

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

LAURIE HIXSON,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MICHAEL HIXSON,	:	
	:	
Appellant	:	No. 1560 MDA 2013

Appeal from the Order entered July 31, 2013
in the Court of Common Pleas of Clinton County
Civil Division at No(s): 980-2012

BEFORE: FORD ELLIOTT, P.J.E., OLSON, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED JULY 24, 2014**

Michael Hixson (Husband) appeals from the July 31, 2013¹ equitable distribution order which provided that Husband pay \$25,246.70 to Laurie Hixson (Wife) in 60 monthly installments of \$488.09. We affirm.

The trial court summarized the history of this case as follows.

Wife filed a *pro se* Complaint in Divorce on August 20, 2012, alleging that the marriage was Irretrievably Broken pursuant to 23 Pa.C.S.A. § 3301(c). Wife consulted with an attorney and on March 6, 2013 filed a Petition raising related claims which included a count requesting a divorce due to indignities being offered to Wife, who was the injured and innocent spouse by Husband pursuant to 23 Pa.C.S.A. § 3301(a)(6) and requesting this Court to equitably divide the marital property. Wife also filed a Petition for Exclusive Possession of Marital Residence and for Special Relief on March 8, 2013 and this Court by Order of July 9, 2013 granted Wife's request restraining Husband from entering the residence at 2240 Woodward Avenue, Lock Haven, Pennsylvania and finding that

¹ The Order is dated July 31, 2013, but was not entered onto the docket until August 1, 2013. This discrepancy has no bearing on this appeal.

* Retired Senior Judge assigned to the Superior Court.

Husband had removed property from the residence and prohibiting Husband from disposing of or damaging any and all personal property that [Husband] removed from the residence at 2240 Woodward Avenue, Lock Haven, Clinton County, Pennsylvania.

Th[e trial c]ourt held a Pretrial Conference on June 25, 2013 and granted Wife's Motion to Bifurcate the proceedings and issued a Divorce Decree that date. Husband did not appear at the Pretrial Conference nor at the hearing on April 9, 2013. This Court advised Husband both times in this Court's Orders that Husband had the right to retain an attorney and that Husband may lose many valuable assets and/or be ordered to pay money as a result of any future proceeding that may be held. On July 23, 2013, this Court held a hearing concerning Wife's claim for Equitable Distribution of Marital Property. Husband appeared unrepresented, while Wife was represented by counsel. After verifying Husband's desire to represent himself, th[e trial c]ourt took testimony from Husband and Wife at said proceeding.

Trial Court Opinion, 8/1/2013, at 1-2 (footnotes omitted; italics added). After hearing the testimony of the parties and considering the equitable distribution factors set forth in 23 Pa.C.S. § 3502(a), the trial court ordered Husband to pay Wife \$25,246.70 in equitable reimbursement for (1) premarital property of Wife that Husband appropriated, (2) damage Husband caused to Wife's property, (3) a vehicle retained by Husband which Wife paid off post-separation, and (4) debt Husband incurred on Wife's credit card. Order, 8/1/2013, at ¶¶ I-IV. Husband timely filed a notice of appeal. The trial court ordered Husband to file a concise statement of errors complained of on appeal, and Husband did so.

Husband presents the following questions to this Court on appeal, which we have reordered for ease of disposition.

- [I]. Did the court abuse its discretion and commit prejudicial error in not advising the unemployed and unrepresented defendant pre-trial that if Husband had insufficient resources he could request alimony *pendente lite*, reasonable counsel fees and expenses during the litigation process under Section 3702 of the Pennsylvania Divorce Code?
- [II]. Did the failure of Wife's attorney to file and serve on the *pro se* Husband either an inventory or a pretrial statement as required by the P[a].R.C.P. 1920.33, and as ordered by the presiding judge, coupled with the failure of the lower court to find Wife's attorney in contempt and impose sanctions limiting the Wife's evidence as required by P[a].R.C.P. 1920.33, constitute prejudicial procedural error and an abuse of discretion denying the Husband a fair hearing and a reasonable opportunity to anticipate, prepare for and defend against the demands made by the Wife?
- [III]. Did the trial court err and abuse its discretion in admitting into evidence a self-serving attorney prepared memorandum of Wife's prior out of Court statements as "demonstrative evidence" which included her opinions and conclusions that her Husband had "misappropriated" her "premarital property", "smashed" her garage doors, "ripped-off" closet doors, "smashed" a plate, and "surreptitiously" incurred debt on her credit card?
- [IV]. Did the trial court err and abuse its discretion in repeatedly permitting testimony by Wife that Wife herself attributed to speculation, and things she had heard from others, and by thereafter failing to discount the credibility of her testimony which she based on statements allegedly made by persons who were not produced to testify under oath or subject to cross examination?
- V. Did the court err and abuse its discretion in failing to make an equitable apportionment of all the known marital assets and debts but instead rendered an order only taking into account the items of reimbursement demanded by Wife?
- [VI]. Did the [t]rial [c]ourt commit error and abuse its discretion by making an award of equitable reimbursement under the

facts in this case, where Husband was a dependent spouse, and Wife's contributions to his benefit did not exceed the sums she was legally obligated to provide as the supporting spouse and where a portion of the funds she was awarded included advances that were gifted to him prior to their marriage, there was no unjust enrichment and Husband does not have the means to pay?

Husband's Brief at 5-6 (*italics added*).

We first address Husband's claim that the trial court erred in not advising Husband, who proceeded *pro se*, about the legal options available to him, such as his ability to request alimony *pendente lite* and counsel fees. Husband's Brief at 42-43.

Husband did not raise this claim in his 1925(b) statement. Accordingly, Husband's first issue is waived.² ***See Dietrich v. Dietrich***, 923 A.2d 461, 463 (Pa. Super. 2007) ("When an appellant files a Pa.R.A.P.1925(b) statement, any issues not raised in that statement are waived on appeal."); ***First Union Mortg. Corp. v. Frempong***, 744 A.2d 327, 337 (Pa. Super. 1999) ("[P]ro se representation does not relieve appellant of his duty to properly raise and develop his appealable claims.").

Husband next argues that the trial court erred in not sanctioning Wife for her failure to serve a pretrial statement or inventory on Husband prior to

² Moreover, the record reflects that the trial court repeatedly informed Husband of the importance of retaining counsel, and that he "may lose assets or be ordered to pay money as a result" of the equitable distribution proceedings. Order, 7/2/2013 at ¶ 3. ***See also*** Order, 6/25/2013, at ¶ 2 (same); Order 4/25/2013 at ¶ 7 (same). Husband cites absolutely no authority to support his position that a trial court has a duty to offer legal advice concerning alimony and other rights under the Divorce Code to *pro se* litigants.

the equitable distribution trial. Husband's Brief at 22-30. Husband neither objected to this alleged violation at or before the equitable distribution hearing, nor raised the issue in his 1925(b) statement. The issue, therefore, is waived. **See Green v. Green**, 69 A.3d 282, 286 (Pa. Super. 2013) (citing Pa.R.A.P. 302(a)) ("Issues not raised in the lower court cannot be raised for the first time on appeal and are considered waived."); Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement ... are waived.").

Similarly, Husband's third and fourth issues are waived. In his third, he complains about a document admitted into evidence; in his fourth, he protests that Wife offered testimony that was speculative and hearsay. Husband's Brief at 30-39. However, Husband did not state any objection to the evidence during trial or include these issues in his 1925(b) statement. This Court, therefore, will not consider the issues. **See, e.g., Beaumont v. ETL Services, Inc.**, 761 A.2d 166, 171 (Pa. Super. 2000) (holding claims that trial court erred in admitting the hearsay testimony was waived based upon failure to object at trial); Pa.R.A.P. 1925(b)(4)(vii).

With his remaining issues, Husband claims that the trial court erred in failing to distribute all marital assets and instead ordering only equitable reimbursement. Because these issues are at least fairly suggested by the issues raised in Husband's 1925(b) statement, we will consider his arguments, mindful of the following standard of review.

A trial court has broad discretion when fashioning an award of equitable distribution. Our standard of review when assessing

the propriety of an order effectuating the equitable distribution of marital property is whether the trial court abused its discretion by a misapplication of the law or failure to follow proper legal procedure. We do not lightly find an abuse of discretion, which requires a showing of clear and convincing evidence. This Court will not find an abuse of discretion unless the law has been overridden or misapplied or the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence in the certified record. In determining the propriety of an equitable distribution award, courts must consider the distribution scheme as a whole. We measure the circumstances of the case against the objective of effectuating economic justice between the parties and achieving a just determination of their property rights.

Reber v. Reiss, 42 A.3d 1131, 1134 (Pa. Super. 2012) (quoting **Biese v. Biese**, 979 A.2d 892, 895 (Pa. Super. 2009)).

We begin with a summary of the applicable law.

“In making its decision regarding equitable distribution, the trial court must consider at least the eleven factors enumerated in 23 Pa.C.S.A. § 3502(a) [hereinafter “statutory factors”].” **Isralsky v. Isralsky**, 824 A.2d 1178, 1191 (Pa. Super. 2003)]. As this Court summarized in **Isralsky**:

[T]here is no simple formula by which to divide marital property. The method of distribution derives from the facts of the individual case. The list of factors [in the Code] serves as a guideline for consideration, although the list is neither exhaustive nor specific as to the weight to be given the various factors. Thus, the court has flexibility of method and concomitantly assumes responsibility in rendering its decisions.

Id. (quoting **Fonzi v. Fonzi**, 430 Pa.Super. 95, 633 A.2d 634, 638 (1993)) (brackets in the original).

Wang v. Feng, 888 A.2d 882, 888 (Pa. Super. 2005). Regarding the valuation of property to be distributed,

the court is free to accept all, part or none of the evidence as to the true and correct value of the property. Where the evidence offered by one party is uncontradicted, the court may adopt this value even though the resulting valuation would have been different if more accurate and complete evidence had been presented. A trial court does not abuse its discretion in adopting the only valuation submitted by the parties.

Baker v. Baker, 861 A.2d 298, 302 (Pa. Super. 2004) (citations and quotations marks omitted).

We turn to the trial court's order in the instant case. The trial court offered the following analysis of the equitable distribution statutory factors.

1. **The length of marriage:** The parties were married on November 18, 2011 and separated July, 2012. The parties were married for approximately seven (7) months and twelve (12) days.

2. **Any prior marriage of either party:** Both parties were married previously. This is the second marriage for both parties.

3. **The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties:** Wife is a 1990 graduate of Lock Haven High School and also has a Bachelor's Degree in Medical Laboratories gained while she was in the United States Air Force. Wife is currently pursuing a degree in Business Management through the University of Phoenix. Wife is employed at Avery Dennison as a research technician where she has been employed for eight (8) years. Wife earns approximately Fifty Thousand and 00/100 (\$50,000.00) Dollars per year.

Husband is forty-three (43) years old, has a GED. Husband is presently employed for Orica USA located in Mainville, Pennsylvania. Husband drives a blasting truck and earns Sixteen and 00/100 (\$16.00) Dollars per hour. Husband has been employed there approximately six (6) months. Husband was previously employed for R. C. Bowman during the parties' marriage and was terminated from that employment.

4. **The contribution by one party to the education, training or increased earning power of the other party:** No evidence was received on this issue.

5. **The opportunity for each party for future acquisition of capital assets and income:** No evidence was received on this issue. However, this Court would note that neither party appears likely to acquire capital assets or income in the future.

6. **The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits:** As noted above, Wife is employed at Avery Dennison, where Wife also receives as a benefit of that employment medical insurance, dental insurance, vision insurance and also participation in 401K Plan. Husband's employment at Orica USA also includes benefits of health insurance, dental insurance, vision insurance and life insurance. Husband's employment does not have any type of pension plan or 401K Plan. Husband indicated that he has his own IRA.

7. **The contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation of the marital property, including the contribution of a party as a homemaker:** No real evidence was received on this issue, except Husband's destruction of property at Wife's residence, along with Husband's seizure of property from Wife. Further, Husband set fire to Wife's wedding gown.

8. **The value of the property set apart to each party:** No real evidence was received on this issue, except for this Court receiving testimony that Wife owns the residence at 2240 Woodward Avenue, Lock Haven, Pennsylvania, but the value of the residence before the marriage and at the time of separation was not established. Clearly, this is Wife's premarital residence. No value was ascertained concerning this real estate.

9. **The standard of living of the parties established during the marriage:** Wife testified un rebuttally [*sic*] that the standard of living during the marriage was average and that Wife's standard of living now is below average, as Wife is barely making it from paycheck to paycheck. Wife was forced to

borrow against her 401K Plan to pay the debt of the parties which will be more fully described below.

10. The economic circumstances of each party at the time the division of property is to become effective: The economic circumstances are as set forth above.

10.1. The Federal, State and Local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and certain: No evidence was received on this issue.

10.2. The expense of sale, transfer or liquidation associated with a particular asset, which expense need not be immediate and certain: No evidence was received on this issue.

11. Whether the party will be serving as a custodian of any dependent minor children: Wife has four (4) children from a previous marriage. These children are eighteen (18), eleven (11), eight (8) and six (6) years of age. The eighteen (18) year old no longer lives with Wife, but the three (3) other children presently live with Wife. Husband has one (1) child, an eleven (11) year old ... from a prior relationship. Husband has partial custody of this child.

Trial Court Opinion, 8/1/2013, at 2-5.

Husband complains that the trial court “made no inquiry into many factors that should have been considered[,]” and points to the lack of evidence as to the marital portion of Wife’s 401k account and the alleged contributions Husband made to increase the value of marital assets. Husband’s Brief at 39-41.

Husband cites no authority for the proposition that a trial court has a burden to seek out evidence that the parties fail to offer. If Husband wished to establish that there were marital assets to be distributed, or counted to

offset marital debts, he had the opportunity and the burden to produce evidence relevant to those issues. **See, e.g., Smith v. Smith**, 653 A.2d 1259, 1268 (Pa. Super. 1995) (holding trial court did not abuse its discretion in equitable distribution where husband failed to offer evidence to show marital portion of the increase in value of wife's inheritance). He chose not to do so. Accordingly, Husband's argument that the trial court failed to apportion marital assets entitles him to no relief.

Finally, Husband argues that the trial court abused its discretion in ordering equitable reimbursement. Equitable reimbursement is a corollary of equitable distribution. As this Court has explained:

The courts of this Commonwealth have created the doctrine of "equitable reimbursement" as a method of compensating a spouse for his or her contribution to the marriage where the marital assets are insufficient to do so. ... [E]quitable reimbursement is nothing more than a method of compensating a spouse for that which is fairly due to him or her. Whether this compensation is achieved via equitable distribution, or via "equitable reimbursement" as it is when there is insufficient marital property available to compensate the spouse, the result is the same.

Schenk v. Schenk, 880 A.2d 633, 640-41 (Pa. Super. 2005) (citing **Zullo v. Zullo**, 613 A.2d 544 (Pa. 1992), and **Bold v. Bold**, 574 A.2d 552 (Pa. 1990)). As Husband acknowledges, equitable reimbursement applies "when one spouse has been unjustly enriched." Husband's Brief at 18.

The trial court offered the following discussion concerning the evidence that Husband was unjustly enriched at Wife's expense.

Wife claims that Husband when leaving the property took with him the following items: [C]obalt saw, two (2) kayaks and rack, two (2) new Dewalt drills, De[w]alt chainsaw, a welder, a [RotoZip], two (2) hand sanders, air compressor, numerous hand tools, screwdrivers, hammers, etc., a diamond ring, and a gas powered RC truck. Husband readily admitted that Husband possesses the chainsaw and the two (2) kayaks and rack and denied most other things.

Wife also claimed that Husband damaged Wife's residence and property by smashing garage doors, ripping off and destroying closet doors, burning Wife's wedding dress, smashing a Thomas Kinkadee plate, and damaging walls in the residence. Husband admitted that Husband did burn Wife's wedding gown and that Husband did damage the walls of the residence. Husband claimed that the closet doors were already damaged and that Husband knew nothing about the garage doors being broken.

Wife also claims that there is certain marital property retained by Husband. Husband has admitted that Husband retained a 1997 Subaru motor vehicle paid in full by Wife after separation. Wife also claims that Husband utilized Wife's VISA Card incurring substantial debt. Husband admitted that Husband utilized the VISA Card of Wife, but did not believe that Husband incurred a debt of Twelve Thousand and 00/100 (\$12,000.00) Dollars.

Given the testimony heard by this Court, this Court resolves credibility in favor of Wife and against Husband. Therefore, the amounts claimed by Wife are justified and correct.

Trial Court Opinion, 8/1/2013, at 5-6.

Husband claims on appeal that the trial court failed to gather evidence of how much of the debt on Wife's credit card was incurred by Husband before, rather than during, the marriage; whether Wife consented to Husband's use of her VISA; and whether the amounts paid by Wife "exceeded the amount of support she had an obligation to provide to

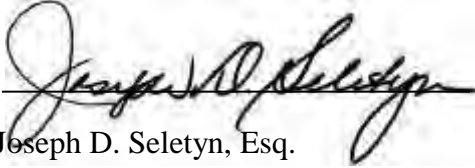
Husband as a dependent spouse under Pennsylvania guidelines.” Husband’s Brief at 16. Husband also complains that the trial court failed to acknowledge adequately the facts that during “most of the marriage Husband had no income and was burdened with a premarital duty to pay child support for his son of a previous marriage” and “Wife knew both before and after the marriage that Husband had limited income, far less than hers.” ***Id.*** at 16-17.

Our review of the record reveals that the trial court considered all relevant factors in light of the evidence offered at trial. Husband failed to offer relevant and convincing evidence at trial to support the claims he makes on appeal. As noted above, Husband cites no authority for his argument that the trial court had a duty to develop evidence favorable to Husband’s position. Given the trial court’s credibility determinations and the factual findings supported by the record, we hold that the trial court did not err or abuse its discretion in determining that Husband was unjustly enriched, at Wife’s expense, during the seven-month marriage. ***See, e.g., Twilla v. Twilla***, 664 A.2d 1020 (Pa. Super. 1995) (holding monthly equitable reimbursement payments were appropriate to compensate wife for husband’s dissipation of equity in the home). Therefore, we have no reason to disturb the order of equitable reimbursement.

Order affirmed.

J-A14035-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/24/2014