

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

HOWARD T. PHILLIPS, Plaintiff	:	NO. 97-20,616
	:	
vs.	:	CIVIL ACTION - LAW
	:	In Divorce
	:	
MARY A. PHILLIPS, Defendant	:	

OPINION AND ORDER

Before the Court are Defendant's Exceptions to the Master's Report and Recommendation filed April 12, 1999.<sup>1</sup> Argument thereon was heard June 3, 1999. Defendant's exceptions will be addressed in the order raised.

First, Defendant contends the Master erred in not awarding the marital residence to Defendant. At the Master's Hearing, each party testified that he or she wished to have the residence awarded to him or her, respectively. By way of background, the parties purchased the residence in July 1995 and Defendant has been residing in the residence since the parties separated, coincident with Defendant obtaining a Protection from Abuse Order against Plaintiff, in April, 1997. The Master awarded the residence to Plaintiff after finding that he wished to maintain the residence because of the "muscle equity" that he had

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<sup>1</sup>Defendant also filed, on June 1, 1999, a Motion to Reopen the Record. In that motion, Defendant seeks to present evidence that she will be able to obtain refinancing for the marital residence. In light of the disposition of this matter, the relevance of that evidence is eliminated and therefore the Motion to Reopen the Record will be denied.

in it and her finding that he has the skills necessary to complete construction on the residence (a farmhouse which is being renovated). Further, the Master found that Defendant wished to have the residence awarded to her so that her daughter could finish school in the same school district but that Defendant was not able to financially maintain the residence as she was at that time behind on the mortgage and taxes.

Plaintiff testified in response to being questioned why he wished to have the residence awarded to him:

A. I would like to obtain the farm property on the existing mortgage primarily because my credit has been destroyed, the mortgage is the largest financial obligation most people have, it's the most serious. I have met with some realtors, I met with Chuck Luppert on occasion and I don't think I should be punished for something that is not my fault, and this is something that is severely wrong, it's degrading to my credit history, my chances with another mortgage are about shot on the high interest.

Q. Besides the mortgage, are there any other reasons why you want to obtain possession of the house?

A. Yes, because it's pretty much a labor of love and I put a lot of time and effort, I am constantly working on the house ...

N.T., November 2, 1998, at 62. On cross examination, however, Plaintiff admitted that he had also failed to make timely payments on his loans and that such also adversely affected his credit rating. *Id.* at 85.

When Defendant was asked why she wished to have the residence awarded to her, she testified:

A. Because we bought that house together. Todd decided he didn't want to share it with me and he wanted Eva and I to leave and he was abusive all through the relationship and more so near the end, and we were able to get him out with a PFA, and I've been working hard. Eva and I have given up

everything in the last year to keep this place going.

...

Q. As far as Eva, did she go to school in the school district where this home is located?

A. Yes, she does.

N.T., December 21, 1998 at 6. The Court notes that according to the testimony of Charles Luppert, at the time of hearing the mortgage was behind one monthly payment. The 1997 and 1998 real estate taxes were not yet paid.

It appears to the Court that neither party has given a sincere, legitimate reason which would justify awarding the residence to either over the other. The choice should therefore be left to the parties themselves. It appears most appropriate in this instance to require the parties to each bid against each other for the property, with a low bid of \$69,450.00, the stipulated fair market value.

Second, Defendant contends the Master erred in not finding the Ford tractor and the Ford van to be marital property or, in the alternative, finding that the parties had an equitable interest in those assets. At argument, Defendant withdrew this exception with respect to the tractor but argued that the van should be considered marital property based on Defendant's allegation that Plaintiff used the van, titled in his father's name, throughout the marriage and put significant improvements into the van after the marriage, which improvements significantly increased its value. The van was purchased by Plaintiff's father in 1982, eleven years prior to the marriage, was titled in Plaintiff's father's name, which title was never changed throughout the van's history and although Plaintiff did work on the van

to a significant extent, whether before or after marriage, the Court finds that in this circumstance, title is controlling. The van is not a marital asset and Defendant cannot show that the parties had an equitable interest in such as any equitable interest must be based upon a contract theory, the basis for which does not exist in this case. The Master, therefore, did not err in failing to include the van or any increase in value in the marital estate.

Third, Defendant contends the Master erred in four (4) specific findings of fact as follows: (1) in finding that Defendant “will have a slightly less opportunity for future acquisition of capital assets and income”. The testimony indicated that Plaintiff is 36 years of age and earns \$13.75 per hour and Defendant is 44 years of age and earns \$7.00 per hour. The Court therefore agrees with Defendant that she has more than slightly less opportunity for future acquisition of capital assets and income. This does not, however, affect the overall distribution as other factors indicate that the percentage distribution recommended by the Master is appropriate, as discussed hereinafter. (2) Defendant contends the Master erred in finding that Defendant was behind on the mortgage payment. The first witness presented in the matter, however, Charles Luppert, testified that at that time, Defendant was one (1) month behind on the mortgage payment. (3) Defendant contends the Master erred in finding that she will need housing but will have a cushion of \$6,000.00 to procure another residence. In light of this Court’s disposition of the matter, this finding will not be considered. (4) Defendant contends the Master erred in finding that the parties’ conduct nullified any finding of marital misconduct on Plaintiff’s part. This finding is significant only with respect to Defendant’s alimony claim, which Defendant has

withdrawn at the time of argument. Therefore, this exception will not be addressed further.

Fourth, Defendant contends the Master erred in not awarding attorney's fees to Defendant, alleging that Plaintiff generated attorney's fees for Defendant. A review of the entire file indicates that both parties were responsible for the numerous petitions and hearings and therefore, the Court finds that the Master did not err in this regard.

Fifth, Defendant contends the Master erred in determining any testimony of the Plaintiff or his father as being credible. After reviewing the transcripts, the Court finds this exception to be without merit.

Sixth, Defendant contends the Master erred in permitting testimony from Plaintiff that was not proper. This exception will be denied as being insufficiently specific.

Seventh, Defendant contends the Master erred in not awarding alimony. This exception was withdrawn at argument.

Eighth, Defendant contends the Master erred in the overall distribution of property. The Master awarded 55% of the marital estate to Defendant and 45% to Plaintiff. Considering the parties' ages and earning capacities/incomes, as noted above, and the fact that their marriage lasted three (3) years, eight (8) months, and also considering that neither contributed to the earning capacity of the other, and the contributions of each to the marital estate, the Court finds no error in the distribution recommended by the Master.

Finally, Defendant contends the Master erred in not considering that Plaintiff presented no testimony he was able to buy out Defendant's share of the property and has a poor history of complying with orders to pay Defendant. This exception will be summarily denied.

The Court notes that a Decree in Divorce has not yet been entered. Defendant had moved for appointment of a Master with respect to the divorce issue but apparently no hearing was held on the divorce issue as Plaintiff thereafter filed his Affidavit of Consent and Waiver of Notice. It appears Defendant never filed an Affidavit of Consent, although she had requested a hearing on the divorce issue. Defendant then filed a Motion for Appointment of a Master on the economic issues, and the hearings before the Master were held pursuant to that motion. The Court will therefore require Defendant to file her Affidavit of Consent within ten (10) days of the date of this Order and to praecipe for a final decree in that time period as well. The \$75.00 administrative fee will be added to the cost in this matter and shared equally.

#### ORDER

AND NOW, this \_\_\_\_ day of June, 1999, for the foregoing reasons, it is hereby ORDERED AND DIRECTED, effective with the entry of the Divorce Decree in this matter (unless otherwise specified), as follows:

#### **Equitable Distribution**

Plaintiff is hereby awarded his tools, and the wheel-horse tractor and Defendant is hereby awarded the 1988 Toyota truck. Plaintiff shall be responsible for payment of the Williamsport National Bank loan secured by his father's truck and the Columbia Propane bill. Defendant shall be responsible for payment of the loan on her Toyota truck, the GTE bill of \$257.38, the Sullivan County Electric bill and all past due interest, past due principal and late charges (payment of which is required to bring the mortgage on the marital

residence current). Within thirty (30) days of the effective date of this Order, Plaintiff shall pay to Defendant an amount equal to 30% of the 1997 County tax bill, which comes out in March each year, and Defendant shall be responsible for payment of the 1997 real estate taxes and the 1998 real estate taxes on the marital residence.

In order to effectuate a 55% distribution to Defendant, 45% to Plaintiff, considering the assessment of responsibility for the various liabilities, Plaintiff shall receive a further credit against his alimony pendente lite arrearage of \$82.95.

The marital residence shall be the subject of an auction between the parties, to be conducted through counsel, the lowest possible bid for which shall be \$69,450.00. After determining the highest bidder, the bidding price less the current mortgage balance (after Defendant has brought such current), shall be distributed 55% to Defendant, 45% to Plaintiff. This auction shall be conducted within thirty (30) days of the effective date of this Order, and payment by the high bidder shall be made to the other party within sixty (60) days thereafter.

**Alimony**

Defendant's request for alimony is hereby denied.

**Counsel Fees**

Defendant's request for counsel fees is hereby denied.

**Fair Rental Value**

Defendant shall be provided a credit by the Domestic Relations Office against his alimony pendente lite arrearage, in the amount of \$646.00.

**Costs**

Costs of \$1,106.25 are hereby assessed. This includes the Master fee of \$750.00, transcript costs and the \$75.00 administrative fee for processing the decree. Plaintiff is ORDERED AND DIRECTED to pay \$553.13 to the Prothonotary within thirty (30) days of this date. Defendant shall receive credit for the \$375.00 deposit and shall pay the sum of \$178.12 to the Prothonotary within thirty (30) days of this date. The Prothonotary is directed to apply \$75.00 of the deposit toward the administrative fee for the decree and the balance of the deposit to the remaining costs. Should either party fail to pay his or her share of the costs as directed herein, the Prothonotary may enter judgment against him or her.

**Divorce**

Within ten (10) days of this date, Defendant shall file her Affidavit of Consent, Waiver of Notice and a praecipe to transmit the record for purposes of entering a decree in this matter. Should she fail to do so, Defendant will be deemed to have consented to the divorce, without notice, by default. Plaintiff may thereafter praecipe for the decree.

The Motion to Reopen the Record is Denied.

By the Court,

Dudley N. Anderson, Judge