

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PAUL ADAMCHICK

Appellant

v.

CHARLENE R. ADAMCHICK

Appellee

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

No. 1655 MDA 2017

Appeal from the Order Entered October 3, 2017
In the Court of Common Pleas of Luzerne County
Civil Division at No: 4205-2012

BEFORE: STABILE, J., NICHOLS, J., and PLATT, J.*

MEMORANDUM BY STABILE, J.:

FILED JUNE 11, 2018

Appellant, Paul Adamchick (“Husband”), appeals from an order relating to the equitable distribution of property in the marital estate. We affirm.

The facts of this case are undisputed.¹ On April 3, 2012, Husband filed this divorce action. On August 13, 2014, a divorce master held a hearing. Two and a half years later, on May 11, 2017, the master issued his report and recommendation relating to equitable distribution of the parties’ assets. On October 3, 2017, the trial court entered an order adopting the master’s report and recommendation. On October 23, 2017, Husband filed a notice of appeal

* Retired Senior Judge assigned to the Superior Court.

¹ These facts are taken from the trial court’s Pa.R.A.P. 1925(a) opinion filed on December 14, 2017.

to this Court. Subsequently, Husband filed a Pa.R.A.P. 1925(b) statement, and the trial court issued a Pa.R.A.P. 1925(a) opinion.

Husband raises the following issues in this appeal:

I. Does the recognition of thirty-nine (39) items of personal property as marital assets amount to a “double dip” in that the same items were considered as income in [Wife’s] request for spousal support[?]?

II. Does the fact that the master’s report and recommendation was filed two and one-half (2½) years after the date of hearing violate Pa. Rule of Civil Procedure 1920.55-2(a)(1)(ii)² and does the delay [a]ffect [Husband’s] ability to make a distribution “in kind”?

Appellant’s Brief at 1.

After careful review of the record and the relevant case law, we conclude that the trial court correctly addressed Husband’s first issue on appeal. **See** Trial Court Opinion, 12/14/17, at 3-7.

In his second argument, Husband argues that he suffered prejudice from the master’s 2½ year delay in issuing his report and recommendation. The master recommended that Husband have the option of distributing marital assets to Wife in-kind. According to Husband, however,

during the [master’s] two and one-half (2-1/2) year delay [Husband] was unaware of the . . . intentions of the [m]aster and continued to buy and sell the items of personal property. Certainly, no freeze order was entered. By the time he received the [master’s report], it was too late to take advantage of a distribution in-kind [because Husband had already sold the items

² Rule 1920.55-2(a)(1)(ii) requires the master to file his report “within thirty days from the last to occur of the receipt of the transcript by the master or close of the record in contested actions.”

in question]. It is unknown what the [m]aster's opinion as to the value of these items would have been if he did not make an in-kind distribution available.

Husband's Brief at 6-7.

Husband has waived this issue by failing to raise it in his Pa.R.A.P. 1925(b) statement. ***Barton v. Lowe's Home Centers, Inc.***, 124 A.3d 349, 356 n.4 (Pa. Super. 2015) (consumer who claimed that lawnmower he bought from major retail chain caught fire and burned down his barn waived right to raise "malfunction" theory of strict liability in appeal due to failure to raise issue in his statement of errors complained of on appeal).

Even if Husband had preserved this issue for appeal, it is devoid of merit. As the plaintiff in this action, Husband "[bore] the risk of not acting within a reasonable time to move a case along . . . It is plaintiff's duty to move the case forward and to monitor the docket to reflect that movement." ***Golab v. Knuth***, 176 A.3d 335, 339 (Pa. Super. 2017). The record does not indicate that Husband requested the master to issue his decision during the 2½ year hiatus. By not seeking a decision, Husband bore the risk that in-kind distribution would no longer be possible at the time of the report.

We affirm the trial court's order and direct that a copy of the December 14, 2017 trial court opinion be attached to any future filings in this case.

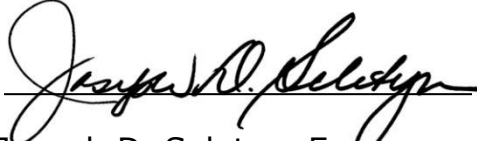
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Order affirmed.

Judge Platt joins this memorandum.

Judge Nichols concurs in the result.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath the name.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/11/2018

PAUL ADAMCHICK	:	IN THE COURT OF COMMON PLEAS
Plaintiff	:	OF LUZERNE COUNTY
vs.	:	CIVIL ACTION- LAW
CHARLENE R. ADAMCHICK	:	IN CUSTODY
Defendant	:	NO. 4205 OF 2012 1655 MDA 2017

FILED
 CLERK OF SUPERIOR COURT
 LUZERNE COUNTY
 2017 DEC 14 AM 10:43

OPINION ISSUED PURSUANT TO PA.R.A.P. 1925 (a)

PROCEDURAL HISTORY:

This Court entered a Divorce Decree on October 3, 2017. On October 23, 2017, the Plaintiff, hereinafter, "Husband" filed a Notice of Appeal to Superior Court referencing the October 3, 2017 Divorce Decree. On October 26, 2017, the Court issued a request that Husband file a Concise Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925 (b). Husband filed the Concise Statement of Errors Complained of on Appeal on November 13, 2017, regarding the court's adopting the Master's Report and Recommendation regarding equitable distribution of the parties' assets.

The divorce action was filed by Husband on April 3, 2012. The Master was appointed on May 27, 2014 and the Master's hearing was held on August 13, 2014. The Master's report was issued on May 11, 2017.

ISSUES:

Husband's Concise Statement of Errors Complained of on Appeal lists three separate issues verbatim:

1. The Master's recommendation adopted by the court's Final Decree included the division of personal property alleged to be marital assets. The division was allowed by one of two methods; the payment of a monetary sum or a division in-kind. The purchase and sale of these items was the Husband's sole source of income and was disclosed on all jointly filed income tax returns. He received no W-2 or 1099. His income was the basis for the imposition of alimony pendente lite. The determination that these items of personal property were also subject to equitable distribution represented a "double dip". In effect, the profit had already been distributed.
2. The Master's Recommendation apparently acknowledged the great diversity in the parties values with regard to the personal property described in Paragraph 1 above. A distribution in-kind eliminates any discussion of trying to choose between those values offered by the Husband and those offered by the Defendant, hereinafter, "Wife" in the event Wife's values were unreasonably high (which Husband contends) Husband would have the option to give her the item in-kind and

therefore, benefit from that value. Unfortunately, delaying two and one-half (2 ½) years to issue such a decision made the Master's rather creative recommendation irrelevant since all the items for distribution were sold during the period of delay. There was therefore, no way to take advantage of the Master's own doubt.

3. During the pendency of this litigation, up to the time of hearing before the Master, the items of personal property were available for view by the Master. There were located approximately five (5) miles from the place of hearing. Although several offers were made to conduct a view of the items that never took place; and in the event it had, would have greatly increased the Master's knowledge of the actual value.

DISCUSSION:

As stated in Taper v. Taper, 939 A.2d 969 (Pa. Super. 2007), in general, the appellate court will not disturb a trial court's equitable distribution order absent an abuse of discretion or error of law that is demonstrated by clear and convincing evidence. Gilliland v. Gilliland, 751 A.2d 1169, 1171(Pa. Super. 2000), appeal denied, 563 Pa. 702, 761 A.2d 550 (2000). Additionally, the Master's Report and Recommendation, although only advisory, is to be given the fullest consideration, particularly on the question of credibility of witnesses, because the Master has the

opportunity to observe and assess the behavior and demeanor of the parties.

Moran v. Moran, 839 A.2d 1091, 1095 (Pa. Super 2003).

There is no simple formula by which to divide marital property, the method of distribution derives from the facts of the individual case. Gaydos v. Gaydos, 693 A.2d 1368(Pa. Super. 1997), In making an equitable distribution of property, the Court must consider all relevant factors. The Court's attempt to split property equitably, instead of equally, taking into consideration such factors as length of marriage, the contributions of both spouses, ages and health of each spouse. Drake v. Drake, 725 A.2d 717 (Pa. Super. 1999). When reviewing an equitable distribution award, the court must consider the distribution scheme as a whole. Wang v. Feng, 888 A.2d 882, 887 (Pa. Super. 2005), citing Schenk v. Schenk, 880 A.2d 633, 643 (Pa. Super. 2005).

The Master herein listed and discussed each relevant factor.

Husband's first issue raises the topic of what has been called "double dipping" which deals with using the same revenue as a source of support and equitable distribution. Such a practice has been expressly rejected by the appellate courts. Rohrer v. Rohrer, 715 A.2d 463 (Pa. Super. 1998), Cerny v. Cerny, 656 A.2d 507 (1995). No federal income tax returns were admitted into evidence by either party. Further, no documents confirming that Husband paid alimony Pendente lite was admitted into evidence by either party. The testimony of

Husband indicated that a joint tax return was filed in 2010 showing a gross income of \$20,343.00 and in 2011 it was indicated to be \$19,642.00. The parties agreed that the date of separation was February 14, 2011. Wife indicated that the 2010 return was a joint tax return but provided no information on the 2011 tax. Neither party testified that there was an order for APL nor the amount and dates of that order.

At no point during the Master's hearing did Husband raise the issue of "double dipping." Husband simply did not develop any facts of record regarding this contention. The Court concludes that there is no evidence to support this claim and/or it is waived.

In the second issue, Husband argues error with the Master's recommendation to use the value of the assets rather than the assets themselves when making an equitable distribution decision. The Master listed the various items of personal property along with the value that he felt was credible and arrived at a total value for thirty-six (36) separate items. He pointed out that the parties had agreed to an equal division of marital assets and he distributed half of the value of those assets which he felt remained in the possession of Husband to Wife. He directed that Husband pay Wife \$75,849.76. Further, the Master directed that Husband could transfer possession of any of the items listed in 1 through 36 of the report with Husband receiving full credit for the values as set

forth, provided, however, that the items must be substantially the same condition at transfer, as at the time of issuance of (this) report. Thus, the Master did allow for the option of a distribution in-kind. In addition, there were three other items identified as numbers 37 to 39 which the Master directed be distributed directly to Wife.

The Divorce Code does not set forth a specific method for valuing assets, and consistent with our standard of review, the trial court is afforded great discretion in fashioning an equitable distribution order which achieves “economic justice.” Similarly, “in determining the value of marital property, the court is free to accept all, part or none of the evidence as to the true and correct value of the property. Mundy v. Mundy, 151 A.3d 230 (Pa. Super. 2016). Citing, Smith v. Smith, 904 A.2d 15 (Pa. Super. 2006).

Husband argues that the Master should have simply divided the various items of personal property rather than awarding a monetary payment to Wife. Based upon the testimony, such a distribution was impossible because Husband testified that he did not know where specific items were or that he sold them without being able to identify the name of the purchaser, the date of the sale and the amount of money he was paid. The Master determined that Wife’s testimony and evidence was more credible and pointed out that Husband was very general

and vague in claiming that items were sold prior to separation. The Master was presented no additional competent evidence.

In the third issue, Husband argues that the Master failed to make a personal inspection of the items of personal property, claiming that they were located approximately 5 miles from the place of the hearing. On the contrary, the Master had no obligation to simply go out and look at the items of personal property. Furthermore, by Husband's own testimony it was obvious that he claimed not to know the whereabouts of much of the personal property. Husband had the ability to either submit photographs of the items or to have them appraised by an expert in the field. He failed to do either and his testimony was very vague on the issue of personal property. Further, this issue of a view by Master was not raised prior to or during the Master's hearing.

The trial court has broad discretion when fashioning an award of equitable distribution. The appellate courts standard of review when assessing the propriety of an order effectuating the equitable distribution of marital property is "whether the trial court abused its discretion by misapplication of the law or failure to follow proper legal procedure." An abuse of discretion, requires a showing of clear and convincing evidence. The appellate court will not find "abuse of discretion" unless the law has been over ridden or misapplied or the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias or ill will, as

shown by the evidence in the certified record determining propriety of equitable distribution award, courts must consider distribution scheme as a whole. The courts measure the circumstances of the case against the objective of effectuating economic justice between the parties and achieving a just determination of their property rights. Morgante v. Morgante, 119 A.3d 382 (Pa. Super. 2015). *Citing Biese V. Biese*, 679 A.2d 892 (Pa. Super. 2009).

The court finds no merit to these issues.

END OF OPINION

ORDER ATTACHED AS PAGE 9