

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CAROLYN J. LORSON,

vs.

PETER A. LORSON,
Defendant

: No. 00-20,356

:

:

: CIVIL ACTION - LAW

: IN DIVORCE

:

:

: 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this Court's Order dated August 8, 2000 and docketed August 22, 2000, wherein the Court denied Defendant's Motion to Withdraw his Affidavit of Consent. The relevant facts are as follows:

1. Plaintiff moved out of the marital residence with the parties' five children on February 25, 2000.
2. On February 28, 2000, Plaintiff filed a Complaint for Divorce.
3. On March 7, 2000, Defendant filed a Protection From Abuse (PFA) Petition against Plaintiff and a temporary order was issued.
4. On March 17, 2000, the Court entered a final PFA Order upon the agreement of the parties with no findings of fact. The PFA Order prohibits Plaintiff from contacting Defendant for any reason other than to discuss custody of the children.
5. On or about May 26, 2000, Plaintiff filed her affidavit of consent.
6. On May 31, 2000, Defendant filed his affidavit of consent.
7. On July 31, 2000, Defendant filed a motion to withdraw his affidavit of consent.

8. This case was scheduled for an equitable distribution hearing on August 7, 2000.¹

9. On August 4, 2000, the Court held a hearing on Defendant's motion. Defendant testified that he sought to withdraw his affidavit of consent because he wanted to reconcile with Plaintiff. He further testified that, although he signed the affidavit after consulting with and upon the advice of counsel, he only did so for financial reasons. Plaintiff testified that she would not undergo marital counseling with Defendant, and she absolutely would not reconcile with him.

10. On August 8, 2000, the Court denied Defendant's motion; however, this Order was not docketed until August 22, 2000.

11. On September 20, 2000, Defendant filed a notice of appeal to this Court's Order docketed August 22, 2000.

Discussion

The sole issue on appeal is whether the Court erred in not permitting Defendant to withdraw his affidavit of consent. Initially, the Court notes that the order entered August 22, 2000, is an interlocutory order and, therefore, it is not appealable at this time. See Pa.R.App.P. 311, 312, 341, 1311. Defendant sought amendment of the Order to include appropriate language to make it appealable; however, this request was not made within thirty (30) days of the original order. Therefore, the Court denied the request as untimely. See, Pa.R.App.P. 341(c), 1311(b); 42 Pa.C.S. §702(b).

Even if the Order is considered final, the Court does not believe it erred in denying Defendant's motion. An affidavit of consent may be withdrawn only with leave of court. Pa.R.Civ.P. 1920.42(c). From this rule it can be inferred that the Court has the power to deny a

¹This hearing was continued because Defendant filed the motion to withdraw his affidavit of consent.

petition to withdraw. Otherwise, an affidavit of consent could always be withdrawn and there would be no reason to seek leave of court. The question becomes what standard the Court should use when determining whether to permit such a withdrawal. Unfortunately, there is very little case law on this subject. At the hearing on this matter, counsel for **Defendant** argued that the standard was whether the affidavit was signed under duress, fraud or undue influence. Defendant's counsel based this argument of language contained in Teribery v. Teribery, 357 Pa.Super. 384, 516 A.2d 33, 35 (1986). In Teribery, Appellant George Teribery sought to withdraw his affidavit of consent after a divorce decree had been entered and alimony and equitable distribution were determined. The Pennsylvania Superior Court held that Mr. Teribery could not negate the entire trial court proceedings by withdrawing his affidavit after he had used those proceedings in full. In so holding, the Court stated:

Appellant does not complain that his affidavit was signed under duress, fraud or undue influence. His affidavit was knowingly, voluntarily and eagerly signed, and he seeks to withdraw it solely due to his displeasure with the alimony and equitable distribution orders.

516 A.2d at 35. Defendant's counsel asserted that Mr. Lorson signed his consent under duress, fraud or undue influence. This assertion, however, was not supported by the testimony presented.

Duress is "that degree of restraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness." Carrier v. William Penn Broadcasting Company, 426 Pa. 427, 431, 233 A.2d 519, 521 (1967). In the absence of threats of actual bodily harm there can be no duress where the party is free to consult with counsel. Id. Here, neither Plaintiff, her counsel nor defense counsel inflicted or threatened Defendant with bodily harm to induce him to sign his

affidavit of consent.

To establish fraud, Defendant must show by clear, precise and convincing evidence that he relied upon a misrepresentation that was fraudulently uttered with the intent to induce him to sign his affidavit. Thomas v. Seaman, 451 Pa. 347, 350, 304 A.2d 134, 137 (1973). Defendant has not shown that any misrepresentation were made to him to induce him to sign his affidavit. Rather, Defendant consulted with Janice Yaw, Esquire, who advised him that it was in his financial interests to sign the affidavit. Although Defendant does not expressly indicate what statements were made by Ms. Yaw, his testimony left the Court with the impression that Ms. Yaw accurately advised him that if he signed the affidavit of consent the divorce would proceed more quickly and, as a result, the total amount of spousal support or alimony pendente lite he would have to pay would be less.

Undue influence is such influence as is obtained by excessive importunity, superiority of will or mind, or by any other means constraining the individual to do what he is unable to refuse. Thomas, 451 Pa. at 352, 304 A.2d at 138. Again, the testimony fails to establish that anyone overrode Defendant's free will. In fact, Defendant admitted that he understood he was agreeing to a no-fault divorce at the time he signed his affidavit. N.T., at p. 19.

Even if withdrawals of affidavits of consent are not limited to situations involving duress, fraud or undue influence, the facts and circumstances of this case do not warrant a withdrawal of the affidavit of consent. In making its determination, the Court considered all relevant factors. Although Defendant was sincere in his desire to reconcile with Plaintiff, there was no hope of this occurring. First, Defendant had a PFA order against Plaintiff which precludes her from speaking to Defendant about matters other than the children and Defendant

had no plans to withdraw the PFA. N.T., at pp. 10-11. Second, even Defendant admitted that the situation between the parties was hostile. N.T., at p. 20. Third, Plaintiff was vehemently opposed to reconciling with Defendant. If there were any possibility of reconciliation efforts being fruitful, perhaps the Court's ruling would have been different. However, this simply was not the case.

It was also significant to the Court that the parties were on the verge of an equitable distribution hearing when Defendant sought to withdraw his affidavit of consent. Everyone was prepared to proceed to an equitable distribution hearing on August 7, 2000 when Defendant filed his motion to withdraw on July 31, 2000. Pre-trial statements had been filed, retirement accounts and other assets had been appraised, and statements regarding the parties' debts had been gathered. If a litigant could withdraw a sworn affidavit that the marriage was irretrievably broken solely on an assertion that he or she wanted to reconcile without examining the surrounding circumstances, the litigant could wreck havoc on the system for scheduling master's hearings and run up the costs of the litigation for the opposing party. For example, a litigant could file such a motion merely to get a continuance of the master's hearing. Furthermore, one would certainly expect that Plaintiff's counsel expended valuable time and effort preparing for the master's hearing prior to receiving Defendant's motion to withdraw his affidavit of consent.

For these reasons, the Court does not believe it erred in denying Defendant's motion to withdraw his affidavit of consent.

DATE: _____

By The Court,

Kenneth D. Brown, J.

cc: Janice R. Yaw, Esquire
Joy Reynolds McCoy, Esquire
Law Clerk
Superior Court (original & 1)
Work file
Gary Weber, Esquire (Lycoming Reporter)