NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DIANE FAIRFIELD Appellee v. RICHARD FAIRFIELD Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 579 EDA 2017

Appeal from the Order Entered January 9, 2017
In the Court of Common Pleas of Bucks County
Domestic Relations at No(s): A06-12-60811-DY-19

BEFORE: GANTMAN, P.J., McLAUGHLIN, J., and RANSOM*, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED JUNE 20, 2018**

Appellant, Richard Fairfield ("Husband"), appeals from the order entered in the Bucks County Court of Common Pleas, which denied Husband's petition to modify alimony under the terms of a Marital Settlement Agreement ("MSA") between Husband and Appellee Diane Fairfield ("Wife"), and granted Wife's petition for enforcement of the MSA and for counsel fees.[1] We affirm.

The trial court opinion fully and correctly set forth the relevant facts and procedural history of this case. Thus, we have no reason to restate them.

Husband raises three issues for our review:

> DID THE TRIAL COURT ERR IN DENYING HUSBAND'S PETITION TO MODIFY ALIMONY?
>
> DID THE TRIAL COURT ERR IN GRANTING WIFE'S PETITION FOR COUNSEL FEES?

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[1] The court's order also denied Wife's request to find Husband in contempt.

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* Retired Senior Judge assigned to the Superior Court.

> IS THE TRIAL COURT'S *SUA SPONTE* SUGGESTION THAT THIS APPEAL SHOULD BE DISMISSED, CONTRARY TO LAW?

(Husband's Brief at 3).[2]

Our review of a MSA implicates the following principles:

> A marital [settlement] agreement incorporated but not merged into the divorce decree survives the decree and is enforceable at law or equity. A settlement agreement between spouses is governed by the law of contracts unless the agreement provides otherwise.
>
> * * *
>
> Because contract interpretation is a question of law, this Court is not bound by the trial court's interpretation. Our standard of review over questions of law is *de novo* and to the extent necessary, the scope of our review is plenary as the appellate court may review the entire record in making its decision. However, we are bound by the trial court's credibility determinations.
>
> When interpreting a marital settlement agreement, the trial court is the sole determiner of facts and absent an abuse of discretion, we will not usurp the trial court's fact-finding function. On appeal from an order interpreting a marital settlement agreement, we

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[2] With respect to Husband's third issue on appeal, the trial court stated in its opinion that Husband's failure to obtain the relevant transcript should result in waiver of all appellate issues or dismissal of the appeal. Nevertheless, the record supports Husband's assertion that he ordered the relevant transcript but transcription was delayed due to the retirement of the court reporter. The relevant transcript is now in the certified record, so we decline to waive any of Husband's issues or dismiss the appeal as suggested. Moreover, even if Husband had waived his issues for failure to obtain the relevant transcript, then we would affirm rather than dismiss the appeal. ***See In re K.L.S.***, 594 Pa. 194, 934 A.2d 1244 (2007) (noting if appellant waives issues on appeal, then we should affirm trial court's decision rather than quash or dismiss appeal). Thus, we give Husband's third issue on appeal no further attention.

> must decide whether the trial court committed an error of law or abused its discretion.
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> [***Stamerro v. Stamerro***, 889 A.2d 1251, 1257-58 (Pa.Super. 2005)].

Kraisinger v. Kraisinger, 928 A.2d 333, 339 (Pa.Super. 2007) (some internal citations and quotation marks omitted).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Raymond F. McHugh, we conclude Husband's remaining issues merit no relief. The trial court opinion comprehensively discusses and properly disposes of those questions. (***See*** Trial Court Opinion, filed October 6, 2017, at 3-4; 6) (finding: **(1)** burden was on Husband to establish he did not lose job through any fault of his own; Husband argues his departure from employer was "without cause," but Husband failed to produce sufficient evidence to meet his burden; Husband's testimony at hearing concerning circumstances leading to his departure from employer was evasive, contradictory, and disingenuous; court simply did not believe him; Husband's 2014 employment review showed that individuals who worked for Husband "operate in climate of fear"; employment review explained employer would be observing Husband in his interactions with others and required Husband to make changes to his management style; Husband left employment approximately four to five months after that review; employment review directly contradicted portions of Husband's testimony; Husband failed to satisfy his burden to prove he lost job through no fault of his own; **(2)** limited award of counsel fees was reasonable, as Wife was not

in position to pay her total counsel fees; Husband was in position to pay portion of those fees[3]). Accordingly, we affirm on the basis of the trial court's opinion with respect to Husband's first and second issues on appeal.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/20/18

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[3] The record belies Husband's suggestion that the court could impose counsel fees only if the court found him in contempt. To the contrary, the parties' MSA states: "It is specifically agreed and understood by and between the parties that any party who willfully breaches any portion of this Agreement shall be liable for reasonable attorneys' fees, costs and expenses incurred by the non-breaching party relative to any contempt **or** enforcement action." (MSA, dated 9/26/13, at 17; R.R. at 156a) (emphasis added). The court found Husband failed to prove he lost his job "without cause." Husband breached the MSA by unilaterally reducing his alimony payments, which caused Wife to petition the court to enforce the alimony provision. Wife was entitled to counsel fees she incurred to enforce the MSA. ***See id. See also*** 23 Pa.C.S.A. § 3502(e)(7) (permitting award of counsel fees and costs where party has failed to comply with terms of agreement between parties).

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IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
FAMILY COURT DIVISION

DIANE FAIRFIELD	:	
	:	No. A06-2012-60811-D
v.	:	
	:	
RICHARD FAIRFIELD	:	

Case #: 2012-60811-0054 D 11720010
Code: 5214 Judge:33
Patricia L. Bachtle, Bucks County Prothonotary
Rcpt: Z1867376 10/6/2017 11:51:35 AM

OPINION

Richard Fairfield (hereinafter "Appellant") appeals to the Superior Court of Pennsylvania following this Court's January 9, 2017 Order denying Appellant's Petition to Modify Alimony and Granting Appellee's Petition for Counsel Fees. We file this Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a).

I. FACTUAL AND PROCEDURAL HISTORY

On October 17, 2013 a Decree in Divorce was entered by the Court between Appellant and Diane E. Fairfield (hereinafter "Appellee"). Prior to the entry of this Decree, the parties entered into a Matrimonial Settlement Agreement (hereinafter "the Agreement") resolving all issues of equitable distribution, child support, custody, and claims for alimony. Pursuant to the Agreement, Appellant agreed to pay Appellee monthly alimony for a total of eighty-eight (88) months in the amount of five thousand seventy dollars ($5,070.00), which would adjust to seven thousand six hundred forty dollars ($7,640.00) upon the emancipation of the parties' son. In accordance with the Agreement, alimony was to be "non-modifiable in amount and duration, except that it may be downwardly modifiable in the event that husband loses his job through no fault of his own."

Appellant paid alimony until June 2016, when he unilaterally reduced the amount to five hundred dollars ($500.00) per month. Appellee was advised by Appellant he had lost

36

his job through no fault of his own. Appellee requested documentation regarding Appellant's loss of employment but never received same.

On June 24, 2016, Appellee filed a Petition for Enforcement and Contempt of Property Settlement Agreement and for Sanctions, Counsel Fees and Costs. Appellant responded by filing a Petition to Modify Alimony on June 30, 2016. A hearing on both Petitions was held on December 15, 2016, after which this Court entered an order on January 9, 2017 denying Appellant's Petition to Modify Alimony and granting Appellee's Petition for Enforcement of Property Settlement and Counsel Fees. Appellant filed his Notice of Appeal to the Superior Court on February 7, 2017.

II. STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

On March 22, 2017, Appellant filed his Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b), raising the following issues, *verbatim*:

> 1. Whether the trial court erred in denying Defendant's Petition to Modify Alimony?
> 2. Whether the trial court erred in granting Plaintiff's Petition for Counsel Fees?
> 3. Whether the trial court erred by allowing Plaintiff to introduce into evidence Defendant's Employment file?

III. DISCUSSION

Before considering the issues raised in the Statement of Matters Complained of on Appeal, we must first address the issue of Appellant's failure to fulfill his obligation pursuant to Pa.R.A.P 1911. Although Appellant filed a Request for Transcript on February 7, 2017, he failed to take the necessary steps required to procure it. Appellant has the responsibility to supply the appellate court with the *complete* record for purposes of review. *See* Pa.R.A.P. 1911(a); *Smith v. Smith*, 637 A.2d 622, 623 (Pa. Super 1993) (emphasis original).

The transcript of proceedings before the trial court is an essential part of the certified record on appeal. Under Pennsylvania law, it "is unequivocal that the responsibility rests upon the

appellant to ensure that the record certified on appeal is complete in the sense that it contains all of the materials necessary for the reviewing court to perform its duty." *Commonwealth v. Preston*, 904 A.2d 1, 7 (Pa. Super. 2006) (en banc) (citation omitted), *appeal denied*, 916 A.2d 632 (Pa. 2007). Additionally, Pa.R.A.P. 1911(d) provides:

> (d) Effect of failure to comply. If the appellant fails to take the action required by these rules and the Pennsylvania Rules of Judicial Administration for the preparation of the transcript, the appellate court may take such action as it deems appropriate, which may include dismissal of the appeal.

In the instant matter, this Court is unable to accurately assess the merits of Appellant's arguments seeking a reversal of its decision because Appellant has failed to provide a transcript of the December 15, 2016 hearing. "An effective review is not possible unless a transcript is obtained, and thus the potential sanction of dismissal for failure to do so in a timely manner is not improper." *Delcamp v. Delcamp*, 881 A.2d 853, 854 (Pa. Super. 2005). Accordingly, this Court respectfully requests the Superior Court take whatever action it deems appropriate, including the dismissal of this appeal.

Even without a transcript of the December 15, 2016 hearing, we will attempt to discuss the issues identified by Appellant in his 1925 Statement based on our personal notes and recollections. Appellant first argues this Court erred in denying his Petition to Modify Alimony. The burden was on Appellant to establish he did not lose his job through any fault of his own. It is the burden of the party seeking to modify an order to show by competent evidence that a change of circumstances justifies a modification. *Litmans v. Litmans*, 673 A.2d 388 (Pa. Super. 1996). Although Appellant argues his departure from his employer was "without cause," Appellant failed to produce sufficient evidence to meet his burden.

At the hearing on December 15, 2016, Appellant testified regarding his termination of employment. According to Appellant, his job was eliminated and he was offered different

severance options, including an opportunity to remain employed subject to further evaluation. He chose some sort of a "buyout" option which led to protracted litigation between him and the employer. The result of said litigation was Appellant returning a large portion of the "buyout" to the employer. His overall testimony regarding the above was evasive, contradictory, and disingenuous. We simply did not believe him. In support of his testimony, Appellant introduced his 2014 Employment Review into evidence as Exhibit H-1. This review claims that individuals who worked for Appellant "operate in a climate of fear" and says "When people fear for their jobs, their goal becomes survival not success. We cannot have our employees operating in such a culture." The review concludes with the following statement: "My measure of success is greater revenue and profit and executive interaction based on respect and team work. Throughout the next year, I will be observing your interaction and speaking with other executives to understand your success in that regard...you have to be willing to make those changes." Appellant's employment was terminated approximately four to five months after this review. Rather than support Appellant's testimony, we found Exhibit H-1 to directly contradict certain portions of it. Accordingly, we determined Appellant had failed to meet his burden of establishing he had lost his job through no fault of his own.

Appellant also claims this Court erred by allowing Appellee to introduce Appellant's employment file into evidence. Specifically he claims the admission of this file into evidence is in contravention of Pennsylvania Rule of Evidence 902(11). Under this Rule, a domestic record that meets certain requirements regarding a regularly conducted activity is considered self-authenticating and requires no extrinsic evidence of authenticity in order to be admitted. Pa.R.E. 902(11). The proponent must give the adverse party reasonable written notice of intent to offer

the record into evidence. *Id.* Appellant argues this Court erred in admitting the record because he did not receive advance notice of Appellee's intention to offer the record into evidence.

The language in Pa.R.E. 902(11) is similar to the corresponding Federal Rule of Evidence. In *U.S. v. Komasa*, 767 F.3d 151, 154 (2d Cir. 2014), the Second Circuit Court, addressing the notice requirement of FRE 902(11), held that although the proponent failed to provide written notice of its intent to offer loan application files for mortgages at issue in a fraud case, the district court did not abuse its discretion in excusing the lack of notice and admitting the evidence. The court found that although written notice was lacking, the Rule's overall purpose requiring notice was satisfied. *Id.*

Similarly, in this case, Appellee failed to provide formal written notice of her intention to offer Appellant's employment file into evidence. Appellant took issue with only the first page of the file, which was admitted into evidence as Exhibit W-1. The first page is Appellant's claim for unemployment compensation in which the employer indicates the word "fired" in the space titled "reason for separation or partial unemployment." As Appellant initiated this claim for unemployment compensation benefits, he had actual notice of the form's existence. He does not challenge the validity of the document itself, but only that no formal written notice was provided. Because this Court found the form was properly admitted as a self-authenticating record pursuant to Pa.R.E. 902(11), Appellant's lack of written notice is inconsequential by way of Appellant's actual notice. Accordingly, it was not error to admit Exhibit W-1 into evidence. It is well established that the admission or exclusion of evidence is within the sound discretion of the trial court, and an evidentiary ruling may only be reversed where it can be shown that this discretion was clearly abused by being not just erroneous, but also harmful or prejudicial to the complaining party. *Hawkey v. Peirsel*, 869 A.2d 983, 989 (Pa. Super. 2005). In light of this Court's

determination Appellant had not met his burden of proof, the admission of Exhibit W-1 is, at most, harmless error.

Finally, Appellant argues this Court erred in granting Appellee's Petition for Counsel Fees. "The amount of an award for counsel fees, costs and expenses awarded in a divorce action is within the discretion of the trial court and is subject to an abuse of discretion standard on appeal." *Butler v. Butler*, 621 A.2d 659, 667 (Pa. Super. 1993).

> The purpose of an award of counsel fees is to promote fair administration of justice by enabling the dependent spouse to maintain or defend the divorce action without being placed at a financial disadvantage; the parties must be "on par" with one another....
>
> Counsel fees are awarded based on the facts of each case after a review of all the relevant factors. These factors include the payor's ability to pay, the requesting party's financial resources, the value of the services rendered, and the property received in equitable distribution....
>
> In most cases, each party's financial considerations will ultimately dictate whether an award of counsel fees is appropriate.

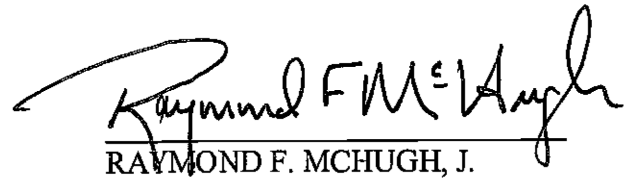
Perlberger v. Perlberger, 626 A.2d 1186, 1206–07 (Pa. Super. 1993), appeal denied, 637 A.2d 289 (Pa. 1993) (citations omitted). We found the amount incurred was reasonable and Appellee was not in a position to pay her total counsel fees. To the contrary, we found Appellant was able to pay a portion of those fees.

IV. CONCLUSION

For the above reasons, it is respectfully submitted the Order entered by this Court on January 9, 2017, should be affirmed.

BY THE COURT:

10/4/2017
Date



RAYMOND F. MCHUGH, J.

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