J-S69008-12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

WILLIAM D. DUNHAM,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
WANDA DUNHAM,	:	
	:	
Appellee	:	No. 758 MDA 2012

Appeal from the Order entered on March 20, 2012
in the Court of Common Pleas of Lebanon County,
Civil Division, No. 2003-20826

WILLIAM D. DUNHAM,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
WANDA DUNHAM,	:	
	:	
Appellee	:	No. 1191 MDA 2012

Appeal from the Order entered on May 31, 2012
in the Court of Common Pleas of Lebanon County,
Civil Division, No. 2003-20826

BEFORE: MUSMANNO, BENDER and COLVILLE*, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: March 11, 2013

William D. Dunham ("Husband") appeals from two related trial court Orders: (1) an Order entered on March 20, 2012, that equitably distributed the marital property of Husband and Wanda Dunham ("Wife"); and (2) an Order entered on May 31, 2012, that amended the March 20, 2012 Order by

*Retired Senior Judge assigned to the Superior Court.

formally decreeing that the parties are divorced from the bonds of matrimony. We affirm.

The trial court has set forth the relevant facts and procedural history in its Opinion, which we adopt herein by reference. ***See*** Trial Court Opinion, 5/22/12, at 1-3.[1]

On appeal, Husband raises the following issues for our review:

1. Did the trial court err by incorrectly valuing the marital estate?

2. Did the trial court err by granting forty percent of the marital estate to [Husband] and sixty percent of the marital estate to [Wife]?

3. Did the trial court err in finding that [Husband] should pay [Wife] the sum of $176,155.39 in equitable distribution?

4. Did the trial court err in determining the value of the Hartford annuity and Franklin Templeton Investment Accounts?

5. Did the trial court err in utilizing stipulated numbers from a hearing on May 2, 2011 court order [*sic*] as [Husband] had not authorized his prior counsel to enter into a stipulation on [Husband's] behalf?

6. Did the trial court err in not considering that [Husband] was denied his due process rights during the course of the litigation resulting in the ultimate entry of the March 20, 2012 Order?

[1] The trial court's Opinion neglects to mention that, on March 20, 2012, the trial court entered an Order equitably distributing the parties' marital property. The trial court subsequently entered an Order on May 31, 2012, which amended the March 20, 2012 Order by merely adding a brief decree divorcing the parties. Following the trial court's denial of Husband's Motion seeking reconsideration of these Orders, Husband timely filed a Notice of appeal.

Brief for Appellant at 12 (capitalization omitted).

In addressing Husband's issues on appeal, we are guided by the following:

> A trial court has broad discretion when fashioning an award of equitable distribution. Our 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 a misapplication of the law or failure to follow proper legal procedure. We do not lightly find an abuse of discretion, which requires a showing of clear and convincing evidence. This Court will not find an abuse of discretion unless the law has been overridden 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. In determining the propriety of an equitable distribution award, courts must consider the distribution scheme as a whole. We 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.

Childress v. Bogosian, 12 A.3d 448, 455 (Pa. Super. 2011) (citations, brackets, and quotation marks omitted).

Husband first argues that the trial court erred in valuing the marital estate, and, specifically, in assigning a value to Husband's two retirement accounts: an annuity with The Hartford Company ("the Hartford annuity") and a brokerage account with Franklin Templeton ("the Franklin Templeton account") (collectively "the retirement accounts"). ***See*** Brief for Appellant at 17-18. Husband concedes that the parties had entered into a stipulation regarding the value of the retirement accounts at a hearing on May 2,

2011.[2] ***Id.*** at 18. According to Husband, however, the trial court's "[u]sing only these stipulated numbers and not evaluating the [retirement accounts] from [the parties'] date of marriage until [their] date of separation or a date close to the hearing on equitable distribution … was clearly an error on the part of the trial court." ***Id.***

In the trial court's Opinion dated March 20, 2012, the court addressed Husband's challenge to the valuation of the retirement accounts as follows:

> For roughly six months, [Husband] was offered the opportunity to provide documentation regarding the value of [the retirement] accounts. He refused. When the [Special Master ("SM")] undertook the unusual action of seeking assistance from [the trial c]ourt, [*i.e.*, by filing a Motion to compel a response from Husband, the trial court] scheduled a hearing [on May 2, 2011]. The parties[, through their respective counsel,] reached certain agreements at this hearing[, ***see*** N.T., 5/2/11, at 2-4], and [the trial court] documented those agreements in a [c]ourt Order. Of specific import are paragraphs 1 and 2 of the [c]ourt Order. Paragraph 1 recorded the parties' agreement that the Hartford annuity should have a value[,] "*for purposes of equitable distribution*"[,] of $102,496.00. Paragraph 2 recorded the parties' agreement that the Franklin Templeton account should have a value[,] "*for purposes of equitable distribution*"[,] of $223,471.00. The SM accepted the values that were stipulated [to] in open court and then undertook her analysis based upon those values.
>
> … If [Husband] truly believed that [the retirement] accounts were worth less, he could have provided documentation to this effect in response to the SM's numerous requests for the same. If [Husband] truly wanted to argue that the value of [the retirement] accounts should have been [less] …, he should not have agreed at the May 2, 2011 hearing that [the retirement] accounts possessed the values design[at]ed "for purposes of equitable distribution."

[2] Husband emphasizes that he did not personally attend the May 2, 2011 hearing. Brief for Appellant at 18.

Trial Court Opinion, 3/20/12, at 4-5 (emphasis in original). The record supports the trial court's sound reasoning and we affirm on this basis for the purpose of appeal. ***See id.*** As an addendum, we point out that this Court has stated the following regarding valuation of marital assets:

> The Divorce Code does not specify a particular method of valuing assets. Thus, the trial court must exercise discretion and rely on the estimates, inventories, records of purchase prices, and appraisals submitted by both parties. When 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. Where the evidence offered by one party is uncontradicted, the court may adopt this value even though the resulting valuation would have been different if more accurate and complete evidence had been presented. **A trial court does not abuse its discretion in adopting the only valuation submitted by the parties.**

Childress, 12 A.3d at 456 (emphasis added; citations, brackets, and quotation marks omitted). In the instant case, since the parties jointly stipulated as to the value of the retirement accounts, the trial court did not abuse its discretion in adopting the only valuation submitted by the parties. ***See id.***

In his second and third issues, Husband contends that the trial court improperly ordered him to pay Wife $176,155.30 in equitable distribution, which "constituted a 60/40 split in favor of Wife." Brief for Appellant at 19. Husband's argument in support of these issues, however, is virtually identical to his arguments advanced in support of his first issue. Since we have already determined that the trial court did not err in using the

stipulated values of the retirement accounts in formulating the equitable distribution award, Husband's instant, redundant claims do not entitle him to relief.

Finally, we will address Husband's fourth, fifth and sixth issues simultaneously, as they are closely related. Husband asserts that the trial court erred in utilizing the stipulated values of the retirement accounts for purposes of equitable distribution because Husband did not authorize his prior counsel, Mark Schappell, Esquire ("Attorney Schappell"), to enter into such stipulation at the May 2, 2011 hearing. ***See*** Brief for Appellant at 20-23. Husband further argues that Attorney Schappell violated Husband's due process rights by negligently failing to inform him of: (1) the scheduled May 2, 2011 hearing; and (2) numerous requests made by the SM requesting Husband to produce documentation pertaining to the value of the retirement accounts. ***Id.*** at 22. Accordingly, Husband contends, the trial court erred in denying his Motion for reconsideration, wherein he alleged that Attorney Schappell had improperly failed to communicate with him. ***Id.*** at 22-23.

In its Opinion, the trial court thoroughly addressed Husband's claims and stated its reasons for finding that these claims lacked merit. ***See*** Trial Court Opinion, 5/22/12, at 4-7. After reviewing the parties' briefs and the certified record, we affirm based on the trial court's sound rationale with regard to these issues. ***See id.***

Since we discern no error of law or abuse of discretion by the trial court in equitably distributing the parties' marital property and divorcing the parties, we affirm the Orders on appeal.

Orders affirmed.

5690081/12

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY
PENNSYLVANIA

CIVL ACTION – LAW

WILLIAM D. DUNHAM	:	NO. 2003-20826
	:	
v.	:	
	:	
WANDA K. DUNHAM	:	

APPEARANCES:

Julieane E. Fry, Esquire BENTLEY LAW OFFICES, P.C.	For William D. Dunhman
M. Jannifer Weiss, Esquire WEISS, WEISS & WEISS	For Wanda K. Dunham

OPINION BY CHARLES, J., May 22, 2012

In the game of golf, friendly competitors will sometimes grant each other "mulligans". A "mulligan" allows a player to replay an errant shot. When a "mulligan" is granted, the initial errant shot is essentially erased. In this case, William Dunham (hereafter "HUSBAND") asks us to grant him a "mulligan" with respect to the above-referenced divorce litigation. Unfortunately, for HUSBAND, "mulligans" do not exist within the Pennsylvania Rules of Civil Procedure governing divorce disputes.

I. FACTS

HUSBAND and Wanda K. Dunham (hereafter "WIFE") separated in October of 2008. Two months later, HUSBAND filed a Complaint seeking

equitable distribution of their marital property. The parties' divorce and equitable distribution dispute proceeded relatively slowly. On March 5, 2010, Special Master Ann Kline (hereafter "SM") was appointed to conduct an analysis of the parties' equitable distribution dispute.

A hearing was conducted before the SM on December 2, 2010. Unfortunately, insufficient documentation was presented at this hearing for the SM to make an equitable distribution. On December 21, 2010, the SM wrote a letter to the parties setting forth the additional documentation she required. No response was forthcoming. On February 1, 2011, the SM again wrote HUSBAND's lawyer and set forth a deadline of February 11 for production of documents. This request was also ignored. On February 22, 2011, the SM wrote HUSBAND's lawyer for a third time seeking the documents she needed in order to render a decision. Once more, no response was forthcoming.

On March 2, 2011, the SM took the unusual step of seeking assistance from the Court via a Motion to Compel. This Court issued an Order granting HUSBAND ten additional days to forward the requested documents. HUSBAND again ignored our Order. As a result, we scheduled a hearing for May 2, 2011. At that hearing, the parties reached a partial stipulation that we documented within our Court Order. That stipulation set forth agreed-upon values for certain assets "for purposes of equitable distribution".

The SM closed the record on October 13, 2011. WIFE filed her brief on November 10, 2011. Not surprisingly, HUSBAND failed to file any brief.

On November 18, 2011, the SM filed her Report and Recommendation. On December 7, 2011, HUSBAND filed four Exceptions. WIFE timely filed a Brief in Opposition to HUSBAND's Exceptions on February 17, 2012. HUSBAND did not. Ultimately, we issued an Opinion on March 20, 2012. We began that Opinion by stating:

> If a man chooses to fall asleep in a hungry lion's den, he will not be heard to complain when he is awoken by a bite. In this case, William D. Dunham (hereafter "HUSBAND") fell asleep within the lion's den of divorce litigation by ignoring his obligation to provide necessary information to a Special Master. Now that he has been "bitten" by a decision he does not like, his primary complaints will fall upon deaf ears.

(Slip Opinion at pg. 1).

On April 18, 2012, HUSBAND filed a Motion for Reconsideration. In his Motion for Reconsideration, HUSBAND alleged that his prior counsel failed to communicate with him. Within HUSBAND's Motion for Reconsideration, he stated: "But for the lack of communication with prior counsel all documents requested by the Special Master and this Honorable Court would have been turned over in a prompt manner." (Motion for Reconsideration at pg. 10). As a result of what HUSBAND characterized as "egregious error on behalf of prior counsel", he asked us to reopen the record and order that another hearing before the SM take place. We declined to do so.

On April 19, 2012, HUSBAND filed an appeal. We issued an Order of Court on April 24 requiring HUSBAND to file a Statement of Errors Complained of on Appeal. He did so on May 15, 2012. Most of the issues set forth in his Statement of Errors Complained of on Appeal were already addressed in our Opinion dated March 20, 2012 and we will rest upon the contents of that Opinion. We issue this opinion to briefly address HUSBAND's claims of negligence hurled at his prior lawyer.

II. DISCUSSION

A Trial Court always retains the authority to reconsider its own decision. However, "a Motion for Reconsideration is addressed to the sound discretion of the Trial Court". ***Moore v. Moore***, 634 A.2d 163, 166 (Pa. 1993). Generally speaking, a Court's decision to refuse reconsideration will only be reversed upon a finding of abuse of discretion. ***Fleeher v. Cmwlth. Dept. of Transportation Bureau of Driver Licensing***, 850 A.2d 34 (Pa.Cmwlth. 2004); ***Sherman v. Yoder***, 430 A.2d 347 (Pa.Cmwlth. 1981).

In this case, HUSBAND essentially seeks a "re-do" of his entire divorce litigation. He asks us to turn back the hands of time and order that the Special Master receive additional testimony and evidence that HUSBAND's first counsel failed to present. He asks us to do so because of what he described as "egregious error" on the part of his prior counsel.

We have found no appellate cases dealing with reconsideration of an equitable distribution decision based upon negligence of counsel. However, we draw guidance from a considerable body of case law that governs conduct of counsel in civil cases. Generally speaking, our appellate courts have stated that attorney dilatoriness or "failure to act with knowledge of the implications" are inadequate grounds for reconsideration. ***Davis v. Burton***, 529 A.2d 22 23 (Pa.Super. 1987); ***Shainline v. Alberti Builders***, 403 A.2d 577 (Pa.Super. 1979). The allegations proffered by HUSBAND represent a pattern of "dilatoriness" and "failure to act with knowledge of the implications" that HUSBAND claims was so severe as to implicate his "due process rights" (See ¶¶ 7, 8 and 9 of Statement of Errors Complained of on Appeal). Relying upon the general principles articulated in ***Davis*** and ***Shainline***, trial counsel's conduct will not be deemed to justify reconsideration.

In addition to the above, we have practical concerns about the fairness of affording HUSBAND with a "re-do". For the past two years, WIFE and WIFE's counsel have played by the rules. They appeared whenever required to do so. They presented documentation that was requested of them. Briefs were filed in a timely fashion. Without question, playing by the rules cost WIFE money in terms of attorney's fees and costs. If we were to permit HUSBAND to re-litigate everything from scratch, all of the money expended by WIFE to comply with the appropriate rules would have been wasted.

Perhaps even more important than money is the time that it would require to re-litigate all of the issues requested by HUSBAND. The parties have been involved in divorce litigation since 2008. WIFE has an understandable desire to sever her marital ties with HUSBAND. By our March 20, 2012 Court Order, we did just that. If we were to afford HUSBAND with a "re-do", WIFE's ability to move forward with her life will be delayed, probably for a period measured in years. Stated simply, we believe WIFE deserves finality sooner rather than later, especially given that she was not at fault in causing the situation of which HUSBAND now complains.

Inconvenience is another factor we have considered. As a Court, we have provided the parties with a Special Master who expended considerable time to analyze the parties' dispute. WIFE herself was inconvenienced by attending Court hearings, meeting with counsel and providing necessary documentation. If we were to afford HUSBAND with the ability to re-litigate issues from the beginning, both WIFE and the judicial system would suffer what we would characterize as unnecessary and unconscionable additional inconvenience.

We remind HUSBAND that he chose to hire his prior counsel. When a client engages an attorney, the attorney becomes the agent of the client and "any acts performed or statements made by the attorney within the scope of his or her employment and authority are binding upon the client". ***Weiner v. Lee***, 669 A.2d 424, 428 (Pa.Cmwlth. 1995). If in fact

HUSBAND's allegations of misconduct on the part of his attorney are true, he may in fact have suffered some financial harm as a result. However, he is not without remedy. HUSBAND retains the ability to initiate a legal malpractice action against his former attorney. If he can establish the type of "egregious error" of which he now complains, he may in fact have a cause of action against his prior lawyer.

In our opinion, affording HUSBAND the ability to re-litigate equitable distribution would work a substantial hardship upon WIFE. When a party such as WIFE plays by the rules established for litigation and is willing to accept the outcome, the opposing party should not be able to gain a "mulligan" simply by alleging that his attorney should have fulfilled his duties in a different manner. For this reason, and all others outlined above, we did not err when we denied HUSBAND's Motion for Reconsideration.

We will now give the above-referenced case to the Pennsylvania Superior Court.