

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

NANCY A. STUMP,

Appellee

v.

GARY C. STUMP,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 664 MDA 2015

Appeal from the Order Entered March 17, 2015
in the Court of Common Pleas of York County
Civil Division at No.: 2011-FC-001123-15

NANCY A. STUMP N/K/A NANCY A. HALL,

Appellant

v.

GARY C. STUMP,

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 710 MDA 2015

Appeal from the Order Entered March 17, 2015
in the Court of Common Pleas of York County
Civil Division at No.: 2011-FC-1123-15

BEFORE: PANELLA, J., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.:

FILED FEBRUARY 01, 2016

* Retired Senior Judge assigned to the Superior Court.

In these consolidated cross-appeals, Appellant, Gary C. Stump (Husband), and Appellee/Cross-Appellant, Nancy A. Stump n/k/a Nancy A. Hall (Wife), appeal from the order entered on March 17, 2015, which denied both parties' exceptions to the divorce master's report and recommendation regarding equitable distribution of the marital estate. For the reasons discussed below, we affirm.

We take the underlying facts and procedural history in this matter from the master's August 1, 2014 report and recommendation, the trial court's March 17, 2015 opinion, and this Court's independent review of the certified record.

Husband and Wife married on April 29, 1978. Husband was born in 1953 and Wife in 1958. They have two adult children. Wife had previously filed and discontinued divorce actions in 1987 and 2000. During the marriage, Husband worked as a civilian employee with the United States Navy. He took a voluntary retirement in late 2010, and his sole source of income is his monthly pension from the Civil Service Retirement System (CSRS). Husband has received 100% of the income from the CSRS pension since his retirement. It is the largest marital asset. Wife, despite suffering from serious health problems including breast cancer, works full-time as a nurse.

The parties separated on May 24, 2011. From the date of separation, Husband enjoyed exclusive occupancy of the marital residence. Both parties

expended funds in preparing the house for sale, but they have been unable to reach an agreement to list it for sale.

Wife filed the instant divorce action on July 8, 2011. On October 8, 2013, the trial court granted a bifurcated divorce decree. Both parties filed support petitions with the York County Domestic Relations Section against each other. Domestic Relations did not award support to either party. On December 4, 2012, the trial court appointed a master to hear the issues of equitable distribution, alimony, and alimony *pendent lite* (APL). After numerous continuances and conferences, a hearing took place on January 2 and 3, 2014. At the hearing, there were three main issues in contention: (1) the distribution of Husband's CSRS pension; (2) the valuation and disposition of the marital residence; and (3) whether, because of Husband's voluntary early retirement, the master should assign an earning capacity to him.

The master filed a report and recommendation on August 1, 2014, and a supplemental report on August 13, 2014. In it, she found Wife's testimony credible and Husband testimony mostly not credible. She also credited the testimony of Wife's father, vocational expert Brian Bierley, both real estate appraisers, and actuarial consultant Jonathan Cramer. The master directed that the parties sell the marital home, and, after reimbursement for the amounts expended on improvements to the residence, the proceeds be divided between the parties. The master determined that Husband had an

earning capacity of at least \$60,000.00 per year. Lastly, the master found the CSRS pension to be the largest marital asset, and that it would be inequitable for Husband to enjoy 100% of its benefits until Wife retires. She recommended that Husband distribute 64% of the 2013 value of the pension to Wife on the first day of the month following the trial court's equitable distribution order becoming final. Both parties filed exceptions. The trial court denied the exceptions on March 17, 2015. The instant, timely appeals followed.¹

On appeal and cross-appeal, the parties raise the following questions for our review:

1. Did the [trial] court err in affirming the [m]aster's recommendation as to distribution of marital assets and failing to enter an order more in keeping with an equalization of assets?

2. Did the [trial] court err in affirming the [m]aster's distribution of the CSRS [m]onthly [p]ension [b]enefit?

3. Did the [trial] court err in affirming the [m]aster's finding that Husband has a gross earning capacity of \$60,000.00, instead of finding Husband's income and earning capacity to be based upon the findings of the Domestic Relations Section in the parties' support actions, which were not appealed and are *res judicata*?

4. Did the [trial] court and the [m]aster err in failing to consider Husband having reached retirement age as a significant factor in equalizing assets and the CSRS annuity?

¹ The trial court did not order the parties to file concise statements of errors complained of on appeal. **See** Pa.R.A.P. 1925(b). On May 15, 2015, the trial court issued a statement adopting its March 17, 2015 opinion. **See** Pa.R.A.P. 1925(a).

5. Did the [trial] court err in affirming the [m]aster's recommendation not to include Husband's labor costs as a setoff against the value of the estate, despite finding that Husband did extensive refurbishment of the marital home to ready the house for sale and having placed it in impeccable condition as verified by both expert appraisers, or, alternatively, did the [m]aster err in failing to consider it against Wife's claim for fair rental value?

(Husband's Brief, at 3).

[1.] Did the trial court abuse its discretion in declining to award counsel fees to Wife where the [m]aster found Husband's conduct to be vexatious and obdurate?

[2.] Did the trial court abuse its discretion in concluding that the effective date of Husband's earning capacity is the first day of the month after the [c]ourt's [o]rder for equitable distribution rather than Husband's date of retirement?

(Wife's Brief, at 3).²

On appeal, both parties challenge the award of equitable distribution.

Our standard of review is 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

² The remaining issues listed in Wife's Brief are actually counter-statements of Husband's issues. Thus, we have not reiterated them here.

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). Under section 3502(a) of the Divorce Code, the court “shall equitably divide, distribute or assign, in kind or otherwise, the marital property between the parties without regard to marital misconduct in such percentages and in such manner as the court deems just after considering all relevant factors.” 23 Pa.C.S.A. § 3502(a). 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). “Moreover, it is within the province of the trial court to weigh the evidence and decide credibility and this Court will not reverse those determinations so long as they are supported by the evidence.” ***Childress v. Bogosian***, 12 A.3d 448, 455–56 (Pa. Super. 2011) (citations omitted). “We are also aware that a master’s report and recommendation, although only advisory, is to be given **the fullest consideration**, particularly on the question of credibility of witnesses, because the master has the opportunity to observe and assess

the behavior and demeanor of the parties.” ***Id.*** at 455-56 (citations and internal quotation marks omitted, emphasis added).

In his first issue, Husband argues that the trial court erred “in awarding Wife a greater distribution of the marital assets and not making an award much closer to or by equalizing assets.” (Husband’s Brief, at 13). Firstly, we note that this issue seems less of a separate issue than an overview of Husband’s remaining four issues. Moreover, in this issue, Husband devotes much time to insisting that the trial court did not make “[a] proper evaluation” of his exceptions; he complains that, instead, the trial court adopted the master’s reasoning and did not include its own findings of fact and conclusions of law. (***Id.***; ***see also id.*** at 18-20, 23). Husband fails to cite to any legal authority that prohibits a trial court from adopting the master’s findings. Further Husband does not point to any misapplication of law on the part of the trial court. Husband’s argument is, in essence, a claim that we should reevaluate the evidence in front of the master and weigh it in a manner more favorable to him. It is not this Court’s place to do so; here, the master issued a detailed and thorough eighty-eight page report explaining the basis for her decision to award Wife a greater share of the marital property, we have reviewed this report, and find no abuse of discretion. Husband’s first issue lacks merit. ***See Biese, supra*** at 895.

In his second claim, Husband argues that his CSRS pension should not be distributed to Wife until the date of her retirement. (**See** Husband's Brief, at 26-31). We disagree.

As noted above, Domestic Relations utilized Husband's CSRS income in determining that neither party was entitled to spousal support. (**See** Master's Report and Recommendation, 8/01/14, at 39). The master noted that, pursuant to Pa.R.C.P. 1910.19, issues of spousal support and APL are modifiable upon a showing of a change in circumstances. (**See id.**). The master found that such a change had occurred because Husband had removed Wife from his health insurance. (**See id.** at 40).

Husband asserts two main arguments in his appeal: (1) that the initial support finding was *res judicata* and precluded the master from revisiting the issue of distribution of the CSRS pension; and (2) because the CSRS pension was used in determining support, to use it as a marital asset constitutes double-dipping. (**See** Husband's Brief, at 26-31). However, Husband fails to cite to any law in support of his contentions. (**See id.**). Therefore, he waived these claims. **See** Pa.R.A.P. 2119(a) (requiring that appellant develop argument with citation to and analysis of relevant legal authority); **see also Papadopoulos v. Schmidt, Ronca & Kramer, PC.**, 21 A.3d 1216, 1229 (Pa. Super. 2011) (finding waiver where appellants failed to cite to any pertinent legal authority).

Moreover, again, Husband's argument is merely a claim that we should revisit the evidence and adopt his position that the CSRS pension should not be distributed between the parties until some unknown date in the future when wife retires. Here, the master found, and Husband does not dispute, that the CSRS pension was the single largest marital asset. (**See** Master's Report and Recommendation, 8/01/14, at 40). Husband received the sole benefit of this asset after the date of separation. With respect to the date of the distribution, the master stated:

This is **the** major asset of the marital estate. Husband's position that he should receive 100% of it, until Wife retires, is without foundation in law or equity. Husband expressed no concern about what division of the pension would be fair and equitable to Wife. Husband's only concern is to avoid employment while requiring Wife to continue working a demanding job, while also fighting cancer and other chronic health conditions. His position would in effect postpone Wife's retirement, because it would take Wife much longer to save enough funds to allow her to retire. She would always be playing catch-up.

(**Id.** at 56-57) (emphasis in original).

Our review of the record shows that the evidence supports the master's findings and we find no abuse of discretion in her determination that the largest marital asset must be distributed on a date certain and not on some unknown date in the future, while Husband enjoys 100% of the benefits of that asset until that date. Husband's second claim lacks merit.

In his third issue, Husband avers that the master erred in failing to find that the issue of earning capacity was *res judicata* based upon the

determination of domestic relations in the support proceedings; that the master erred in finding that Husband voluntarily retired and remained unemployed without wife's consent; and that the master erred in finding Husband had an earning capacity of \$60,000.00. (**See** Husband's Brief, at 31). We disagree.

Initially we note that Husband conflates the doctrines of *res judicata* and law of the case. (**See id.** at 32-33). Moreover, none of the cases cited by Husband support his contention that the master could not reexamine the issue of Husband's earning capacity in light of the changed circumstances since the support proceeding. Accordingly, we reject Husband's contention that the issue was *res judicata*.

Husband contends that his earning capacity should be based on his CSRS pension alone; that his retirement is not voluntary and that his earning capacity was not \$60,000.00 per year. (**See id.** at 33-39). Husband premises these contentions upon the theory that the master should have rejected the testimony of both Wife and the vocational expert and accepted Husband's testimony with respect to the circumstances surrounding his retirement, his limited skill set and inability to obtain employment. (**See id.**). However, the master specifically found that the vocational expert's and Wife's testimony were credible and Husband's testimony was not credible. (**See** Master's Report and Recommendation,

8/01/14, at 28-31, 42-44). We have no basis to overturn these findings, as they are amply supported by the record. **See Childress supra**, at 455-56.

As noted by the master, when a person voluntarily reduces his income, by early retirement, he must be assigned an earning capacity for purposes of spousal support and APL. **See** Pa.R.C.P. 1910.16-2(d)(4) (“[i]f the trier of fact determines that a party to a support action has willfully failed to obtain or maintain appropriate employment, the trier of fact may impute to that party an income equal to the party’s earning capacity.”); **see also Neil v. Neil**, 731 A.2d 156, 159 (Pa. Super. 1999) (in all instances court is authorized to determine earning capacity; affirming trial court decision basing spousal support obligation on earning capacity rather than actual income where husband voluntarily sold ownership interest in family business).

To determine a party’s earning capacity, the rule states, in pertinent part:

Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity. In order for an earning capacity to be assessed, the trier of fact must state the reasons for the assessment in writing or on the record. Generally, the trier of fact should not impute an earning capacity that is greater than the amount the party would earn from one full-time position. Determination of what constitutes a reasonable work regimen depends upon all relevant circumstances including the choice of jobs available within a particular occupation, working hours, working conditions and whether a party has exerted substantial good faith efforts to find employment.

Pa.R.C.P. 1910.16-2(d)(4).

Here, the master applied the appropriate standards and discussed, in detail, her reasoning for assigning Husband an earning capacity of \$60,000.00 per year. (**See** Master's Report and Recommendation, 8/01/14, at 42-45). After a thorough review of the record, we see no legal error or abuse of discretion in this finding. **See *Smedley v. Lowman***, 2 A.3d 1226, 1229 (Pa. Super. 2010) (affirming trial court decision assigning earning capacity to husband who voluntarily retired at age fifty-two and declining to consider his pension to be sole income considered for support purposes). Husband's third issue lacks merit.

In his fourth issue, Husband claims that the fact that he has now reached retirement age should be considered to effectuate economic justice. (**See** Husband's Brief, at 39). Husband did not raise this issue below. It is settled that new legal theories cannot be raised for the first time on appeal. **See** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Accordingly, we find that Husband waived this issue.

In his fifth issue, Husband claims that the master erred in failing to include his labor costs in the determination of the marital estate, as a set-off against the value of the estate. (**See** Husband's Brief, at 41). We disagree. Again, we note that Husband has failed to include any legal support for his

claim and his argument amounts to nothing more than a request that we reevaluate the evidence in a manner more favorable to him.

Moreover, in concluding that Husband was not entitled to the value of the costs of his labor in either the determination of the marital estate or as a set-off against the value of the property, the master noted several factors. These included Husband's attempt to double-dip by seeking these costs against both the fair rental value of the residence and against the value of the residence at sale and by improperly inflating the costs. (**See** Master's Report and Recommendation, 8/01/14, at 30, 67). She noted that Husband has had sole possession of the marital residence since the date of separation; therefore, he enjoyed and would continue to enjoy the benefits of the improvements to the house until it was sold. (**See id.** at 68). The master's report also discussed, in detail, Husband's attempts to delay the sale of the property and/or obtain a low estimate of its value in order to enable him to retain possession of the property. (**See id.** at 19, 23-25, 49-52). The evidence supports the master's factual findings and we see no abuse of discretion, under the circumstances in the instant matter, in her failure to award Husband labor costs. **See Childress, supra**, at 455-56. Husband's fifth issue lacks merit.

On cross-appeal, Wife contends that the trial court erred in not awarding her attorney's fees. (**See** Wife's Brief, at 22-24). We disagree.

Our standard of review is settled.

We will reverse a determination of counsel fees and costs only for an abuse of discretion. The purpose of an award of counsel fees is to promote fair administration of justice 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 representing party's financial resources, the value of the services rendered, and the property received in equitable distribution.

Counsel fees are awarded only upon a showing of need. Further, in determining whether the court has abused its discretion, we do not usurp the court's duty as fact finder.

Tedorski v. Tedorski, 857 A.2d 194, 201 (Pa. Super. 2004) (quotation marks and citations omitted). Here, the trial court denied Wife's request for attorney's fees in light of the master's finding that both parties contributed to the delays in the proceedings and neither had been proactive in obtaining and providing requested information to the other. (**See** Trial Court Opinion, 5/17/15, at 23). After reviewing this issue, we find no abuse of discretion. ***See Tedorski, supra***, at 201.

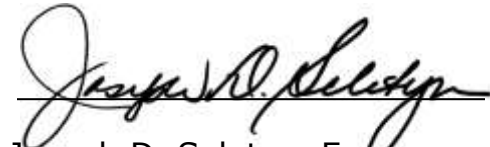
In her second issue on cross-appeal, Wife also takes issue with the trial court's decision regarding the CSRS pension, arguing that the master should have distributed it as of the date of Husband's retirement, rather than as of the date the trial court's order for equitable distribution becomes final. (**See** Wife's Brief, at 24-26). We disagree.

Wife argues that the master should have distributed CSRS pension as of the date of separation. (**See** Wife's Brief, at 24-26). Wife cites to no legal support for this contention. (**See id.**). Here, the master found that Domestic Relations considered the CSRS pension as income in determining support. (**See** Master's Report and Recommendation, 8/01/14, at 61). Thus, she found that, until there was a change in circumstances, which she found at the time of the hearing, the CSRS pension could not be counted as an asset. (**See id.**). We see no legal error or abuse of discretion in this finding. **See Miller v. Miller**, 783 A.2d 832, 835 (Pa. Super. 2001). Wife's second issue on cross-appeal lacks merit.

Accordingly, for the reasons discussed above, we affirm the March 17, 2015 Order.

Order affirmed.

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: 2/1/2016