) Denies one or more of the allegations set forth in the affidavit but, after notice and hearing, the court determines that the parties have lived separate and apart for a period of at least two years and that the marriage is irretrievably broken.

...

23 Pa.C.S.A. § 3301(d).

Wife offers no legal support for her contention that equitable economic considerations, such as loss of coverage under a spouse's employer-sponsored family medical insurance, may preclude a trial court from granting a divorce when the legal grounds therefor have been established. Indeed, as cited above, our review of a trial court's grant or denial of a divorce is not for abuse of discretion. Rather we independently review the record to decide if legal cause for a divorce exists. *Frey, supra* at 627. Since Wife does not challenge the legal ground for the divorce granted in this case, her first allegation of error is without merit. Therefore, we conclude the trial court did not err in entering a decree, divorcing the parties in this case.

Wife next argues the trial court abused its discretion by awarding her an insufficient amount of alimony. Wife's Brief at 12. When considering a challenge to an award of alimony, we are guided by the following.

Following divorce, alimony provides a secondary remedy and is available only where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution. An award of alimony should be made to either party only if the trial court finds that it is necessary to provide the receiving spouse with sufficient income to obtain the necessities of life. The purpose of alimony is not to reward one party and punish the other, but rather to ensure that the reasonable needs of the person who is unable to support herself through appropriate employment are met.

Alimony is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor's ability to pay. An award of

alimony may be reversed where there is an apparent abuse of discretion or there is insufficient evidence to support the award.

Balicki v. Balicki, 4 A.3d 654, 659 (Pa. Super. 2010) (citations and quotations omitted).

In determining whether alimony is necessary, the trial court must consider the enumerated factors set forth in 23 Pa.C.S. § 3701. That statute provides:

(b) Factors relevant.—In determining whether alimony is necessary and in determining the nature, amount, duration and manner of payment of alimony, the court shall consider all relevant factors, including:

(1) The relative earnings and earning capacities of the parties.

(2) The ages and the physical, mental and emotional conditions of the parties.

(3) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits.

(4) The expectancies and inheritances of the parties.

(5) The duration of the marriage.

(6) The contribution by one party to the education, training or increased earning power of the other party.

(7) The extent to which the earning power, expenses or financial obligations of a party will be affected by reason of serving as the custodian of a minor child.

(8) The standard of living of the parties established during the marriage.

(9) The relative education of the parties and the time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment.

(10) The relative assets and liabilities of the parties.

(11) The property brought to the marriage by either party.

(12) The contribution of a spouse as homemaker.

(13) The relative needs of the parties.

(14) The marital misconduct of either of the parties during the marriage. The marital misconduct of either of the parties from the date of final separation shall not be considered by the court in its determinations relative to alimony except that the court shall consider the abuse of one party by the other party. As used in this paragraph, "abuse" shall have the meaning given to it under section 6102 (relating to definitions).

(15) The Federal, State and local tax ramifications of the alimony award.

(16) Whether the party seeking alimony lacks sufficient property, including, but not limited to, property distributed under Chapter 35 (relating to property rights), to provide for the party's reasonable needs.

(17) Whether the party seeking alimony is incapable of self-support through appropriate employment.

(c) Duration.—The court in ordering alimony shall determine the duration of the order, which may be for a definite or an indefinite period of time which is reasonable under the circumstances.

23 Pa.C.S. § 3701(b)(c).

Kent v. Kent, 16 A.3d 1158, 1161-1162 (Pa. Super. 2011), *appeal denied*, 29 A.3d 797 (Pa. 2011).

Wife contends the trial court and master failed to properly consider and weigh the economic impact of its alimony award, “adamantly aver[ring] that the award of alimony of \$150.00 per month for six (6) months is insufficient to enable [Wife] to obtain the reasonable needs and necessities of life in accordance with the standard of living during the marriage.” Wife’s Brief at 13. Wife maintains as a consequence of the divorce she will incur prohibitive expenses of approximately \$700.00 per month in order to maintain her own health insurance, given her pre-existing medical conditions. ***Id.*** Wife asserts the factors enumerated in Section 3701 of the Divorce Code support a higher alimony award.

When looking to the relative needs of the parties, it becomes obvious that the needs of [Wife] surpass those of [Husband]. [Husband] is employed and does not appear to suffer from any conditions that would inhibit his ability to continue his earnings. Conversely, [Wife] suffers from numerous physical, mental, and emotional conditions, and considering the approximate cost to [Wife] to obtain her own medical insurance coverage, she would almost certainly need to seek employment to cover the increase. Yet, her present conditions make seeking

and securing additional employment impractical, if not impossible.

Id. at 15.

The trial court found that the master had considered all of the factors enumerated in Section 3701 and assessed them properly in recommending the alimony award in this case. Trial Court Opinion, 9/14/12, at 2. Those findings include the following. The parties each had comparable modest incomes and earning capacities. Master's Report, 2/3/12, 3, 5. Husband, 56 years old at the time of the master's hearing, immigrated into the country around 1985 from Algeria where he completed a course in a petroleum college. *Id.* at 3. Currently, Husband earns a gross income of \$23,000.00 per year as a custodian for a Catholic school. *Id.* Wife, 62 years old at the time of the master's hearing, attended modeling school and had a 40-year career producing trade shows. *Id.* Wife's current income totaled about \$27,000.00 per year between her trade show business and social security payments. *Id.* at 3, 5. Wife owns her home and has approximately \$170,000.00 in premarital savings and investment. *Id.* at 4. Husband does not own a home and has no significant savings. *Id.* 3. Husband had no physical or mental impairments. *Id.* Wife testified to several past and present illnesses including colon cancer, prescription drug dependency, heart condition, anxiety disorder, and diabetic condition. *Id.* at 3-4. Wife supplied no expert evidence of the impact of her medical conditions on her earning capacity. The marriage was of relatively short duration, with the

parties having resided together for about four and one half years before separating. *Id.* at 3. During the five years of separation, Husband paid for Wife's health insurance on his family plan at a cost of about \$56.00 per month. *Id.* The cost for Wife to obtain her own health insurance is about \$700.00 per month. *Id.* at 4-5.

During the January 13, 2012 hearing, Wife's counsel acknowledged to the master that the economic position of the parties renders futile an alimony award against Husband.

[WIFE'S COUNSEL]: ... So what we are looking to simply say is look, keep them married until February, because the cost to her is unbelievable and **there is no way, quite frankly, [Husband] on a \$23,000.00 a year income is going to be able to pay enough to [Wife] to provide for the health insurance that is costing \$56.00 a month.** That doesn't make any sense. But it is one of those difficult cases when you have a two year period of separation and it is pretty clear the marriage is irretrievably broken and nothing to suggest otherwise, but the consequences of granting a divorce between now and February, and if it turns out that it is age 65, that creates another little bit more of an issue.

Is just such a great impact on her and I can't make it up financially for [Husband] because the income isn't there, to do that. That is why we are saying is the option is to either stay married or you are going to to [sic] pay for her health insurance, whatever it is, it is. And you pay for it, **but that is not a practical solution to the thing.**

N.T., 1/13/12, at 47-48 (emphasis added).

After careful review, we conclude the record supports the findings of the master and the trial court. We further conclude that the trial court properly considered the factors set forth in section 3701 of the Divorce Code and the policy considerations relevant to an alimony award. ***See Lawson v. Lawson***, 940 A.2d 444, 448 (Pa. Super. 2007) (holding where trial court considered all the statutory factors, “[w]e cannot conclude that the trial court abused its discretion by giving determinative weight to ... undisputed factors”), *appeal denied*, 951 A.2d 1165 (Pa. 2008). We discern no abuse of discretion in the trial court’s grant of temporary alimony in this case.

It is an unfortunate reality that divorce oftentimes results in a net adverse economic impact for the parties. That fact cannot serve as grounds to deny a divorce where the legal case for the same has been established. The economic claims attendant to a divorce action, to wit, equitable distribution, alimony, costs, and support, are the proper vehicles to address these issues. In this case, the trial court balanced the equities of the parties and issued an order designed to afford economic justice between the parties. Accordingly, we affirm the trial court’s July 23, 2012 decree.

Decree affirmed.