

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

JACQUELINE A. CICARDO,
Plaintiff

Vs.

WILLIAM A. CICARDO,
Defendant

No. 20-0698

IN DIVORCE

FILED
2022 MAY -6 PM 9:07
CARBON COUNTY
PROTOSTARY

Barry C. Shabbick, Esquire
Brian J. Cali, Esquire

Counsel for Plaintiff
Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - May 5, 2022

Before the Court are "Exceptions to the Hearing Officer's Report" filed by the Defendant, William Cicardo, (hereinafter "Defendant" or "Husband"), against Plaintiff, Jacqueline Cicardo, (hereinafter "Plaintiff" or "Wife"). In this action, Defendant excepts to the Recommended Order of equitable distribution submitted by the Hearing Officer, Eileen Diehl, filed on July 23, 2021. An argument was held on the Exceptions on February 14, 2022. Based upon the evidence presented, the applicable case law and governing statute, and briefs lodged, Defendant's Exceptions are **GRANTED in part and DENIED in part.**

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced this action on April 22, 2020 by filing a complaint for divorce, equitable distribution, alimony pendente lite, counsel fees, costs and expenses, and post-divorce alimony.

[FM-15-22]

Attorney Matthew Kelly accepted service of the divorce complaint on behalf of the Defendant via affidavit on May 14, 2020 and the affidavit was filed on May 22, 2020. On March 8, 2021 Attorney Eileen M. Diehl was appointed to hear the claims raised in the pleadings.

An initial divorce conference was held on April 15, 2021 at which time it was agreed/stipulated to by the parties and both counsel that the only issue remaining unsettled was the distribution of Husband's pension. This is also reflected in the fact that each party filed an inventory which lists Husband's pension as the only asset to be distributed in the divorce. The Hearing Officer's hearing was held on May 25, 2021. Plaintiff appeared with Attorney Shabbick. Defendant's attorney withdrew from representation on May 13, 2021. Defendant failed to appear or to participate in the Hearing Officer's hearing, however it is specifically noted that Wife verified on the record that she observed that Husband was posting on Facebook at 8:20 A.M. while she was waiting in the courthouse hallway, just before the hearing commenced. It is also is noted that Attorney Kelly filed his withdrawal of appearance/appearance of Husband as pro se on May 13, 2021, a full twelve (12) days prior to the hearing date. Furthermore, it is specifically noted that the Defendant filed a motion for continuance of the hearing on May 26, 2021, the day after the hearing. The motion for continuance was properly denied

as moot, but it also clearly evidences the fact that the Defendant received notice of the hearing itself. Attorney Cali then entered his appearance on behalf of Defendant on June 14, 2021.

The Hearing Officer put forth facts¹ from the May 25, 2021, hearing in her Report and Recommended Order dated July 23, 2021.

¹ GROUND FOR DIVORCE

The parties were married on November 9, 1986. These parties have been living separate and apart since February 20, 2007. Wife filed her 3301(c) affidavit of consent and waiver of notice affidavit on May 27, 2021.

Because the Defendant has not filed his 3301(c) affidavit of consent, the Hearing Officer recommends the entry of a decree in divorce pursuant to 3301(d) of the Divorce Code together with an Order resolving as set forth herein the ancillary claims raised by the parties.

EQUITABLE DISTRIBUTION FACTORS

The marriage, from date of marriage to date of separation, is of just over 20 years' duration. This is the first marriage for both parties. There are no minor children. The parties' four (4) children range in ages from 19 to 31.

Wife is 60 years old. She is unemployed. She last worked in 2018 for a few months. She has no pension or retirement benefits of any nature whatsoever. She was the primary caretaker of the parties' four (4) children during the marriage.

Her health is currently very poor. She suffers from migraine headaches, memory problems, hypoxia, back problems (which required compression surgery, fusion surgery and a laminectomy). She is under the care of a pain management specialist. She suffers from extensive arthritis, carpal tunnel syndrome in her shoulders and plantar fasciitis in her feet. She also has C.O.P.D. and uses an inhaler to breathe. She is currently prescribed various medications, including Chantix, Fioricet, Gabapentin, Prozac, Ambien and Xanax. She receives Social Security Disability payments of \$1,279 per month before taxes. The sum of \$148.50 is taken out for her Medicare insurance premium each month. This is her only source of income.

Wife resides with Paul Roth. Although there is an alimony claim raised in the pleadings, her cohabitation negates her candidacy for alimony. Wife cannot afford to move out. She testified that she could not afford to proceed with the divorce any sooner than she did. She testified that she has nowhere to go and not enough money to live on her own. It is noted that Wife did not present testimony relative to alimony at the hearing, which this Hearing Officer takes as an acknowledgement as to the effect of her cohabitation on the alimony claim.

Wife testified that Husband retired at age 55 on October 2, 1998 and after electing the joint-survivor pension option, he began receiving his pension benefit from the Teacher's Retirement System of the City of New York. Wife testified that upon retirement at 55, the Defendant's Husband spent most of his time lying around and watching T.V. Although their youngest child was born in 2002 after Husband retired, Wife testified that he did not become a "hands on" parent, despite having the time available to do so. Wife was clearly the primary caretaker of the children during this marriage. Wife testified that Husband

Since Defendant did not appear at said hearing, the Court concludes the facts in the record to be correct. The Court however, does not find that the Husband's pension needs to be discussed in length, for it being declared Husband's sole property.² Defendant filed Exceptions to the Hearing Officer's Recommended Order. Defendant averred seven (7) exceptions³ to the Hearing Officer's Recommended Order. Subsequently, Plaintiff filed a Petition for Special Relief

calculatingly chose to move out at age 62 ½, because at this specific age, his Social Security derivative benefit would pay the bulk of the child support he would have to owe Wife. Husband receives Social Security in the amount of \$1,600 per month. Wife did not testify as to any chronic health ailments of Husband. Husband is now 76 years old.

CLAIM FOR COUNSEL FEES, COSTS AND EXPENSES

Wife has expended approximately \$3,579.80 in attorney's fees, costs and expenses in this divorce action. This does not include the attorney fees she would have presumably subsequently incurred as a result of her attorney representing her at the hearing. Given the disparity in income of the parties, it is prudent to award Wife her counsel fees, costs and expenses.

² The Hearing Officer's Report concluded that Wife is entitled to 70% of the marital portion of Husband's pension. This Court does not agree with the Hearing Officer's Report on this issue as explained in length herein.

³ Defendant excepts to the Hearing Officer's Report and in support thereof avers the follow:

1. The Defendant did not have a chance to appear at the Hearing Officer's hearing that took place on May 25, 2021.
2. The Defendant did not have counsel at the time and therefore contacted the Court to request a continuance of the May 25, 2021, hearing and paid a filing fee to the Prothonotary for the same.
3. Due to the Defendant filing a request for continuance, he believed that the Hearing Officer's hearing scheduled for May 25, 2021, was continued and therefore did not appear at the hearing.
4. The Defendant was not aware the hearing took place on May 25, 2021, until such time he received the Hearing Officer's Report in the mail on August 2, 2021.
5. The facts that established the factors were not developed accurately with regard to the Defendant in that he was not present at the time of the hearing in order to put into evidence his factors.
6. The Hearing Officer's erred, as a matter of law, in awarding 70% of the marital portion of the Defendant's Pension with the Teacher's Retirement System of the City of New York (TRSNYC) to Plaintiff.
7. The Hearing Officer's erred, as a matter of law, in awarding the Plaintiff counsel fees in the amount of \$3,580.00.

on August 30, 2021, seeking the monies awarded, to be placed in an escrow account held by Plaintiff's attorney. The Court ordered on November 25, 2021, that the money in question shall be held in escrow by Attorney Shabbick.⁴

An argument was held on February 14, 2022, regarding the Exceptions to the Hearing Officer's Order. Defendant proffered several arguments in favor of sustaining the preliminary objections, however, the exception found to be dispositive is that the Hearing Officer failed to account for the fact that Husband's pension had already been used to calculate child support payments.⁵

LEGAL DISCUSSION

Although advisory, the Hearing Officer's findings and recommendations shall be given the fullest consideration, particularly on the question of credibility of witnesses, because the Hearing Officer has the opportunity to observe and assess the behavior and demeanor of the parties. *Childress v. Bogosian*, 12 A.3d 448, 455-456 (Pa.Super. 2011) (most internal citations and

⁴ Defendant was ordered to remit the sum of Eight Hundred and Five Dollars (\$805.00) per month to counsel for the Plaintiff until further order of court. In addition, Defendant was also required to remit the sum of Three Thousand, Two Hundred Twenty Dollars (\$3,220.00) to counsel for Plaintiff.

⁵ The parties have four (4) children and at the time of the parties' separation in 2007 all four (4) children were minors. On or about April 12, 2007, Plaintiff filed a Complaint in Support in Luzerne County. A Domestic Relations Order was in effect from 2007 through June 2020, when the last child was emancipated. The last guideline calculation was completed in 2009 when the parties agree to Defendant's net monthly income of \$3,338.00. This net monthly income is consistent with Defendant's receipt of pension payments and Social Security.

A.3d 448, 455-456 (Pa.Super. 2011) (most internal citations and quotation marks omitted). The final responsibility for making the equitable distribution of property rests with the court. *Tagnani v. Tagnani*, 654 A.2d 1136 (Pa.Super. 1995). The court has the authority to deviate from the Hearing Officer's recommendation if it is not supported by the record or it conflicts with the law. *Morschhauser v. Morschhauser*, 516 A.2d 10 (Pa.Super. 1986).

Equitable Distribution of the Defendant's Pension

The decision that 70% of the martial portion of Husband's pension shall be awarded Wife was inappropriately calculated because it conflicts with Pennsylvania law. The Superior Court has held that "an asset awarded in equitable distribution may not be included in an individual's income for purposes of calculating support payments" *Hess v. Hess*, 212 A.3d 520, 524 (Pa.Super. 2019). In determining income for support purposes, it is axiomatic that the trial court may not include income that constitutes marital property under 23 Pa.C.S.A. § 3501, as such an action would foreclose the equitable distribution of those assets. *Miller v. Miller*, 783 A.2d 832, 835 (Pa.Super. 2001). The court further explained that "money included in an individual's income for the purpose of calculating support payments may not also be labeled as a marital asset subject to equitable distribution." *Miller*, 783 A.2d at 835 (quoting *Rohrer v. Rohrer*, 715 A.2d 463, 465 (Pa.Super. 1998)) (most internal citations and quotation marks omitted). The

Superior Court additionally, has held that the Commonwealth does not condone "**double dipping**," i.e., using the same revenue as a source for "support" and "equitable distribution." *Berry v. Berry*, 898 A.2d 1100, 1105 (Pa.Super. 2006); *Cerny v. Cerny*, 656 A.2d 507 (Pa.Super. 1995).

Although the Hearing Officer noted that child support was paid by the Defendant, from a calculation which included the Defendant's pension payments, the Hearing Officer failed to recognize the inclusion of pension income for the child support calculation in awarding a division of those pension payments. The Child Support Orders took into consideration Defendant's pension benefit and was utilized to calculate the appropriate child support award to Plaintiff from April, 2007 until June, 2020. This Court finds that Plaintiff is not entitled to an award of 70% of the marital portion of Defendant's pension because the Court cannot equitably divide an asset that was already used to calculate a child support obligation.

Attorney's Fees Awarded to Plaintiff

The purpose of an award of counsel fees is "to promote the fair and impartial administration of justice by enabling the dependent spouse to maintain or defend the principal action in Divorce without being placed at a financial disadvantage" or, in other words, to place the parties "on par" in protecting their rights. *Busse v. Busse*, 921 A.2d 1248, 1258 (Pa.Super. 2007). An

award of counsel fees may be entered against a participant in any matter for dilatory, obdurate or vexatious conduct during the pendency of a matter. 42 Pa.C.S. § 2503. Counsel fees are awardable in connection with divorce proceedings in the discretion of the Court. 23 Pa.C.S. § 3323(b). Awards of counsel fees are made on a case-by-case basis after review of the relevant factors, including the payer's ability to pay and the financial resources of the requesting party. The factors to be considered include the size of the estate of the requesting party, the value of the services rendered, the ability to pay and the property received in equitable distribution, and the conduct of one of the parties which protracts the litigation and increases the expenses of the proceeding. *Busse v. Busse*, 921 A.2d 1248, 1258 (Pa.Super. 2007). An award of counsel fees is not automatically made, an actual need must be established. Need is a relative concept, and may be inferred where there is a gross disparity in the parties' incomes. *Williams v. Williams*, 540 A.2d 563 (Pa.Super. 1988).

In the case *sub judice*, the Defendant's ability to pay has been established, as were the limited financial resources of the Plaintiff. The conduct of the Defendant by failing to attend the hearing and then the filing of Exceptions has significantly protracted the litigation and increased Plaintiff's litigation cost of the proceeding. Further Defendant did not incur fees for failing to attend the hearing. The Hearing Officer concluded that

there existed a disparity in the parties' incomes and a need existed for the awarding of attorney's fees to Plaintiff.

CONCLUSION

Based upon our analysis of the applicable statute regarding standing, the Court enters the following order:

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

JACQUELINE A. CICARDO,	:		
Plaintiff	:		
	:		
Vs.	:	No.	20-0698
	:		
WILLIAM A. CICARDO,	:	IN DIVORCE	
Defendant	:		

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CARBON COUNTY, PA
CLERK OF COURT

EQUITABLE DISTRIBUTION ORDER

AND NOW, this 5th day of May, 2022, upon consideration of the "Defendant's Exceptions to the Hearing Officer's Report" filed August 20, 2021 by Defendant, William A. Cicardo, along with briefs lodged to support thereof or in opposition thereto, and after argument thereon, it is hereby **ORDERED and DECREED** as follows:

1. Husband shall pay to Wife the sum of **\$3,580.00** in consideration of her reasonably necessary counsel fees, costs and expenses incurred in this divorce proceeding;¹
2. Wife shall not be entitled to receive any portion of the marital component of Husband's pension with the Teacher's Retirement System of the City of New York (TRSNYC);
3. All other assets titled in Husband's name alone shall become and remain his sole and separate property without any further claim thereto by Wife;

¹ Per the Order of November 29, 2021, the Defendant has paid monies into an escrow account held by Plaintiff's attorney. Those monies shall be applied to Plaintiff's attorneys' fees in the amount of \$3,580.00 and any money left over in the escrow shall be returned to Husband.

4. All other assets titled in Wife's name alone shall become and remain her sole and separate property without any further claim thereto by Husband; and
5. By further order of court, JACQUILINE CICARDO, Plaintiff and WILLIAM CICARDO, Defendant, shall be divorced from the bonds of matrimony.

BY THE COURT:

A handwritten signature in dark ink, appearing to read "J. Matika", is written over a horizontal line.

Joseph J. Matika, J.