

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

KENDALL A. DESAULNIERS,

Appellee

v.

PETER A. DESAULNIERS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1386 MDA 2012

Appeal from the Order June 28, 2012
In the Court of Common Pleas of Fulton County
Civil Division at No.: 206 of 2009-C

BEFORE: FORD ELLIOTT, P.J.E., PANELLA, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.:

FILED JULY 03, 2013

Appellant, Peter A. Desaulniers (Husband), appeals from the Order of June 28, 2012, which granted him and Appellee, Kendall A. Desaulniers (Wife), a no-fault divorce and distributed the parties' property. For the reasons discussed below, we affirm.

Husband and Wife married on May 16, 1992; the parties have one minor child born on June 24, 2003.¹ During the marriage, Husband owned and operated Pete's Concrete Pumping LLC. The parties separated in April

* Retired Senior Judge assigned to the Superior Court.

¹ The facts and procedural history are taken from the trial court's August 17, 2011 and June 28, 2012 Opinions, the master's March 11, 2011 Report and Recommendations, and the master's March 16, 2012 Supplemental Report and Recommendations on Remand.

2009, when Husband relocated to California to work for Kiewit Construction Company; Husband subsequently became unemployed. Wife attended law school during the marriage and is currently employed as an attorney in Maryland.

Wife filed the instant action in divorce on June 12, 2009. An initial master's hearing took place on November 23, 2010. The master issued a report and recommendations on March 11, 2011. Husband filed exceptions, and, on August 17, 2011, the trial accepted in part and rejected in part the master's March 11, 2011 Report and Recommendations. The trial court remanded the matter to the master for further proceedings solely regarding the distribution of personal property.

On October 31, 2011, Husband filed a claim for alimony *pendent lite* (APL). On November 29, 2011, the trial court entered an order referring the issue of APL to the master. A second master's hearing took place on February 1, 2012. The master issued a supplemental report on March 16, 2012. Husband filed exceptions. On June 28, 2012, the trial court issued an order denying Husband's exceptions and adopting the master's recommendations. The June 28, 2012 Order incorporated the trial court's prior order of August 17, 2011, concerning equitable distribution.

The instant, timely appeal followed. Husband filed a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

The trial court issued an opinion relying on its August 17, 2011 and June 28, 2012 Opinions.

On appeal, Husband raises the following issues for our review:

- A. Whether it was abuse of discretion or error of law for the [trial] court to have denied [Husband's] claim for alimony *pendent lite* and to not have ordered [Wife] to pay [Husband] alimony *pendent lite* in an amount based on the income and circumstances of the parties as previously determined by the court[?]
- B. Whether it was abuse of discretion or error of law for the court to order distribution of USAA account #554-9 in the amount of \$42,000.00 to [Husband] as a separate asset from the distribution of business equipment sold post separation of \$12,118.88 to [Husband] and \$32,000.00 to [Wife] (total \$44,118.99) [sic] and in not allowing testimony which would have explained the transfers between bank accounts and the proceeds of the sale of the business assets and would have clarified that the funds stipulated to be in USAA account #554-9 were part of the proceeds of the sale of business assets[?]
- C. Whether it was abuse of discretion or error of law to have ordered Appellant to pay Appellee alimony[?]

(Husband's Brief, at 4).

In his first claim, Husband alleges that the trial court erred in not awarding him APL. (**See** Husband's Brief, at 13-19). Pennsylvania law provides, "[i]n proper cases, upon petition, the court **may** allow a spouse reasonable alimony *pendente lite*[" 23 Pa.C.S.A. § 3702 (emphasis added). Either spouse may receive APL during the pendency of the divorce action, but it is not a matter of right to either party. **See Nemoto v. Nemoto**, 620 A.2d 1216, 1221 (Pa. Super. 1993). Further:

The amount awarded as [APL] is within the sound discretion of the trial court and absent abuse of discretion, the appellate court will not disturb the trial court's award. APL is based on the need of one party to have equal financial resources to pursue a divorce proceeding when, in theory, the other party has major assets which are the financial sinews of domestic warfare. APL focuses on the ability of the individual who receives the APL during the course of the litigation to defend her/himself, and the only issue is whether the amount is reasonable for that purpose, which turns on the economic resources available to the spouse.

* * *

In ruling on a claim for [APL], the court should consider the following factors: the ability of the other party to pay; the separate estate and income of the petitioning party; and the character, situation, and surroundings of the parties.

Litmans v. Litmans, 673 A.2d 382, 388-89 (Pa. Super. 1996) (citations and quotation marks omitted).

In the instant matter, Husband notes the ***Litmans*** factors in his brief but does not apply them to the facts of this case. (***See*** Husband's Brief, at 13-19). Instead, Husband argues that: (1) he is entitled to APL because his income on unemployment is approximately one-half of Wife's income and she received APL when her income was one-half of his; and (2) the master and trial court erred in concluding that he unnecessarily delayed the divorce litigation. (***See id.***). We disagree.

Firstly, Husband has not provided any legal support for the novel argument that he is automatically entitled to APL simply because Wife received it earlier in the course of litigation. Given Husband's

underdeveloped legal argument on this issue, there is no need to discuss further this unique assertion. **See** Pa.R.A.P. 2119(a)-(b).

Secondly, while both the master and the trial court did factor what they believed to be Husband's dilatory conduct into their decision to deny his request for APL, this was not the only factor in their decision. (**See** Master's Supplemental Report and Recommendations on Remand, 3/16/12, at 8-9; Trial Court Opinion, 6/28/12, at 3-7). In discussing the first two **Litmans** factors the trial court stated:

In making his recommendation, the [m]aster did consider the extensive evidence of the parties' incomes and estates already in the record. The [m]aster specifically incorporated his findings and recommendations regarding alimony from his report dated March 11, 2011. Thus, the [m]aster was in the best position to pass on the first two **Litmans** factors: the ability of Wife to pay and the separate estate and income of Husband.

With regard to Wife, the [m]aster noted that "[t]here is no evidence that [Wife] has any sources of income aside from her practice of law [and] [t]here is no indication that she has any significant separate estate." (Master's Report, p.8, ¶ III.C.3.a.). Moreover, Wife has been paying for the marital home and their child's medical expenses while receiving meager child support.^[2]

Husband's current income is in the form of unemployment compensation from the state of California, which he has been receiving for almost a year. However, he has the ability to earn at least as much as Wife and has in fact earned significantly more in the very recent past. Further, in making his recommendation the [m]aster was aware that Husband has significant cash reserves and/or assets, including but not limited

² The record reflects that, at the time of the second master's hearing, Husband was paying \$50.00 per week in child support. (**See** N.T. Second Master's Hearing, 2/1/12, at 16).

to a non-marital retirement account, which was worth \$7,340.22 in 2010 (11/23/10 N.T. 153, lines 1-25 & 154, lines 1-11), equity in his Ford F-350 pickup truck set apart to him since separation (Master's Report, p. 13, ¶ III.C.8.), and a nonmarital USAA Federal Savings Bank account that was worth \$23,137.01 in February, 2010. Therefore, the [m]aster's conclusion that Wife did not have significant income to pay Husband and that Husband had adequate resources to support himself was reasonable.

(Trial Ct. Op., 6/28/12, at 4) (emphasis omitted). Husband does not meaningfully dispute these findings. (**See** Husband's Brief, at 16). Instead, he points to a single sentence in the master's first report and recommendations wherein the master concluded that Wife's current income enabled her to maintain a better lifestyle than she had during the marriage. (**See id.** at 16; Master's Report and Recommendations, 3/11/11, at 18 ¶ 8). However, this statement was made in the context of the master's finding that the parties' lifestyle was "very modest and frugal" during the marriage, and ended with the master concluding that, despite this, Wife was entitled to alimony. (Master's Report and Recommendations, 3/11/11, at 18 ¶ 8; **id.** at 17-20). Thus, Husband has not demonstrated that the trial court abused its discretion in concluding that the first two **Litmans** factors weighed against the award of APL.

Both the master and the trial court found that the third **Litmans** factor weighed heavily against Husband. (**See** Master's Supplemental Report and Recommendations on Remand, 3/16/12, at 8-9; Trial Court Opinion, 6/28/12, at 3-7). The master, whose findings were accepted by the

trial court, did not base this finding solely on Husband's dilatory conduct during the divorce proceedings;³ rather, the master also expressed great concern over Husband's lack of effort to find employment in Pennsylvania, where his son resided and where he had significant business contacts. (**See** Master's Supplemental Report and Recommendations on Remand, 3/16/12, at 8-9). The trial court properly determined that the master's concerns are legitimate given that, approximately two months before Husband lost his job,⁴ he testified at the first master's hearing that he was concerned about losing his job and that if that happened he was "giving consideration" to returning to Pennsylvania to be closer to his son and to be in a position to restart his business. (N.T. First Master's Hearing, 11/23/10, at 142-44). At the second master's hearing, Husband failed to provide any explanation as to why he remained in California, when he had been unable to find employment for one year and was evasive in his responses to the master's

³ While Husband contests certain of the trial court's findings regarding his conduct, he admits that he filed a late brief in support of his exceptions to the first master's report and recommendations, requested a thirty-day extension to file an amended pre-trial statement, and did not appear at the second master's hearing, which was held at his request. (**See** Husband's Brief, at 18-19; Trial Court Opinion 6/28/12, at 5-7; **see also** Master's Supplemental Report and Recommendations on Remand, 3/16/12, at 8-9). However, Husband contends that these delays were excusable and did not prejudice the case. (**See** Husband's Brief, at 18-19).

⁴ Husband lost his job in January 2011. (**See** N.T. Second Master's Hearing, 2/1/12, at 12).

questions regarding his attempts to find work in Pennsylvania. (**See** N.T. Second Master's Hearing, 2/01/12, at 13-14).

Lastly, as noted by the trial court,

At the time the [m]aster issued his Supplemental Report and Recommendations on Remand, the [m]aster was certainly aware that this divorce and equitable distribution should be near its end despite the numerous delays, missed deadlines, and ignored procedural rules. The [m]aster and the [c]ourt had already resolved the equitable distribution of the parties' property, save the personal property. Awarding Husband APL when the parties' divorce was imminent and the most significant reason it had not already occurred was Husband's own unnecessary delay and lack of attention to detail would have caused this [c]ourt great concern.

(Trial Court Opinion, 6/28/12, at 6-7). APL is not alimony; its purpose is to give the parties equal footing while litigating a divorce, **see Litmans, supra** at 388, and this litigation was nearing its end. Husband does not explain why, at this stage of the litigation, APL was necessary for him to litigate the action. While Husband claims that he was unable to afford an airline ticket to attend the second master's hearing, he has never substantiated that claim. Further, Husband does not point to any actual prejudice incurred because of his failure to attend since he was in phone contact with his attorney during the hearing and was able to make his selections of personal property. (**See** Husband's Brief, at 19).⁵

⁵ We note that, during the hearing, the parties discussed plans for Husband to come to Pennsylvania to retrieve his personal property from the marital residence. Husband did not contend then and does not contend now that he
(Footnote Continued Next Page)

Thus, for the reasons discussed above, we find that Husband has not shown that the trial court abused its discretion in denying his request for APL. Husband's first claim lacks merit.

In his second claim, Husband challenges the trial court's equitable distribution order, claiming that the trial court counted \$42,000.00 contained in Husband's USAA bank account #554-9 separately from proceeds attributable to Husband from the sale of equipment following the closure of his business, resulting in an inequitable distribution of the marital estate. (**See** Husband's Brief, at 20-22). "We review an equitable distribution order for an abuse of discretion." **Reber v. Reiss**, 42 A.3d 1131, 1134 (Pa. Super. 2012), *appeal denied*, 62 A.3d 380 (Pa. 2012) (citation omitted).

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

(Footnote Continued) _____

was unable to afford to come to Pennsylvania to retrieve his property. (**See** N.T. Second Master's Hearing, 2/1/12, at 63-70, 82-84; Husband's Brief, at 13-19).

parties and achieving a just determination of their property rights.

Id. (citation omitted). Further, this Court has explained:

We note that there 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 of [23 Pa.C.S.A. § 3502(a)] 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 decision.

Smith v. Smith, 653 A.2d 1259, 1264 (Pa. Super. 1995), *appeal denied*, 663 A.2d 693 (Pa. 1995) (citation omitted).

In its August 17, 2011 opinion, the trial court explained the factual background of Husband's claim as follows:

Throughout the marriage, Husband operated Pete's Concrete Pumping LLC. Husband acquired equipment and tools for his business through borrowed funds using the marital real estate as collateral. Following separation, equipment acquired for Husband's business was sold through Cochran Auction House in Boonsboro, Maryland, in the beginning of April, 2009. [**See**] N.T. [First Master's Hearing, 11/23/10, at] 32. However, some equipment, in particular the Reed B-45 trailer pump (further addressed below), was not sold through Cochran Auction until March or April of 2010. [**See id.** at] 32. Husband introduced into evidence [at the First Master's Hearing] a "Consignment Order Balance" from Cochran Auctioneers and Associates. [**See** Husband's] Exhibit 8. Total sales from the auction were \$46,935.00. From this figure, \$2,816.22 was paid to Cochran as a commission. The invoice shows the auction occurred at the "2009 Spring Contractors Auction-April 2, 3 & 4." [**Id.**] Husband received a check in the amount of \$44,118.88 which he deposited into an account bearing the name Pete's Concrete Pumping held by Tower Bank. [**See**] N.T. [First Master's Hearing, 11/23/10, at] 120. The invoice from Cochran has a "PAID" stamp at the bottom with a date of April 7, 2009. [Husband's] Exhibit 8.)

Husband also sold two (2) concrete pumps through Outback 4X4 for \$23,449.92. [**See id.** at] 121[; **see also**] [Wife's] Exhibit 3, page 26. The proceeds from this sale were placed into a USAA account with account number 554-9 that Husband opened after he moved to California. [**See**] N.T. [First Master's Hearing, 11/23/10, at] 121. Husband also sold the Reed B 45 Concrete Pump w/Hoses, Clamps & Fittings at the Cochran Auction House for a gross sale price of \$5,250.00. [**See** Wife's] Exhibit 3, page 25. From the gross sale price, Cochran was paid a commission of \$420.00, leaving a net sale price of \$4,830.00. [**See id.**] The auction for this item was held on April 8, 9, and 10th 2010 at the "Heavy Equipment Auction." [**id.**].

(Trial Court Opinion, 8/17/11, at 7).

Husband argues that the \$42,000.00 in the USAA account was part of the proceeds from these sales of equipment and that it was initially placed in Husband's Tower Bank Account #0241 and then transferred into the USAA account, and thus should not have been counted separately. (**See** Husband's Brief, at 20). Husband argues that the master wrongly precluded him from testifying about the transfer of monies and therefore, he was unable to explain this fully to the court. (**See id.** at 20-21).

However, Husband has not highlighted any portion of the record that demonstrates that he was precluded from testifying about the transfer of funds. (**See** Husband's Brief, at 20-22). Rather, the pages of testimony that Husband points to in support of his claim concern his attempts to enter into evidence a summary he prepared with the assistance of counsel, concerning his banking activities and certain bank records. (**See** Husband's Brief, at 21; N.T. First Master's Hearing, 11/23/10, at 121-30). At the

hearing, Wife objected to the admission of the summary because there was no foundation; when Husband attempted to move the bank statements supporting the summary into evidence, Wife objected because they had not been furnished to her until that morning despite being previously requested in discovery. (**See** N.T. First Master's Hearing, 11/23/10, at 122-27). Thereupon, the parties went off the record and agreed to the following stipulation:

Counsel, I want you to listen carefully to make sure I'm accurately reflecting some of the further stipulations that have been reached.

Referring to Plaintiff's Exhibit Number 3, initially the USAA savings account in husband's name was disputed. . . . It's now agreed that there was \$42,000 attributable to that account that was retained by husband.

With respect to the Tower Bank checking account ending in 241 was disputed. It is no longer disputed. Husband received \$19,875.5 at separation from that account. Further stipulation, there was equipment owned at date of separation that was eventually sold and proceeds in the following amounts were received by husband: Two of these numbers were earlier stipulated to and that's the \$23,449.92 and \$4,830. Additionally, there's \$44,118.88 of proceeds that were received by husband as a result of the sale of business equipment.

Counsel have further stipulated to these facts. One, that the Ford truck was purchased through financing shortly before the date of separation, and based on those facts, the parties had no equity in this asset at the date of separation.

There were additionally two debts for which husband will receive credit for paying post separation. One is \$379 to Erie Insurance and the other is \$155.40 to Roberts Oxygen. . . .

(**Id.** at 127-29). Neither party objected to this stipulation. (**See id.**).

Firstly, we see nothing in this stipulation that would have precluded counsel from questioning Husband regarding the source of the monies and any transfers between the accounts. Thus, we find Husband, who was present for this hearing, has not shown that he was precluded from testifying about transfers between his bank accounts. Further, to the extent that Husband may be challenging the accuracy of the stipulation, he is bound by it as the law of the case. **See *Paronese v. Midland Nat'l Ins. Co.***, 706 A.2d 814, 815 (Pa. 1998) ("Parties may by stipulation resolve questions of fact or limit the issues, and, if the stipulations do not affect the jurisdiction of the court or the due order of the business and convenience of the court, they become the law of the case.").

In any event, as the trial court discussed, those bank statements that the master did admit into evidence do not support Husband's contention.

The trial court stated:

. . . Husband further argues, "[t]he \$42,000 retained by Mr. Desaulniers in USAA account 554-9 was part of the \$44,118.88 received by Mr. Desaulniers from the auction sale in April, 2009 which he first placed in Tower Bank account 0241." During the Master's hearing, Wife introduced into evidence two (2) bank statements. The first bank statement is from an account held by Husband at USAA bearing the account number 554-9. [**See**] Plaintiff's Exhibit 3, p. 16. As of April 30, 2009, this account had a balance of \$42,025.00.^[a] [**See id.**]. On April 30, 2009, \$42,000 was deposited into the 554-9 account. The second bank statement is from a Tower Bank account held by Pete's Concrete Pumping LLC with account number 0241. [**See**] Plaintiff's Exhibit 3, p. 17. On April 30, 2009[,], this account shows a balance of \$51,181.15. [**See**] Exhibit A, attached to Brief of Defendant Peter A. Desaulniers in Support of Exceptions to Master's Report.^[b] The next bank statement for account 0241

is labeled as Plaintiff's Exhibit 3, p. 17. This exhibit shows a beginning balance of \$51,181.15 on May 1, 2009, and an ending balance of \$6,318.37 on May 31, 2009. Plaintiff's Exhibit 3, p. 17. Therefore, because both the 554-9 account [and] the 0241 account show balances of over \$42,000.00 as of April 30, 2009, the Master was correct in finding that these are two (2) separate assets. If Husband were correct in his argument that this was one single asset, the Tower Bank account with account number 0241 would necessarily show a \$42,000.00 withdraw on or about April 30, 2009, to correspond to the \$42,000 deposit made April 30, 2009, to the 554-9 account. Instead, the 0241 account shows a balance of \$51,181.15 on April 30, 2009, and a balance of \$51,181.15 on May 1, 2009. The Court also considers the parties stipulation on this matter and concludes that Husband has presented no evidence to support his argument that the Master incorrectly inflated the marital estate by \$42,000.00. . . .

[a] On April 20, 2009, there was a \$25.00 cash advance and on April 30, 2009, there was a \$42,000 mail deposit.

[b] Husband attached a bank statement from Pete's Concrete Pumping LLC with dates from April 1, 2009 through April 30, 2009. This document was never admitted into evidence. However, the Court will consider the document because Wife cites to the document in her brief and attaches the same statement to her brief.

(Trial Court Opinion, 8/17/11, at 9-11).

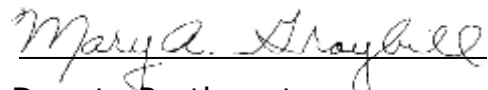
Our review of the record supports the trial court's conclusions. Husband has simply failed to cite to any evidence of record that would support his contention that the \$42,000.00 was obtained from the sale of equipment and initially placed in the Tower account and then transferred to the USAA account. Thus, Husband has not shown that the trial court abused its discretion in counting it as a separate asset. Husband's second claim must fail.

In his third claim, Husband alleges that the trial court abused its discretion in awarding APL to Wife. (**See** Husband's Brief, at 4). However, this issue is not argued in the body of his brief. Thus, it is waived. **See *Commonwealth v. Jones***, 815 A.2d 598, 604 n.3 (Pa. 2002) (holding that claims raised in Statement of Questions Involved but not pursued in body of brief are waived).

Accordingly, for the reasons discussed above, we affirm the June 28, 2012 Order.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.


Deputy Prothonotary

Date: 7/3/2013