

LEGAL NOTICES, cont.

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the intention to file, with the Department of State of the Commonwealth of Pennsylvania, on August 1, 1984, an application for a certificate for the conducting of a business under the assumed or fictitious name of Gourmet Cellar, with its principal place of business at 111 West King Street, Waynesboro, PA 17268. The names and addresses(es) or the person(s) owning or interested in said business is (are) Thomas A. Leighty 111 West King Street, Waynesboro, PA 17268.
8/3/84

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on July 16, 1984, of an application for a certificate for the conducting of a business under the assumed or fictitious name of J R RENTALS, with its principal place of business at 8197 Ft. McCord Road, Chambersburg, Pennsylvania 17201. The names and addresses of the persons owning or interested in said business are Raymond L. Wingert and Janice S. Wingert, 8197 Ft. McCord Road, Chambersburg, Pennsylvania 17201.
8/3/84

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on July 10, 1984, an application for a certificate for the conducting of a business under the assumed or fictitious name of Professional Management Software, with its principal place of business at 9974 Molly Pitcher Highway, P.O. Box 695, Shippensburg, PA 17257. The name(s) and addresses(es) or the person(s) owning or interested in said business is (are) Forest N. Myers, 12 South Penn Street, Shippensburg, PA 17257.
Forest N. Myers,
Attorney
8/3/84

NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed on June 18, 1984 with the Department of State, Commonwealth of Pennsylvania at Harrisburg, Pennsylvania and a Certificate of Incorporation was issued on said date to a business corporation organized under the Business Corporation Law of the

LEGAL NOTICES, cont.

Commonwealth of Pennsylvania approved May 5, 1933, P.L. 364, as amended. The name of the corporation is: PARK HEIGHTS ASSOCIATION, INC. The purpose or purposes of the corporation are that it shall have unlimited power to engage in and do any lawful acts concerning any and all lawful business for which corporations may be formed under the Pennsylvania Business Corporation Law of 1933, as amended. Forest N. Myers, Esquire
P.O. Box 695
Shippensburg, PA 17257
8/3/84

Payment of Annual Attorney Registration Fee

Rule 219 of the Pennsylvania Rules of Disciplinary Enforcement provides that on or before July 1 of each year all attorneys are required by this rule to file the attorney registration form and pay the annual fee if active status is desired. Because of a delay in printing of the forms, the mailing was late. While the date for payment has been extended to August 1, 1984, no grace period will be permitted beyond that date. Consequently, failure to comply by that date will be deemed a request for transfer to inactive status (Rule 219(f) (1) P.A.R.D.E.).
The Disciplinary Board of the
Supreme Court of Pennsylvania
8/3/84

Disciplinary Board Notice

The Disciplinary Board of the Supreme Court of Pennsylvania is presently interviewing applicants for the position of Chief Disciplinary Counsel to be located in Harrisburg. The position involves supervision of the Board's District Offices and personnel, and supervision of investigations and prosecution of disciplinary matters. All duly qualified applicants for this position are requested to send a detailed resume and salary requirements by September 10, 1984 to John M. Elliot, Esq., Chairman of Search Committee, The Disciplinary Board, Commerce Building, 300 N. Second Street, Harrisburg, PA 17101.
8/3/84

Defendant's final set of preliminary objections is a motion for a more specific complaint. As discussed earlier, plaintiff must allege in more detail the business of Cambridge Wreckers and the nature of its "inventory."

Defendant also argues that it is necessary for plaintiff to plead the date upon which Cambridge actually made payment for the Corvette. Once again, since this is a material fact central to the dispute as to which party has priority, we agree that plaintiff must include this information in its amended complaint. *Price, supra*, at 522; Pa.R.C.P. 1019 (a).

ORDER OF COURT

April 5, 1984, the defendant's demurrer stating that plaintiff does not allege facts from which it could be found that the Corvette is part of the inventory of Cambridge is treated as a motion for more specific complaint and is granted; the demurrer stating that plaintiff has not alleged facts to disprove the existence of a purchase money security interest in the car is denied.

The defendant's motion to strike Count II of the complaint and the motion for a more specific complaint are granted.

The plaintiff is given 20 days from this date to file an amended complaint.

FEDERLINE V. FEDERLINE, C.P., Franklin County Branch,
F.R. 1983-840
Equity - Partition - Divorce Code - Marital Property Platek v. Platek 454 A.2d 1059 (1982)

1. The Court's power to direct a Partition of property is qualified by its duty to divide marital property in an equitable manner.

2. The Superior Court in *Platek v. Platek* clearly demonstrates its intention to advance the legislative intent of the Divorce Code by favoring equitable distribution in cases to which the Code applies over the equal division mandated by partition.

3. In order to prevent a party in possession of assets from defeating a partition action simply by filing a divorce complaint and then delaying action on his divorce complaint, the Court may defer acting on a petition to dismiss the partition action and retain jurisdiction of both proceedings.

Donald L. Kornfield, Esq., Counsel for Plaintiff
Philip S. Cosentino, Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., April 19, 1984:

On December 1, 1983, the plaintiff, hereinafter Wife, commenced this equity proceeding for partition by the filing of a complaint which alleged that on June 30, 1983, the defendant, herein after Husband, ordered her from their home which was owned by both of them as tenants by the entireties, threw out her clothing from the premises and excluded her from further use and enjoyment of the premises by changing the locks and nailing the windows shut. The complaint was served on December 3, 1983. On February 6, 1984, Husband filed an answer with new matter denying he ordered plaintiff from the premises and threw her clothing from the premises, and to the contrary he alleged that Wife left the premises voluntarily. Husband denied excluding Wife from use or enjoyment of the property but admitted changing the locks to prevent Wife from absconding with additional property of the parties. Under new matter Husband alleged that Wife on June 27, 1983 withdrew \$12,230.17 from a tenancy by the entireties savings account which had a balance of \$14,952.106 prior to her withdrawal. In an included counterclaim Husband incorporated the allegations of new matter and inter alia prayed: "(a) That *if* the Court decrees partition of the real estate, that plaintiff's share be decreased by \$12,230.17 plus interest that said amount would have earned from June 27, 1983 through the date of actual partition. (*Italics Ours*)" Wife's reply to new matter and counterclaim was filed February 27, 1984, wherein she admitted all of the allegations of new matter and alleged "no response is required" to Husband's counterclaim.

On February 6, 1984, Husband filed a complaint in divorce alleging that Wife committed adultery with Earl D. Slye, Sr. In a second count Husband alleged the ownership by the parties of various items of real and personal property subject to equitable distribution and prayed for such distribution. Wife accepted service of the complaint in divorce on February 20, 1984.

On February 6, 1984, counsel for Husband presented a petition to dismiss the partition proceeding commenced by Wife on the grounds that an action in divorce with a request for equitable distribution had been commenced and the real estate Wife seeks to have partitioned is marital property subject to equitable distribution and thus not available for partition. A rule to show cause why an order should not be entered dismissing the partition action was issued upon the same date. An answer to the petition with new matter was filed February 27, 1984. Wife admitted the allegations of the petition but alleged under new matter that the divorce action filed by Husband requires him to proceed and there is no guarantee that he will do so. The matter was placed on the April Argument List; briefs were exchanged and arguments heard. The matter is now ripe for disposition.

It has long been the law in Pennsylvania that where one spouse appropriates entireties' property to his own use and to the exclusion of the other spouse that is deemed to be an offer by the excluding party to partition all of the entireties' property owned by the parties. The offer is deemed accepted by the non-appropriating spouse's commencement of a partition action. *Vento v. Vento*, 256 Pa. Super. 91,389 A. 2d 615 (1978). In the case at bar Wife contends that her exclusion from the marital home constituted the offer to partition, and she accepted that offer by the filing of her complaint on December 1, 1983. If the plaintiff proved the allegations of her complaint by a preponderance of the evidence, the Court is satisfied that the Wife would be entitled to a decree in partition.

On July 1, 1980, the Pennsylvania Divorce Code became effective, Act of April 2, 1980 P.L. 63, No. 26, §101, et seq., 23 P.S. §101 et seq., Section 401 (d) provides:

"In a proceeding for divorce or annulment, the court shall, upon request of either party, equitably divide, distribute or assign the marital property between the parties."

Section 401 (f) provides:

"All property, whether real or personal, acquired by either party during the marriage is presumed to be marital property regardless of whether title is held individually or by the parties in some form of co-ownership such as joint tenancy, tenancy in common or tenancy by the entirety..."

Husband contends that where parties are married and a divorce action commenced, the provisions of the new Divorce Code pre-empt the equitable action for partition of marital property because that equitable action permits only a 50-50 distribution of tenancy by the entireties property. He cites *Playtek v. Playtek*, _____ Pa. Super. _____, 454 A. 2d 1059 (1982) wherein the appellant initiated a divorce action and also appropriated to her own use the proceeds of a personal injury action which had been placed in the parties' joint savings account. The appellee petitioned the lower court to enjoin the appellant from disposing of the settlement proceeds on the theory that they were marital property. The Superior Court held:

"It is apparent, therefore, that the court's power to direct a partition of property is qualified by its duty to divide marital property in an equitable way. If the property is not marital property, the court may direct its partition. But if it is marital property, the court must instead, upon request of either party, direct its equitable division. The result may well be different. For partition is an even division. *Vento v. Vento*, supra. But an equitable division often will not be even; the essence of the concept of an equitable division is that 'after considering all relevant factors,' the court may 'deem just' a division that awards one of the parties more than half, perhaps the lion's share, of the property.

...

"The lower court justified its order of partition by expressing 'the opinion...that the *Vento* doctrine is still viable, and that the Divorce Code of 1980 has not rendered it mute'...if the property in question is not 'marital property,' as that term is defined by the Divorce Code, then the *Vento* doctrine is indeed still viable. If the joint tenants are not husband and wife, *Vento* will apply. *Vento v. Vento*, supra. at 94 n.3, 389 A.2d at 617 n.3. Even if the joint tenants are husband and wife, *Vento* will still apply if the property is the separate property of one of them. But if the property is marital property, *Vento* has no application." (At 1062, 1063)

Thus, Husband urges his petition to dismiss Wife's partition action must be granted.

To the contrary Wife argues that the petition must be denied for the following reasons:

1. Husband agreed to the partition by his pleading in that he alleged in new matter and counterclaim that the Court should reduce the amount of Thus, Husband urges his petition to dismiss Wife's partition action must be granted.

To the contrary Wife argues that the petition must be denied for the following reasons:

1. Husband agreed to the partition by his pleading in that he alleged in new matter and counterclaim that the Court should reduce the amount of the estate to be partitioned to Wife by the amount she had allegedly withdrawn from their joint account, and it would be an anomaly for the Court to permit them to recognize Wife's rights to partition and then deny them.

2. *Platek v. Platek* is distinguishable by virtue of the fact that the action in divorce which triggered the application of the new Divorce Code occurred first; whereas in the case at bar the action for partition was first commenced and that constituted the acceptance of the Husband's offer to partition which changed the nature of the property from entireties to individually held assets, and eliminated the concept of "marital property."

3. The right of a spouse excluded from tenancy by the entireties' property to recover a share of that property should not be held hostage to the whim of the other spouse who commence an action in divorce to the extent that that excluding spouse could indefinitely delay action on the divorce proceeding he had initiated.

There is no merit in Wife's first argument, for as previously noted Husband did not in his new matter and counterclaim "agree to the partition", but rather in the ad damnum clause of his pleading prayed that *if* partition was decreed that Wife's share be reduced by the amount she had allegedly withdrawn from the tenancy by the entireties' savings account plus interest. Clearly, there was no factual justification for Wife's counsel to assert the argument. It compels the conclusion that either counsel failed to read and/or comprehend the pleading or intended to mislead the Court. Whatever the explanation, we find the conduct unprofessional and it should never be repeated.

Wife's second contention that the filing of her complaint for partition not only constituted an acceptance of Husband's offer but also and instantaneously effected a de jure partition of the entirety's real estate is unsupported by the facts pleaded and the law, and is consequently unpersuasive. The insurmountable factual problem confronted by Wife's contention is that Husband's answer to the partition complaint denies that he ejected her from the premises and excluded her from use or enjoyment of the property; and to the contrary he alleges that she left voluntarily. Whatever the ultimate resolution of the factual issue might be, it is obvious that at this stage of the proceeding no determination of her right to partition is possible. While we doubt seriously that the legal fiction employed in Pennsylvania to permit the partition of entirety's property during marriage effects the change in the manner that the parties hold the real estate immediately upon the filing of a complaint in partition, it would not do so where the grounds alleged for the partition are denied.

Furthermore, we find nothing in the Superior Court's opinion in *Platek v. Platek*, which would justify distinguishing the rule there established on the basis of which party won the race to the courthouse. Generally the law does not encourage such contests. Section 102 of the Divorce Code, 23 P.S. 102 provides inter alia:

The Superior Court in *Platek* clearly demonstrates its intention to advance the legislative intent of the Divorce Code by favoring equitable distribution in cases to which the Code applies over the equal division mandated by partition which until July 1, 1980 was the only legal remedy available.

“(a) The family is the basic unit in society and the protection and preservation of the family is of paramount public concern. Therefore, it is hereby declared to be the policy of the Commonwealth of Pennsylvania to:

(6) effectuate economic justice between parties who are divorced or separated and grant or withhold alimony according to the actual need and ability to pay of the parties and insure a fair and just determination and settlement of their property rights.

“(b) The objectives set forth in subsection (2) shall be considered in construing provisions of this act and shall be regarded as expressing the legislative intent.”

Wife urges in support of her third contention that dismissal of her partition action solely on the grounds that Husband has commenced a divorce action is legally and logically indefensible because it permits a spouse who excludes the other spouse from use and enjoyment of entirety's property to destroy the right of the excluded spouse to partition of that property by the simple expedient of filing a complaint in divorce and claiming equitable distribution. Once the complaint has been filed contends Wife, there is no incentive for the excluding spouse to proceed with the expeditious disposition of the divorce action, and the equitable distribution of the marital property. The fact that Husband's complaint in divorce was filed on February 6, 1984, and he has neither filed a motion for the appointment of a Master nor an inventory and appraisal as mandated by Pa. R.C.P. 1920.33 gives credence to Wife's argument that there is no incentive for him to proceed expeditiously or otherwise with his action in divorce so long as Wife is barred from her partition action and he is in control of the marital property. It is true Wife has the option to file her own motion for the appointment of a Master, file her own inventory and appraisal with 60 days as required by the Rule of Civil Procedure, and seek the imposition of sanctions upon Husband for non-compliance with the Rule. However, this option may be largely illusory, for if a Master is to be appointed to consider divorce, alimony, alimony pendente lite, distribution of property, support, counsel fees and costs and expenses, the party filing the motion would be required to deposit with the Prothonotary the sum of \$675.00 which is not an insignificant amount. (we take judicial notice of an order of this court filed January 27, 1984, wherein it is noted that Husband's net weekly income is approximately \$230.00 and Wife's is \$180.00.)

Under Section 102 of the Divorce Code, supra, it is not only the policy of the Commonwealth and the intent of the Legislature to “effectuate economic justice between parties” (Subsection A-6) but also to “(1) make the law for legal dissolution of marriage effective for dealing with the realities of the matrimonial experience.” In our judgment it was not the intention of the Legislature to make the rights of the more economically dependent spouse hostage to the whims or dilatory action of the other spouse nor do we believe it was the intention of the Superior Court in *Platek* that its opinion be construed to potentially permit such a transparent violation of Commonwealth policy and legislative intent.

In our opinion Husband should be given the opportunity to demonstrate his good faith by proceeding promptly with his action in divorce and for equitable distribution of marital property. During that time period the court should simply defer acting on Husband's petition to dismiss the partition action, and retain jurisdiction of both proceedings. Then, if Husband fails to pursue his cause of action with reasonable diligence the Court will entertain a motion either to hold a hearing on the petition to dismiss and responsive answer or if appropriate dismiss the petition. For the guidance of the parties and their counsel, it would appear appropriate to expect Husband's motion for the appointment of a Master to be filed within two weeks of the date of this order and in the absence of unusual or unforeseen circumstances for all proceedings before the Master to be concluded within 90 days of the date of this order.

ORDER OF COURT

NOW, this 19th day of April, 1984, all proceedings in the partition action of Joan Marie Federline vs. Bernard L. Federline, Jr. are stayed until further Order of Court. Judicial action on the petition of Bernard L. Federline, Jr. to dismiss the said partition action is deferred pursuant to the Opinion attached hereto. Jurisdiction is herewith retained.

Exceptions are granted the Plaintiff and the Defendant.

MITCHELL V. MITCHELL, C.P. Franklin County Branch, F.R. 1979-1170S

Support Order - Res Judicata - Changed Circumstances

1. An initial support order is res judicata and is subject to further modification only upon a showing of subsequent material changes in conditions and circumstances.
2. Consideration of a request to modify a pre-existing support Petition is appropriate only where a written Petition, cross petition or answer with counterclaim is before the review officer.
3. Where defendant petitioned for a reduction in support and plaintiff did not file an answer with counter claim, plaintiff later petitioned for increased support and must rely on changed circumstances from the time of the last hearing.



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