

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

VAN HOANG LECLAIR

Appellant

v.

JOHN W. LECLAIR

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 2199 MDA 2013

Appeal from the Order of November 19, 2013  
In the Court of Common Pleas of Centre County  
Civil Division at No.: 2001-2518

BEFORE: LAZARUS, J., WECHT, J., and MUSMANNO, J.

MEMORANDUM BY WECHT, J.:

**FILED JULY 28, 2014**

Van Hoang LeClair ("Wife") appeals the trial court's November 19, 2013 opinion and order that provided for the equitable distribution of the parties' marital estate. Because we remand to allow the trial court to address issues it failed to consider, we vacate the order.

On October 9, 2001, Wife filed a complaint in divorce against John LeClair ("Husband"). On October 11, 2003, the trial court granted bifurcation of the divorce. Subsequently, on December 17, 2003, a divorce decree was entered, but jurisdiction was reserved in the trial court over unresolved economic issues.

On March 11, 2004, the court entered an order memorializing a partial settlement of equitable distribution reached by the parties. The parties agreed to an apportionment of marital assets and debt with forty-five

percent attributable to Wife and fifty-five percent to Husband; the method by which Husband would pay Wife for her share of equity in certain real property; payment of college expenses for the parties' children; and the appointment of a master to determine distribution of tangible personal property. The court specifically retained jurisdiction over the issues left unresolved by the order.

On April 25, 2012, Wife petitioned for an equitable distribution hearing, alleging that the parties had not been able to resolve all economic issues. An equitable distribution hearing was scheduled for December 2012, but did not occur because the parties indicated that they were going to settle the case.

On January 17, 2013, Wife filed a petition to enforce a settlement agreement. In that petition, Wife alleged that the parties had reached an agreement in November 2012, that Husband's then-counsel, Attorney Brian Marshall, had prepared a written agreement, and that Wife signed that agreement on December 7, 2012. A week after Wife signed, Attorney Marshall notified Wife's counsel that Husband refused to sign the agreement.

On March 1, 2013, the trial court held a hearing on the petition to enforce the settlement agreement and Attorney Marshall's petition to withdraw. Attorney Marshall was permitted to withdraw. Only Attorney Marshall testified at the hearing. Wife's petition to enforce was denied. Wife appealed. We quashed that appeal as interlocutory.

On August 22, 2013, the trial court held a hearing on equitable distribution, at which both parties testified. The court then deferred its decision to allow the parties to provide suggested findings of fact and conclusions of law. On November 19, 2013, the trial court issued its opinion and order in which it resolved disputes of whether specific personalty was marital property; resolved disputes regarding certain investment accounts and bank accounts; granted and denied specific credits that Husband requested; outlined the responsibility for payment of the children's college education; set forth the distribution of property to Husband and Wife; and ordered Wife to make a payment to Husband to effectuate the 45/55 split of the marital estate and the 25 (Wife)/75 (Husband) division of college expenses to which the parties agreed.

On December 11, 2013, Wife filed a notice of appeal. The trial court ordered, and Wife timely filed, a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On February 11, 2014, the trial court filed its opinion, relying in part upon its November 19, 2013 opinion and order.

Wife raises six issues for our review:

- I. Whether the Trial Judge erred by refusing to grant the Petition to Enforce Settlement Agreement and by failing to give Counsel the opportunity to cross examine [Husband].
- II. Whether the Trial Court erred when it did not include the Smith Barney IRA Account as marital property.

- III. Whether the Trial Court erred in failing to address whether American Funds are Marital Assets and the value of these funds.
- IV. Whether the Trial Court erred in failing to address and award attorney's fees to [Wife].
- V. Whether the Trial Court erred in failing to allow [Wife] immediate access to escrow funds in the equitable distribution order.
- VI. Whether the Trial Court erred in [its] calculation of college expenses for the children.

Wife's Brief at 6.

Wife's first issue relates to the enforcement of a settlement agreement. Settlement agreements are governed by contract law. ***Paroly v. Paroly***, 876 A.2d 1061, 1063 (Pa. Super. 2005).

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.

***Kraisinger v. Kraisinger***, 928 A.2d 333, 339 (Pa. Super. 2007).

Wife argues that the agreement she signed on December 7, 2012 was a binding agreement because Husband made the offer and Wife accepted it with her signature. Therefore, Wife contends, Husband could not later disclaim the validity of the agreement. Wife also argues that Husband was not credible in his statements that his attorney did not explain thoroughly the agreement and Wife contends that Attorney Marshall was credible in his testimony that he spent two hours explaining the agreement and that he

told Husband that he planned to contact Wife's counsel to convey the settlement offer. Wife further argues that the trial court erred in failing to allow her counsel to cross-examine Husband at the hearing to enforce the agreement. Wife's Brief at 13-17.

Husband argues that the evidence at the hearing demonstrated that both attorneys met and reached a mutual agreement that was to be presented to Husband and Wife. At that meeting, nothing was in writing except for a spreadsheet listing assets and debts. Husband asserts that he changed his mind about the settlement, but Attorney Marshall did not immediately convey that information to Wife's counsel. Husband contends that no evidence was presented that Attorney Marshall had express authority to agree to a settlement on Husband's behalf or that Husband agreed to the written settlement agreement. Finally, Husband argues that Wife never requested the opportunity to cross-examine Husband and that Husband was not called as a witness at the hearing. Husband's Brief at 32-34.

The trial court found that Husband, while willing to settle, did not consent or agree to the settlement agreement that Wife signed. The trial court relied upon Attorney Marshall's testimony that Husband backed away from the agreement when he became frustrated that Wife had not responded to Attorney Marshall's phone call, that Attorney Marshall did not convey Husband's lack of agreement to Wife's counsel, and that there was nothing in Attorney Marshall's file to memorialize Husband's consent to the agreement. Finally, the trial court asserted that Wife never sought to cross-

examine Husband, so there was no denial of that request and no subsequent error. Trial Court Opinion ("T.C.O."), 2/10/2014, at 2-3.

Husband stated that he did not agree to waive his claim for reimbursement from Wife for her share of the children's college tuition, he did not know at first that provision was in the settlement agreement, and he would not have consented to that. Notes of Testimony ("N.T."), 3/1/2013, at 11. Husband also stated that the spreadsheet the attorneys used to discuss settlement was incorrect in many of its values, and Attorney Marshall did not explain how those values were determined. ***Id.*** at 12-13. Husband stated that Attorney Marshall did not review the terms of the settlement with him, and Attorney Marshall insisted that he sign the settlement agreement or Attorney Marshall would no longer represent Husband. ***Id.*** at 17-19.

Attorney Marshall testified that he created "a quite extensive and rather cryptic spreadsheet" in preparation for the then-scheduled equitable distribution hearing and that, upon reviewing the spreadsheet with Wife's counsel, the attorneys reached a mutual agreement to settle the case. ***Id.*** at 24. Attorney Marshall met with Husband and reviewed the spreadsheet and Husband's options. Attorney Marshall believed Husband consented to the agreement. ***Id.*** at 38. Attorney Marshall stated that, after meeting with Husband, he left a voicemail for Wife's counsel that Husband had agreed to the resolution. ***Id.*** at 25. Attorney Marshall had nothing in his file to indicate that Husband consented to the agreement or that Attorney Marshall told Husband of Wife's December 3 letter, which outlined the settlement that

Wife agreed to enter. **Id.** at 39. Attorney Marshall admitted that the tuition reimbursement was a serious concern for Husband and that it was not included in the spreadsheet. Furthermore, reimbursement was not incorporated into the purported agreement. **Id.** at 43-45. When asked whether Husband ever said he agreed to the settlement, Attorney Marshall testified that Husband “left him with a very clear impression that [Husband] was willing to resolve the case . . . on the terms that were presented in that spreadsheet.” **Id.** at 51. However, Attorney Marshall also admitted that there were areas of disagreement between the attorneys, including a dispute regarding who would receive certain stocks. **Id.** at 40-41.

“[A]n attorney can only bind his client to a settlement based on express authority.” **Reutzel v. Douglas**, 870 A.2d 787, 792 (Pa. 2005). Thus, we must determine whether Husband provided Attorney Marshall with express authority to settle this case. It is clear that, when the attorneys met and reached a tentative agreement, Attorney Marshall did not have the authority to settle the case. Attorney Marshall then met with Husband. When asked directly whether Husband agreed to the settlement, Attorney Marshall did not say yes. Instead, Attorney Marshall said he had the impression that Husband “was willing to resolve the case.” N.T., 3/1/2013, at 51. The trial court found that Husband did not give consent and did not agree to the settlement. Based upon the record before us, we find support for the trial court’s conclusion.

Wife also argued that she was not given the opportunity to cross-examine Husband at the hearing. The trial court is correct that Wife never requested to cross-examine Husband at the hearing. While Husband was never called as a witness, both he and Wife's counsel offered an opening statement of the facts surrounding the purported settlement agreement. No one objected to this procedure. Husband also inserted some testimonial statements during his cross-examination of Attorney Marshall. However, Wife did not object to those improper statements. The failure to raise a timely objection in the trial court waives the issue. **See** Pa.R.A.P. 302(a). Wife could have objected to the procedure the trial court used, objected to Husband's injection of testimony in his cross-examination, or asked to cross-examine Husband. She did not do so. Therefore, she has waived this issue. **See Green v. Green**, 69 A.3d 282, 287-88 (Pa. Super. 2013) (holding that the failure to object to development of record through submission of trial aids in trial court waived issue on appeal).

Wife's remaining issues stem from the court's equitable distribution order. Our standard of review in this context is well-settled:

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.

***Biese v. Biese***, 979 A.2d 892, 895 (Pa. Super. 2009) (citations and quotation marks omitted).

Wife argues that the trial court erred in not determining that a Smith Barney IRA was entirely marital property. The trial court found that a portion of the account was pre-marital. Wife argues that, because Husband was not credible in other testimony, it is unlikely that Husband testified truthfully about the amount that was in the account prior to their marriage. Wife also contends the trial court should not have credited Husband's testimony because he had no documentation to verify his testimony. Wife's Brief at 17-18.

Husband responds that he testified that he transferred money from a pre-marital fund into the Smith Barney IRA and that he did not have documentation because the prior account was set up in the 1970s and documentation was not available. Husband valued the account by subtracting the pre-marital portion. Husband's Brief at 36-37. The trial court credited Husband's testimony, found that there was a pre-marital component of the IRA and excluded that portion from the marital estate. Trial Court Opinion & Order ("Order"), 11/19/2013, at 9.

Marital property does not include property acquired prior to marriage or property acquired in exchange for property obtained prior to marriage. 23 Pa.C.S.A. § 3501(a)(1). As the fact-finder, the trial court “is free to believe all, part, or none of the evidence and the Superior Court will not disturb the credibility determinations of the court below.” **Anzalone v. Anzalone**, 835 A.2d 773, 780 (Pa. Super. 2003).

Here, the trial court found Husband to be credible in his testimony regarding the pre-marital component of the Smith Barney IRA. The trial court as fact-finder was entitled to believe that testimony and there is nothing in the record to persuade us that the trial court erred in making that determination. Thus, Wife’s second claim is without merit.

Wife’s third argument is that the trial court erred in not including an American Funds account as a marital asset. Wife contends that there was no evidence that it was non-marital. Wife’s Brief at 18. Husband responds that Wife did not provide any testimony or question Husband about this account. Husband asserts that Wife included only one statement from the account in a “stack of documents provided to the trial court as Wife’s trial exhibits.” Husband’s Brief at 38.

The trial court acknowledged that the American Funds account was not part of its equitable distribution order. The trial court stated that Wife provided no testimony regarding the account and submitted only one statement as an exhibit amongst seventy-one other exhibits. The trial court also acknowledged that Wife included the fund in her proposed findings of

fact and conclusions of law, but that the court overlooked it. T.C.O. at 5. Finally, the court asserted that Wife included this issue in her motion for reconsideration, that the court intended to grant reconsideration to address the fund, but that the motion was filed incorrectly.<sup>1</sup> After the problem with the motion was brought to Wife's attention, she filed a notice of appeal instead of correcting the motion. Therefore, the trial court lacked jurisdiction to address the issue. ***Id.*** at 6.

Seventy of Wife's seventy-one exhibits were admitted at the close of Wife's testimony. N.T., 8/22/2013, at 43. In her case-in-chief and in her rebuttal, Wife only testified regarding nine of those seventy exhibits. To include an asset in equitable distribution, the trial court must determine that the asset is part of the marital estate. 23 Pa.C.S.A. § 3502(a). To prove it is marital property, the party must demonstrate that it was obtained during the marriage. 23 Pa.C.S.A. § 3501(a). The document admitted by Wife simply shows an account in Husband's name and its value as of September 30, 2003. The document does not list when the account was opened and there was no testimony or evidence to indicate that the account was marital property. Therefore, it would not have been error for the trial court to exclude the item from the marital estate.

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<sup>1</sup> It is unclear from the record what irregularity prevented the trial court from addressing the motion for reconsideration.

However, the trial court admitted that it overlooked the asset, rather than excluding it purposely based upon a determination that it was not a marital asset. T.C.O. at 6. Because the exclusion was inadvertent, it was not an exercise of the court's discretion and therefore, error. Further, once Wife filed her notice of appeal, the trial court was without jurisdiction to correct its error. Therefore, we remand the case to allow the trial court to consider this asset, to determine whether there was sufficient evidence to include it in the marital estate, and, if necessary, to adjust its equitable distribution order accordingly.

Wife next argues that the trial court erred in neither addressing her claim for attorney's fees and nor awarding her those fees. Wife asserts that she properly raised the claim in her complaint and provided information on her costs in her proposed findings of fact and conclusions of law. Wife's Brief at 18-21. The trial court again found that no testimony had been provided regarding attorney's fees. T.C.O. at 5. However, the trial court stated that it overlooked the claim in issuing its order, and that it had intended to address the issue in the response to the motion for reconsideration, had it been filed properly. *Id.* at 6.

The award of attorney's fees in equitable distribution lies within the trial court's discretion. *Anzalone*, 835 A.2d at 785. Documentation of the amount of fees incurred and the services performed is required because the court is required to consider the value of services rendered as a factor in awarding fees. *Id.* at 786.

However, as we are vacating the order and remanding the case, we are mindful that the purpose of equitable distribution is to achieve economic justice and that the trial court failed to consider it. Therefore, we remand this issue to allow the trial court to consider whether attorney's fees should be awarded, provided there is an evidentiary basis for such an award.

Wife next argues that the trial court erred in failing to order the release of funds allocated to Wife that had been held in an escrow account. Wife claims that Husband has refused to release the funds unless and until Wife pays Husband according to the order now on appeal. Wife's Brief at 21-22.

The trial court believed that it had addressed this issue in its order when it stated that the amount in the escrow fund was awarded to Wife and that the assets awarded to Wife were her "sole and separate property." T.C.O. at 6. Nothing in the certified record supports Wife's assertion that Husband has prevented her from obtaining the escrowed funds. The trial court believed that it had provided access to the funds and, if that was not the case, the court appears willing to provide an order releasing the funds. If Husband did not cooperate with the equitable distribution order, Wife should have sought relief in the trial court in the first instance. However, it appears that Wife has not done so. We will not conclude that the trial court erred by not providing an order when Wife did not ask the court to do so. However, Wife remains free to seek enforcement of the order in the trial court.

Wife also argues that the trial court erred in calculating the children's college expenses. Wife contends that the record does not support the calculation because Husband testified regarding only some of the expenses. Wife asserts that the trial court found that the expenses totaled \$241,267.05, but that Husband only provided documentation for expenses totaling \$59,834.19. Wife also argues that the trial court erred in including \$450 per month for board when the children lived in one of Husband's rental properties and Husband did not charge the children rent. Wife makes a similar argument regarding the expenses for food for the children. Wife's Brief at 22-24.

The trial court found that the parties had agreed that Wife would be responsible for twenty-five percent of "all remaining undergraduate college expenses," which were defined to include "room, board, tuition and fees . . . for a four-year course of study." Order at 11. Based upon that language, the trial court concluded that the parties did not intend to include the expenses for one of the parties' children who attended college for three years prior to the agreement; the expenses for more than four years for any of the children; and unenumerated expenses such as books. ***Id.*** at 11-12. The trial court found credible Husband's testimony regarding the expenses and adopted the values in Husband's exhibits 42 through 47. However, the trial court adjusted those values based upon the conclusions listed above. ***Id.*** at 12. Finally, the court found the amounts Husband included for room

and board while the children were living in his rental property to be reasonable. ***Id.*** at 13.

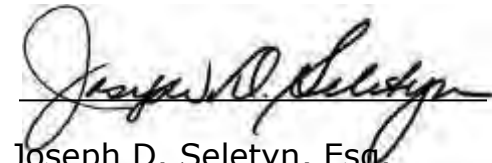
Husband testified regarding his expenses and stated that he had borrowed to pay those expenses for the children to attend college. N.T., 8/22/2013, at 122-24. Further, he testified that he had determined those amounts based upon the bursar's account statements from Penn State University, where all four children attended school. ***Id.*** at 124. Those account statements were admitted into evidence. Husband testified that he either used the amount charged for on-campus dining or averaged the amount he gave the children for food. ***Id.*** at 127. Husband also testified that, because the children were living in the rental property, he lost the income he would have gained from renting it to a third party. ***Id.*** at 128. At the time of the equitable distribution hearing, the property was rented to a third party and Husband received \$525 per month in rent. Therefore, he estimated the lost rent to be \$450 per month for the time the children lived there, which he used to calculate the room expense for the children when they were not living in university housing. ***Id.*** at 129.

The trial court found Husband to be credible, and the record supports that determination. Wife does not question the trial court's conclusions regarding its interpretation of the parties' agreement, only the evidentiary basis for the court's application of those conclusions. However, our review of the record demonstrates that ample evidence supported the trial court's determination of the college expenses.

We find no abuse of discretion or error by the trial court, with the exception of its failure to consider the status of the American Funds account and Wife's request for attorney's fees. However, we must vacate the order to allow the court to consider whether that account is part of the marital estate, whether the record supports an award of attorney's fees, and if so, how those determinations affect equitable distribution.

Order vacated. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

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: 7/28/2014