

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

GREGORY J. HAUCK,		IN THE SUPERIOR COURT OF
		PENNSYLVANIA
Appellee		
v.		
SARA A. HAUCK,		
Appellant		No. 1984 WDA 2011

Appeal from the Order Entered December 9, 2011
In the Court of Common Pleas of Washington County
Civil Division at No(s): No. 2009-1258

GREGORY J. HAUCK,		IN THE SUPERIOR COURT OF
		PENNSYLVANIA
Appellee		
v.		
SARA A. HAUCK,		
Appellant		No. 1985 WDA 2011

Appeal from the Decree Entered December 1, 2011
In the Court of Common Pleas of Washington County
Civil Division at No(s): No. 2009-1258

BEFORE: BENDER, J., MUNDY, J., and STRASSBURGER, J.*

MEMORANDUM BY BENDER, J.

FILED: May 16, 2013

Sara A. Hauck (Wife) appeals from both the decree in divorce, dated December 1, 2011, and the order denying her petition to vacate the divorce

* Retired Senior Judge assigned to the Superior Court.

decree, dated December 9, 2011, related to the dissolution of her marriage to Gregory J. Hauck (Husband).¹ After review, we affirm the decree and the order.

The trial court set out the following statement of the facts:

On February 19, 2009, Plaintiff, Gregory Hauck ("Husband"), filed a *pro se* Complaint in Divorce alleging that the marriage between the parties was irretrievably broken. For more than two years thereafter, neither party took any action with respect to the divorce. On August 11, 2011, Husband filed an affidavit under §3301(d) of the Divorce Code averring (1) that the parties separated on November 27, 2004 and continued to live separate and apart for a period of at least two years; and (2) that the marriage was irretrievably broken. In addition, Husband acknowledged his understanding that any rights he might have concerning alimony, division of property, lawyer's fees or expense that were not claimed before entry of a divorce decree would be lost.

On August 17, 2011, Husband filed a *Praecipe* to Reinstate the Divorce Complaint. This action was necessary due to a local rule regarding "stale" cases that have been inactive for two years or more. The complaint was then reinstated by the Prothonotary of Washington County on the same day. Thereafter, on August 31, 2011, Wife filed an incomplete Counter-Affidavit pursuant to §3301(d) of the Divorce Code. Wife's Counter-Affidavit indicated that she opposed the entry of a divorce decree, but did not include the required election of a reason for her opposition. Wife's counter-affidavit also indicates by way of election that she intended "to claim economic relief which may include alimony, division of property, lawyer's fees or expense or other important rights."

More than a month later, on October 3, 2011, Husband served upon Wife a Notice of Intention to Request Entry of Section 3301(d) Divorce Decree (the "Notice of Intention"),

¹ Wife's two appeals were consolidated *sua sponte* by *per curiam* order of this Court on January 12, 2012.

which was sent via regular mail to Wife's address at 131 Canterbury Lane, McMurray, Pennsylvania 15317. The Notice of Intention informed Wife that Husband could seek a final divorce decree from the Court as soon as October 24, 2011 or 20 days after service of the Notice. Then on October 27, 2011, Husband filed a *Praecipe* to Transmit the Record under §3301(d) of the Divorce Code (the "*Praecipe*") seeking the issuance of a final divorce decree from this Court. The *Praecipe* requested that the Prothonotary transmit the record, together with the following information, to the Court for entry of a Divorce Decree:

1. The ground for divorce: Irretrievable breakdown under §3301(d) of the Divorce Code and the parties have lived separate and apart for at least two (2) years.
2. The date and manner of service of the complaint: The following documents were personally served on Defendant on September 12, 2011: a copy of the Complaint in Divorce filed on February 19, 2009, a copy of the *Praecipe* to Reinstate the Divorce Complaint which was filed on August 17, 2011, Plaintiff's Affidavit under Section 3301(d) of the Divorce Code, which was filed on August 11, 2011, and a *Praecipe* for Appearance, which was filed on August 11, 2011.
3. Date of execution of the Affidavit required by section 3301(d) of the Divorce Code: Plaintiff signed the Affidavit under section 3301(d) on August 10, 2011.
4. Date of filing and service of the Plaintiff's affidavit upon the respondent: Plaintiff's Affidavit was filed with the court on August 11, 2011 and served upon Defendant on September 12, 2011 with the above listed documents and Counter-Affidavit.
5. Related claims pending: None.
6. Date and manner of service of the Notice of Intention to file *Praecipe* to Transmit Record: On October 3, 2011, the Notice of [I]ntention to file the *Praecipe* to Transmit was sent via regular mail to Defendant's address at 131 Canterbury Lane, McMurray, PA 15317.
7. The Notice of Intention outlined that Plaintiff would be filing the *Praecipe* to Transmit on October 24, 2011.

The Court then entered a Divorce Decree pursuant to §3301(d) of the Divorce Code on December 1, 2011. On December 14, 2011, Wife presented her Petition to Vacate the Divorce Decree (the "Petition") in motions court. The Petition alleged that Wife filed a Counter-Affidavit in a timely manner that she was not served with a copy of the *Praecipe* to Transmit. In addition, Wife asserted that she was completely dependent on Husband's health insurance, that they acquired various items of marital property during the relationship, and that she was entitled to her marital portion of Husband's pension. On that basis, Wife requested that the Court set aside the Divorce Decree. After consideration of the Petition and argument thereon during motions court, the Court issued the denial of the petition.

Trial Court Opinion (T.C.O.), 11/19/12, at 1-4.

On December 21, 2011, Wife filed appeals from both the divorce decree and the denial of her petition to vacate the divorce decree. Wife also submitted timely concise statements of matters complained of in response to the Court's two orders requesting the statements pursuant to Pa.R.A.P. 1925.

In her brief, Wife raises the following questions for our review:

1. The Trial Court abused its discretion in entering a Final Decree in Divorce and in denying [Wife's] Petition to Vacate Divorce Decree where the Final Decree in Divorce was entered in violation of Pennsylvania Rule of Civil Procedure 1920.42(d)(1);
2. The Trial Court abused its discretion in entering a Final Decree in Divorce where [Husband] failed to provide Notice of Intention to Request Entry of Decree to [Wife] at least twenty (20) days prior to the filing of the *Praecipe* to Transmit the Record;
3. The Trial Court abused its discretion in entering a Final Decree in Divorce where [Husband] did not file a *Praecipe* which stated the date and manner of service of the Notice of Intention to Request Entry of Decree on [Wife];

4. The Trial Court abused its discretion in entering a Final Decree in Divorce where the [Wife] filed a Counter-Affidavit raising issues of Equitable Distribution to which there was no resolution of the issue on the record in accordance with Pennsylvania Rule of Civil Procedure 1920.76;

5. The Trial Court abused its discretion in entering a Final Decree in Divorce where the parties had not filed signed Waivers of Notice of Request for Entry of Divorce Decree in violation of Pennsylvania Rule of Civil Procedure 1920.42(e)(1); and

6. The Trial Court abused its discretion in entering a Final Decree in Divorce where there was an existing order for spousal support and [Wife] had filed a Counter Affidavit under Section 3301(d) of the Divorce Code raising issues of Equitable Distribution and the Decree failed to state that the [sic] "The court retains jurisdiction of any claims raised by the parties to this action for which a final order has not yet been entered. Any existing spousal support order shall hereafter be deemed an order for alimony pendent lite if any economic claims remain pending[]" in accordance with Pennsylvania Rule of Civil Procedure 1920.76.

Wife's brief at 4-5.²

² We are compelled to comment that Wife has failed to comply with Pa.R.A.P. 2119(a), which states:

The argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.

Although Wife's organization of the sole argument section does not correspond with the issues presented and does not facilitate our review, "it does not impair our review to the extent that we would decline to address the issues on this basis." **Lemenestrel v. Warden**, 964 A.2d 902, 910-11 n.5 (Pa. Super. 2008). However, in light of the manner in which Wife has discussed her various arguments, we address them together, but not necessarily in the order she has presented them.

Our standard of review when addressing a court's denial of a petition to vacate a divorce decree is "whether the trial court abused its discretion." ***Bingman v. Bingman***, 980 A.2d 155, 157 (Pa. Super. 2009). "Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will." ***Id.*** (quoting ***Commonwealth v. Widmer***, 560 Pa. 308, 322, 744 A.2d 745, 753 (2000)).

Wife begins her argument by quoting the language contained in section 3332 of the Divorce Code, which states that:

A motion to open a decree of divorce or annulment may be made only within the period limited by 42 Pa.C.S. § 5505 (relating to modification of orders) and not thereafter. The motion may lie where it is alleged that the decree was procured by intrinsic fraud or that there is new evidence relating to the cause of action which will sustain the attack upon its validity. **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.** Intrinsic fraud relates to a matter adjudicated by the judgment, including perjury and false testimony, whereas extrinsic fraud relates to matters collateral to the judgment which have the consequence of precluding a fair hearing or presentation of one side of the case.

23 Pa.C.S. § 3332 (emphasis added). As the basis for her contention that the trial court should have vacated the divorce decree, Wife relies on that portion of section 3332 providing for the opening of a divorce decree when a "fatal defect is apparent upon the face of the record." Wife also emphasizes

that the court has broad equitable powers in divorce proceedings, noting that 23 Pa.C.S. § 3102(a)(6) identifies the Commonwealth's policy to "[e]ffectuate economic justice between parties who are divorced or separated and ... insure a fair and just determination and settlement of their property rights." Then, Wife argues that in entering the divorce decree and refusing to grant her petition to vacate the decree, the trial court violated Pa.R.C.P. 1920.42(d)(1). Rule 1920.42(d)(1) states that:

(d)(1) Except as provided in (e), no decree shall be entered by the court under § 3301(c) or § 3301(d)(1)(i) of the Divorce Code **unless a notice of intention to request entry of divorce decree**, substantially in the form prescribed by Rule 1920.73(a), **was mailed or delivered** to the attorney of record of the party against whom the decree is to be entered or, **if there is no attorney of record, to the party, at least twenty days prior to the date of the filing of the praecipe to transmit the record**. The praecipe shall state the date and manner of service of the notice, a copy of which shall be attached. [Emphasis added.]

Specifically, Wife contends that the court abused its discretion because the "[r]ecord does not reflect the filing of the Notice of Intention to Request Entry of Divorce Decree nor the service of the Notice of Intention on Wife." Wife's brief at 15. Rather, Wife asserts that "Husband circumvented the Rules [of] Civil Procedure and obtained the Divorce Decree without proper notice to Wife, despite her filing of her counter-Affidavit under Section 3301(d) [of the Divorce Code]."³ ***Id.*** Wife relies on ***Lazaric v. Lazaric***,

³ Section 3301(d)(1) of the Divorce Code provides in pertinent part:

(Footnote Continued Next Page)

818 A.2d 523 (Pa. Super. 2003), in support of her claim that the record here was defective. The **Lazaric** case held that “the technical requirement that notice of intention to request entry of Section 3301(c) divorce decree be served upon wife was a necessary prerequisite, and the failure to do so constituted such a procedural deficiency under Pa.R.Civ.P. 1920.42(d)(1) that the final decree of divorce must be reversed.” **Id.** at 526.

Although the husband in **Lazaric** conceded that he had not served the wife or her attorney with a copy of the notice of intention, the trial court refused to conclude that the decree was invalid. On appeal, this Court reversed, determining that the record certified to the trial court was procedurally deficient because “[t]here was no evidence in the record to support the conclusion that, prior to filing the praecipe to transmit the

(Footnote Continued) _____

(d) Irretrievable breakdown.—

(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. § 3301(d)(1).

record, husband's attorney served wife or her attorney with notice to request entry of ... divorce decree." ***Id.***

The record in the instant case belies Wife's allegations of error. Notably, Pa.R.C.P. 1920.42(d)(1) requires that the notice of intention must be substantially in the form prescribed by Rule 1920.73(a), must be mailed or delivered to the opposing party at least twenty days prior to the filing of the praecipe to transmit the record, and that the praecipe must state the date and manner of service of the notice of intention, which must be attached to the praecipe. Our review reveals that the trial court's findings as to Husband's compliance with Rule 1920.42(d)(1) are supported by the documents in the record. In particular, Husband's praecipe to transmit the record contains the information regarding the date of mailing of the notice of intention to Wife, the address to which it was sent and the date by which she must request any economic relief, *i.e.*, October 24, 2011.⁴ Wife has cited no rule that requires more than this. Therefore, we conclude that the trial court did not abuse its discretion when it found that Husband had complied with these requirements. ***See*** T.C.O. *supra*.

⁴ The notice of intention specifically states: "Unless you have already filed with the court a written claim for economic relief, you must do so by the above date or the court may grant the divorce and you will lose forever the right to ask for economic relief. The filing of the form counter-affidavit alone does not protect your economic claims." Notice of Intention to Request Entry of § 3301(d) Divorce Decree.

Wife also argues that when she filed her counter-affidavit under section 3301(d), she indicated that she wished “to claim economic relief which may include alimony, division of property, lawyer’s fees or expenses or other important rights.” Wife’s Counter-Affidavit. She acknowledges that in opposing the entry of the divorce decree, she did not indicate the reason, *i.e.*, she did not check either or both of the options claiming the parties had not lived separate and apart for a period of at least two years and/or that the marriage was not irretrievably broken. ***See Wetzel v. Heiney***, 17 A.3d 405, 407 (Pa. Super. 2011) (stating that by checking only the option opposing the entry of divorce decree in the counter-affidavit, but failing to check either or both reasons for the opposition, the grounds for a section 3301(d) divorce were established). Here, Wife also checked statement (b) wherein she requested economic relief. However, she did not comply with the following directive:

I understand that in addition to checking (b) above, 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] notice to me, and I shall be unable to thereafter to [sic] file any economic claims.

See Wife’s Counter-Affidavit, 8/31/11. Simply stated, Wife’s *pro se* status in the trial court does not excuse her failure to abide by the directives she received in the notice of intention, **see** n.4 *supra*, and/or in the counter-affidavit. Having failed to take any action by filing her economic claims with

the prothonotary and serving them on Husband, she has waived these claims. Thus, the absence of language in the divorce decree, retaining jurisdiction of any claims raised, including economic claims, was proper in that no such claims existed. Therefore, we conclude that these arguments provide Wife no relief.

Wife also discusses the timing of her filing of her petition to vacate the divorce decree, acknowledging that her petition was filed thirteen days after the entry of the divorce decree. Thus, she points out that the petition was filed within the thirty-day period provided for under 42 Pa.C.S. § 5505 or within the five year period after the entry of the decree as provided for in 23 Pa.C.S. § 3332. Wife also appears to be aware that a divorce decree must be vacated or opened so that a court may consider her economic claims. However, Wife's timing argument provides no relief in that she has simply failed to persuade this Court that a fatal defect was apparent on the record, which would have required the opening of the divorce decree.⁵

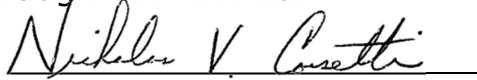
⁵ In response to the Dissent, we acknowledge that Wife asserted that Husband should have filed a new affidavit after he filed the praecipe to reinstate the divorce complaint. However, Wife supplies no citation to support this statement. She also does not argue that Husband's failure to refile the affidavit should force a *quid pro quo*, which is what the Dissent contends. In fact, the language contained in 23 Pa.C.S. § 3301(d) provides no requirement that the affidavit must be filed anew when a divorce complaint has been reinstated. (In this case, Husband's affidavit was filed about one week before the complaint was reinstated.) Additionally, section 3301(d) does not set forth any timeframe compelling the filing of an affidavit as it relates to the filing of the complaint, even if this is the usual practice. Moreover, the Dissent's reliance on the abbreviated decision in ***Givens v.*** (Footnote Continued Next Page)

For the reasons stated above, we affirm the divorce decree and the order denying the petition to vacate the decree.⁶

Divorce decree affirmed. Order affirmed.

Judge Strassburger files a dissenting memorandum.

Judgment Entered.



Deputy Prothonotary

Date: 5/16/2013

(Footnote Continued) _____

Givens, 46 Pa. D.&C.3d 111 (Fayette Cty. 1986), does not convince us otherwise. Neither are we obligated to follow **Givens**, nor does **Givens** provide any basis or reasoning that we could apply to the present situation.

⁶ We also comment on Wife's claim that the waivers of notice of intention to request entry of decree were required under Pa.R.C.P. 1920.42(e)(1) before the court could enter a divorce decree. However, as stated by the trial court, this rule "is only applicable in the absence of a duly-served Notice of Intention." T.C.O. at 6. As recognized by the trial court, and confirmed by our review of the record, Husband served the notice of intention on Wife on October 3, 2011.