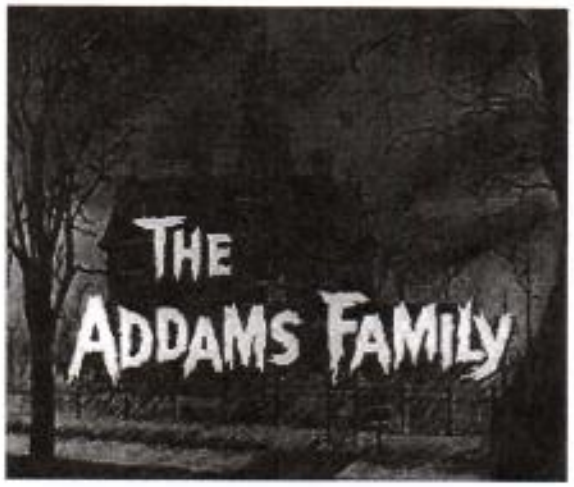
MATRIMONIAL INNS OF COURT

OUR HOUSE, IS A VERY, VERY, VERY FINE HOUSE?

FEBRUARY 24, 2015



Committee Members:

Kristen Humphrey, Chair
Roslyn Berger
Joseph Chester
Samantha Eisenberg
Gordon Fisher
Timothy Gricks
Richard Julius
The Honorable Lawrence Kaplan
Farley Schlass
David Slesnick
Michael Stewart

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Biese v. Biese, 979 A.2d 892; 2009 Pa. Super. 142 (2009)

Semasek v. Semasek, 502 A.2d 109; 509 Pa. 282 (1985)

Smith v. Smith, 904 A.2d 15; 2006 Pa. Super. 175 (2006)

Credit for Fair Rental Value:
Gilmer v Gilmer, 959 A.2d 977 (2008)

Middleton v. Middleton, 812 A.2d 1241; 2002 Pa.Super. 371 (2002)

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McGinnis v. McGinnis, 7 Pa. D.& C. 4th 58 (1990) Crawford County

Laczkowski v. Laczkowski, 496 A.2d 56; 344 Pa.Super. 154 (1985)

15 Summ. Pa. Jur. 2d Family Law § 5:59 (2d ed.)

Summary of Pennsylvania Jur
Database updated January 2015
Family Law
Part Two. Dissolution of Marriage
Chapter 5. Alimony, Disposition of Property, and Other Allowances

Stephanie Giggetts, J.D.

III. Disposition of Property
B. Equitable Distribution
3. Identification and Valuation of **Marital** Property

Topic Summary Correlation Table References

§ 5:59. Valuation, generally

Wilder, 17 West's Pennsylvania Practice: Family Law § 22:4 (7th ed.) (Valuation)

West's Key Number Digest

West's Key Number Digest, Divorce ⇐253(4)

A.L.R. Library

Divorce property distribution: treatment and method of valuation of future interest in real estate or trust property not realized during marriage, 62 A.L.R.4th 107
Necessity that divorce court value property before distributing it, 51 A.L.R.4th 11
Valuation of stock options for purposes of divorce court's property distribution, 46 A.L.R.4th 689
Divorce and separation: treatment of stock options for purposes of dividing marital property, 46 A.L.R.4th 640

The **Divorce** Code does not include a specific method of valuing assets. The court must exercise its discretion, relying upon the estimates and inventories submitted by both parties, the records of purchase prices, and appraisals. In determining the value of **marital** property, the court is free to accept all of the testimony, portions of the testimony, or none of the testimony regarding the true correct value of the property.[1] 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.[2]

Illustration:

A trial court did not abuse its discretion in accepting the uncontradicted valuations of an ex-husband's veterinary practice which were offered by the ex-wife's expert; the ex-husband did not produce expert witness testimony regarding the valuation of his veterinary practice, he did not submit a written income and expense statement, and a portion of the ex-wife's expert's testimony was corroborated by the ex-husband who admitted he commingled business and personal expenses in his business accounting.[3]

Adjustment in the value of a **residence** for expenses associated with the contemplated **sale** may be an appropriate consideration in some equitable distribution cases. However, courts will not adopt a rule that in all cases where the recipient of a **marital residence** intends to sell it immediately, its value for equitable distribution should be reduced by a 7% real estate agent's commission and a 1% realty transfer tax.[4]

Illustration:

A trial court properly refused to deduct the **cost** of **sale** where the record did not establish the expenses incident to the contemplated **sale** with sufficient specificity to require that such expenses be deducted.[5]

Absent a specific guideline in the **divorce** code, the trial courts are given discretion to choose the date of valuation of **marital** property which best provides for economic justice between the parties.[6] Limited circumstances where it is more appropriate to value **marital** assets as of the date of separation, are confined to situations where one spouse consumes or disposes of **marital** assets or there are other conditions that make current valuation difficult.[7]

CUMULATIVE SUPPLEMENT

Cases:

The **divorce** code does not specify a particular method of valuing assets; the trial court must exercise discretion and rely on the estimates, inventories, records of purchase prices, and appraisals submitted by both parties. Childress v. Bogosian, 2011 PA Super 5, 12 A.3d 448 (2011).

[END OF SUPPLEMENT]

Footnotes

1 Smith v. Smith, 2006 PA Super 175, 904 A.2d 15 (2006); Aletto v. Aletto, 371 Pa. Super. 230, 537 A.2d 1383 (1988). As to manner of valuation, generally, see Std. Pa. Prac. 2d § 126:588.

2 Smith v. Smith, 2006 PA Super 175, 904 A.2d 15 (2006); Baker v. Baker, 2004 PA Super 413, 861 A.2d 298 (2004), appeal denied, 591 Pa. 694, 918 A.2d 741 (2007).

3 Baker v. Baker, 2004 PA Super 413, 861 A.2d 298 (2004), appeal denied, 591 Pa. 694, 918 A.2d 741 (2007).

4 Zeigler v. Zeigler, 365 Pa. Super. 545, 530 A.2d 445 (1987).

5 Zeigler v. Zeigler, 365 Pa. Super. 545, 530 A.2d 445 (1987).

6 Smith v. Smith, 2006 PA Super 175, 904 A.2d 15 (2006).

7 Nagle v. Nagle, 2002 PA Super 155, 799 A.2d 812 (2002).

End of Document

Valuation of Real Estate for Equitable Distribution Purposes

When valuing assets, including real estate, the court or master in equitable distribution must exercise discretion, relying on estimates and inventories of the parties, records of purchase prices, and appraisals. When valuing marital property, "the court is free to accept all of the testimony, portions of the testimony, or none of the testimony regarding the true 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." 15 Summ. Pa. Jur. 2d Family Law § 5:59 (2d ed.) (citing Smith v. Smith, (904 A.2d. 15 (Pa. Super. 2006).

In addition to appraisers or other experts, the owners of the property are considered experts when testifying as to the property's value. *Semasek v. Semasek* 502 A.2d 109, 112 (Pa. 1985).

When determining the value of the marital residence, mortgages, home equity loans, and other loans secured by the property must be considered. 23 Pa. C.S. § 3501(a)(7) excludes property "to the extent to which the property has been mortgaged or otherwise encumbered in good faith for value prior to the date of final separation."

Pursuant to 23 Pa. C.S. § 3502(A)(10.1) and (10.2), federal state, and local tax ramifications, and expenses of sale, transfer, or liquidation associated with a particular asset are relevant factors to the equitable division of property. As with the other factors relating to equitable distribution, whether cost of sale or tax effects associated with an asset are weighed heavily or at all is with the discretion of the court or master. One other tax benefit to be considered when the marital residence may be sold is the exclusion of gain from the sale of primary residence of up to $250,000.00 for single taxpayers and $500,000.00 for joint returns. 26 U.S.C. § 121(a).

Lastly, because of fluctuation in the real estate market, the date of valuation for real estate in equitable distribution is critical. Just as with other marital assets, real estate that constitutes marital property is valued at a date closest to the date of distribution. *Sergi v. Sergi*, 506 A.2d 928, 931 (Pa. Super. 1986)(citing *Sutliff v. Sutliff*, 543 A.2d 534 (Pa. 1988). However, if real estate is considered non-marital property, the increase in value of the asset will be determined as of the date of final separation or the date as close to the hearing on equitable distribution as possible, whichever results in a lesser increase. 23 Pa. C.S. § 3501(a.1); *Biese v. Biese* 979 A.2d 892, 899 (Pa. Super. 2009).

17 West's Pa. Prac., Family Law § 22:6 (7th ed.)

West's(R) Pennsylvania Practice Series TM
Family Law
Database updated September 2014
Joanne Ross Wilder[a1]
Chapter 22. Equitable Distribution

§ 22:6. Credits

1 **Trembach v. Trembach, 615 A.2d 33 (Pa. Super. 1992); Hutnik v. Hutnik, 535 A.2d 151 (Pa. Super. 1987); Gee v. Gee, 460 A.2d 358 (Pa. Super. 1983); Yeates v. Yeates, 136 P.L.J. 32 (1988). See also Ressler v. Ressler, 644 A.2d 753 (Pa. Super. 1994), where the court granted husband a credit for taxes paid but not for mortgage payments since wife had been out of possession while husband had exclusive possession for several years and the payments made by husband were not on the original mortgage but on a home equity loan taken prior to separation for the purchase of a truck; Gordon v. Gordon, 647 A.2d 530 (Pa. Super. 1994), rev'd, 545 Pa. 391, 681 A.2d 732 (1996), where, citing Butler v. Butler, 621 A.2d 659 (Pa. Super. 1993), the Superior Court held that the post-separation fair market rental value of the marital residence could not be included as an asset in the marital estate since this income was foregone by wife's occupancy of the property. The court remanded on the issue of wife's entitlement to credit for maintenance and mortgage payments. See § 22:10, Marital residence, infra.**

2 Middleton v. Middleton, 812 A.2d 1241 (Pa. Super. 2002) **(credit denied where payments were voluntary and credit would result in economic injustice); Cohenour v. Cohenour, 696 A.2d 201 (Pa. Super. 1997); Schmidt v. Krug, 624 A.2d 183 (Pa. Super. 1993) (credit denied where both spouses had access to the property); Butler v. Butler, note 1 supra, rev'd on other grounds 541 Pa. 363, 663 A.2d 148 (1995); Gruver v. Gruver, 539 A.2d 395 (Pa. Super. 1988); Powell v. Powell, 577 A.2d 576 (Pa. Super. 1990); DeMasi v. DeMasi, 530 A.2d 871 (Pa. Super. 1987); Hutnik v. Hutnik, note 1, supra; Gee v. Gee, note 1, supra; Hoover v. Hoover, 19 Lyc. 237 (1993) (since husband left the residence voluntarily and was not excluded, no credit for fair rental value was appropriate until wife moved her boyfriend into the residence); Yeates v. Yeates, note 1, supra.**

...

5 **Cohenour v. Cohenour, note 2, supra (husband awarded one-half of fair rental value from date of separation to entry of order awarding ownership to wife); Trembach v. Trembach, note 1, supra.**

6 **Schneeman v. Schneeman, 615 A.2d 1369 (Pa. Super. 1992).**

7 **Beener v. Beener, 619 A.2d 713 (Pa. Super. 1992).**

7.50 **Lee v. Lee, 978 A.2d 380 (Pa. Super. 2009).**

8 **See Dasher v. Dasher, 542 A.2d 164 (Pa. Super. 1988).**

9 **Stackhouse v. Zaretsky, 900 A.2d 383 (Pa. Super. 2006) (interest allowed only from date of decree); Dasher v. Dasher, note 8, supra.**

10 **Fishman v. Fishman, 805 A.2d 576 (Pa. Super. 2002).**

11 **23 Pa.C.S.A. § 3502(a)(10.1). See also Zeigler v. Zeigler, 530 A.2d 445 (Pa. Super. Adams 1982).**

12 **Hunsinger v. Hunsinger, 554 A.2d 89 (Pa. Super. 1989).**

13 **Grandovic v. Grandovic, 564 A.2d 960 (Pa. Super. 1989).**

14 Middleton v. Middleton, note 2, supra.

15 **Grandovic v. Grandovic, note 13, supra.**

16 **Goldblum v. Goldblum, 611 A.2d 296 (Pa. Super. 1992).**

17 **Melton v. Melton, 831 A.2d 646 (Pa. Super. 2003).**

18 **Busse v. Busse, 921 A.2d 1248 (Pa. Super. 2007) (substantial amount of alimony *pendente lite* supported an equal division of the marital estate despite disparity in earning capacity).**

...

Issues relating to post-separation pay down of the mortgage on the marital residence

While appearing clear-cut at first, there can be several issues when one party pays down the mortgage on the marital residence after separation. Generally, the spouse who remains in the marital residence is responsible for paying the mortgage post-separation and does not receive a credit at equitable distribution for the payment. However, in determining the equity in the marital residence the Court will use the mortgage balance as of date of separation so that the non-paying spouse does not get the benefit of the post-separation mortgage pay down. Simple right? Not so fast, this is Family Law and our motto is "Nothing is Easy". Here are a few situations that muddy the waters.

1. Gomez has moved out of the marital residence and has been paying Morticia $1000 a month. Morticia never files for support and the parties have no written agreement for support. After 2 years the parties are in front Judge It and arguing their equitable distribution cases. Gomez is arguing that he was paying $1000 for the mortgage and therefore the Court should use the current mortgage balance in valuing the marital residence. Morticia is arguing that the $1000 a month was to help support Pugsley and Wednesday and the Court should use the mortgage value as of the date of separation in valuing the marital residence. Who is correct?

2. Gomez and Morticia take out a mortgage on 1313 Mockingbird Lane to finance Wednesday's college education and place the proceeds in a whole life insurance policy in Gomez's name. Each year, Gomez uses the money in the policy to pay tuition. After Wednesday's sophomore year, Gomez moves out of the marital residence. Morticia requests that he help pay the mortgage and Gomez refuses arguing that Morticia is getting the benefit of living there while he has to pay rent. Morticia's attorney presents a Petition to Judge It asking that Gomez be required to pay 50% of the mortgage. How should he rule? How should the Court address the mortgage balance at equitable distribution if the parties have already agreed that the remaining monies in the insurance policy will be used solely for Wednesday's college expenses?

3. Morticia files a support complaint and Gomez is ordered to pay $1000 a month in spousal and child support. The monthly payment includes a mortgage deviation of $100 per month. Before Judge It, Gomez argues that the Court should give him credit for paying $100 per month toward the mortgage post-separation. Will he prevail?

4. Gomez and Morticia take out a home equity loan on 1313 Mockingbird Lane to purchase a brand new Mustang Convertible. Gomez packs the Mustang and heads out. During separation Gomez pays the monthly home equity loan but only the interest. At equitable distribution the parties agree that Gomez will retain the Mustang. How should the Court

address the home equity loan in valuing the marital residence and who should be responsible for paying it?

5. The mortgage on marital residence at 1313 Mockingbird Lane is in Morticia's name only as Gomez has very bad credit. Morticia moves out and Gomez files for support. Because Gomez has a history of not paying bills, the support Order provides that Morticia is to continue making the mortgage payment of $1,000 per month directly and same is deducted from her total support obligation to Gomez. At equitable distribution will Morticia get credit for post-separation payment of the mortgage?

DIALOGUE TO FAIR MARKET RENTAL VALUE AS PART OF AN EQUITABLE DISTRIBUTION SCHEME

23 PA. 3502 (a) grants a court the authority to equitably divide and assign marital assets. The propriety of the court's scheme of distribution as authorized by the statute will be the measuring stick if any appeal of an equitable distribution award becomes an issue.

One of the elements of a scheme of division is the propriety of granting a credit to either spouse because one of the spouses has been dispossessed from the parties' marital residence. This credit is known as a fair market value rental credit.

SOURCE: **"Where both spouses have an ownership interest in the marital residence, and one spouse is dispossessed of the residence to the exclusive use and possession of the other spouse during separation, that spouse can pursue a claim for fair market rental credit at the time of equitable distribution. *Trembach v. Trembach,* 419 Pa. Super. 80, 615 A.2d 33 (1992). Such credit is not mandatory, but, rather, it is entirely within the sound discretion of the trial court. *Id.*"**

The first inquiry becomes whether a dispossession has occurred.

SOURCE: "The intent of fair market rental credit is to compensate a spouse who is dispossessed of his or her interest in the residence and is deprived of his or her right to use and enjoy fully the joint property *Trembach,* 419 Pa Super. at 87, 615 A.2d at 37. "

Next is to arrive at the total fair rental value of the asset in question. The value can be achieved (1) **by stipulation of the parties**, (2) **by the opinion of the parties** or (3) **by introduction of expert real estate witness testimony**. In other words, the criteria to prove value is the same as would be utilized at an equitable distribution trial as if the credit were not an issue, but rather only the value of the real estate were at issue.

As a process of mathematics, a court should compute the total fair rental claim to be a product of X-amount, per month (rental value arrived at) value times the months the spouse was wrongfully dispossessed times the interest of the dispossessed spouse. In most cases the interest will be 50 %.

Once the rental value is determined the court can then offset or reduce that credit by allowing a percentage of the payments made by the spouse in possession to the extent that payments have been made to legitimately maintain and preserve the marital residence. It is the obligation of the possessory party to prove those justified payments.

SOURCE: **""When fair market rental credit is awarded, the court must reduce a credit by any expenses paid by the spouse in possession of the residence designed to maintain or increase the value of the property. *Trembach,* 419 Pa. Super. at 88, 615 A.2d at 37. It is the burden of the party in possession of the residence to prove those expenses before a deduction from the monthly rental amount that made."**

The usual methodology for granting the determined fair market value rental credit is for the court to deduct the net of the rental value claim (rental amount less expenses) from the other spouse's ultimate distribution of the marital estate.

It is important to remember that the statute tells the court that it has discretion to allow or disallow the credit . Nothing in the statute imposes a mandatory directive to the court that is must allow the fair market value rental credit.

SOURCE: **An equitable distribution order may include an award to the non-possessing spouse of one-half of the rental value of the marital residence when possessed exclusively by the other spouse during the parties' separation. *Gordon v. Gordon,* 436 Pa.Super. 126, 647 A.2d 530 (1994), *reversed on other grounds,* 545 Pa. 391, 681 A.2d 732 (1996); *Powell v. Powell,* 395 Pa.Super. 345, 577 A.2d 576 (1990); *Gruver v. Gruver,* 372 Pa.Super. 194, 539 A.2d 395 (1988); *Hutnik v. Hutnik,* 369 Pa.Super. 263, 535 A.2d 151 (1987). This award, however, is not mandatory. *See* 23 Pa.C.S.A. § 3502(a)(7); *see also Schneeman v. Schneeman,* 420 Pa.Super. 65, 615 A.2d 1369 (1992) (while each party is entitled to his or her equitable share of marital property, including fair rental value of the marital residence, the trial court need not compute that equitable share as a credit to the non-possessory spouse, as long as the total distributory scheme is equitable);**

SOURCES: The foregoing was gleaned from the articulation of prior appellate law in the case of **Middleton v. Middleton, 812 A.2d 1241 (Pa. Super. 2002)** In addition **PA Practice Series TM (Joanne Ross Wilder) and Summary of PA Jurisprudence** echo the foregoing recitation of current law.

The short and sweet of the fair market value rental credit becomes this:

(1) it is allowed when a spouse has been determined by the court to have been dispossessed;

(2) the court finds it necessary to allow the credit to reach an appropriate economic justice level of distribution;

(3) the overall scheme of distribution warrants the grant of the credit and

(4) any appropriate offset to the credit is warranted because the possessory spouse has preserved and maintained the marital residence as to essential needs of the residence while in possession. and that preservation credit is justified in the overall scheme of economic distribution among the parties.

The mental checklist for pleading and proving the credit is as follows:

- Was a spouse dispossessed from the marital residence to the exclusion of the marital residence by the possessory spouse? In determining this ask questions such as "Was or is there a PFA or exclusive possession order? Does the PFA or exclusive possession order direct who pays the mortgage and other expenses of the marital residence? Did the dispossessed spouse have opportunity to come back into and enter the marital residence without threat of harm? Was the dispossessed spouse truly precluded from entry to the marital residence?"
- What is the fair market rental value of the marital residence? This may be determined by use of an expert realtor or through the opinion of the parties as to the rental value of the property.
- Is there any reason to deny the credit to the dispossessed spouse? Did the spouse have the ability to possess and use the residence as a true owner?
- What did the spouse in possession outlay to preserve the marital residence? E.g., taxes, mortgage payments, necessary repairs
- Compute the credit and do the math for the court
- Follow the methodology outlined in case law and Summary of PA Jurisprudence; i.e. add the monthly fair rental value times months in possession and divide by two; do the same as to necessary outlays; then take the difference and offset it against the possessory or non-possessory spouse's interest depending on what the final math reveals!

MORTGAGE RE-FINANCING ISSUES (PRACTICAL CONSIDERATIONS; FEW OR NO STATUTES; FEW OR NO RULES, SOME CASE-LAW)

a. If, on the one hand, the receiving spouse is credit-worthy and there are other off-setting assets to effect "equitable distribution", the mortgaged marital residence asset may be DISTRIBUTED IN KIND SUBJECT TO RE-FINANCE OF THE MORTGAGE

i. Practical consideration: the MORTGAGE BANK WILL NOT RELEASE THE CONVEYING SPOUSE FROM LIABILITY for the mortgage without re-financing; banks just don't give up security;

ii. Practical consideration: the conveying spouse, however will want refinancing and release from the mortgage liability, so that their own future credit-worthiness is not burdened by the old mortgage, and possibly "held hostage" to the mortgage

iii. One reason to distribute in kind: Parties may wish to distribute the marital residence in kind to AVOID SALES COSTS which would otherwise diminish the overall estate

iv. Another reason to distribute in kind: A spouse may wish to receive the residence in kind to KEEP THE CHILD(REN) IN THE SAME SCHOOL DISTRICT without incurring costs of relocating within the district

(1) Sometimes, however, a DEFERRED SALE can keep the child(ren) in the same school district until they have graduated

v. Yet another reason to distribute in kind: wishes of the spouse to maintain residence intact; both in Moran v. Moran, - - - Pa.Super. - - -, 389 A.2d 1091 (2003) and in Zollars v.Zollars, - - - Pa. - - -, 579 A.2d 1328 (1990) the court ordered / considered distribution in kind when desired by one spouse and off-setting assets were available for "equitable" distribution

vi. EQUITABLE DISTRIBUTION VALUE of the residence asset, of course, would be net of the mortgage (presumably, since mortgage debt would be listed in the inventory described in Pa.R.C.P. 1920.75) and net of the conveyance costs according to 23 Pa.C.S.A. 3502(a)(10.2) as well

vii. Mortgages commonly have a "DUE ON SALE" CLAUSE, but that clause is not applicable to a transfer from the conveying spouse to the spouse receiving the residence

b. If, on the other hand, the receiving spouse is NOT CREDIT-WORTHY and cannot re-finance, and there are no other off-setting assets to effect

"equitable distribution", the marital residence asset will simply have to liquidated to distribute the marital equity

i. Interesting interplay with possession: Manke v. Manke, - - - Pa.Super. - - -, 1056 WDA 2013 (decided 04-28-2014) (husband faulted for not seeking re-financing to extend his possession of residence)

ii. Interesting delay in liquidation to attempt re-financing: Holland v. Holland, - - - Pa.Super. - - -, No. 1436 WDA 2014 (Court enforced agreement to delay sale for one year to permit attempt at refinancing)

iii. Practical consideration: the MORTGAGE BANK WILL NOT RELEASE THE CONVEYING SPOUSE FROM LIABILITY for the mortgage without re-financing; banks just don't give up security;

(a) Lack of credit-worthiness of the receiving spouse was less severe after the mortgage debacle of 2008-2010, and assistance was available to credit-challenged spouses, but not much longer probably

iv. One less desirable solution is for for the conveying spouse to receive INDEMNIFICATION FOR THE MORTGAGE from the spouse receiving the asset, and possibly the RIGHT TO SELL if that spouse DEFAULTS on the mortgage; of course, the old mortgage would continue to adversely affect the future mortgage credit-worthiness of the conveying spouse

EXCLUSIVE POSSESSION OF THE MARITAL RESIDENCE

The seminal case concerning exclusive possession of the marital residence is Laczkowski v. Laczkowski, 344 Pa Super. 154 (Pa. Super. 1985), and codified in 1990 in 23 Pa.C.S.A. (Equitable Distribution of Marital Property), Section 3502(c). Section 3502 (c) reads as follows:

(Family Home).--The court may award, during the pendency of the action or otherwise, to one or both of the parties the right to reside in the marital residence.

The Laczkowski case is included in the materials.

In Pennsylvania, both spouses have the right to occupy and have equal access to the marital residence, even during the pendency of a divorce action. However, there are certain circumstances that gives the court discretion to make an award of temporary exclusion possession to one or both spouses. While exclusive possession is routinely awarded during a Protection from Abuse proceeding, the *Laczkowski* court based its decision to award temporary exclusion possession to Wife based on the common law doctrine of *parens patriae*, "the goal of which is to provide the child with a permanent home". Wife and the parties' only child had moved out of the marital residence due to Husband's behavior. The Court found that Wife's new living conditions were inadequate and unfair to her parents, with whom she was living, and Wife was unable to obtain adequate housing due to her lack of a credit rating and income. Wife was awarded exclusive possession of the marital home. The Court emphasized the well-being of the child in awarding Wife exclusive possession.

Exclusive possession should be ordered sparingly, as it is considered a harsh remedy. See *Uhler v. Uhler*, 428 Pa. Super. 630 (Pa. Super. 1993), wherein the request for exclusive possession was denied.

There are other cases that have clarified the circumstances under which exclusive possession could be ordered, in addition to considering the emotional and best interests of the children. These circumstances include:

1. Physical condition of the parties: In *Merola v. Merola*, 19 Pa. D.& C.4th 538, there were no minor children but Wife, who was granted exclusive possession, was confined to a wheelchair and Husband, who had moved out of the marital residence, returned home on the weekends, which was of concern to Wife.

2. If the responding party has moved out and established a residence elsewhere. *McGinnis v. McGinnis*, 7 Pa. D. & C.4th 58. Also, *Merola*, above. Discussed also in *Laczkowski*, above, discussing *Degenaars v. Degenaars*, 186 N.J. Super. 233, 452 A.2d 222 (1982).

3. The ability of the responding party to obtain his or her own housing. Discussed in *Laczkowski*.

The economic interests of the person who has been excluded from the marital residence can be adjusted at equitable distribution through a rental credit. *McGinnis v. McGinnis*, above, paragraph 2, and *Gee v. Gee*, 314 Pa. Super 31, 460 A.2d 358 (1983).

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

MORTICIA ADAMS,

Plaintiff,

v.

GOMEZ ADAMS,

Defendant.

FD

PETITION FOR SPECIAL RELIEF – MARITAL RESIDENCE

Filed on Behalf of Plaintiff:
Morticia Adams, *Pro Se*

4222 Clinton Way
Spooksville, PA 01101

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

MORTICIA ADAMS,	)	
	)	
Plaintiff	)	
	)	
vs.	)	No.
	)	
GOMEZ ADAMS,	)	
	)	
Defendant	)	

NOTICE OF PRESENTATION

TO: Mr. Gomez Adams
0001 Cemetery Lane
Spooksville, PA 01101

KINDLY TAKE NOTICE that the within Motion will be presented before The Honorable Gloomy Ghost., Court of Common Pleas of Spooksville County, Graveyard Building, Room 301, Spooksville, PA 15219on the 13th day of May, 1940 at 2:00 p.m.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 1940, a true and correct copy of the within Motion was served by Regular mail upon the Defendant at the above listed address.

_____
Morticia Adams, Plaintiff

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

MORTICIA ADAMS,	)	
	)	
Plaintiff	)	
	)	
vs.	)	No.
	)	
GOMEZ ADAMS,	)	
	)	
Defendant	)	

PETITION FOR SPECIAL RELIEF – MARITAL RESIDENCE

Plaintiff Morticia Adams files this Petition for Special Relief – Marital Residence, and in support thereof represents as follows:

1. The parties own in their joint names a residence at 1313 Mockingbird Lane, Spooksville, PA 01101.

2. Wife left the marital residence on October 31, 1937. Husband subsequently moved out of the marital residence as well, so neither party lives there at this time.

3. On January 1, 1938, the parties signed a Listing Agreement with Monster Realty for the sale of the marital residence, and selected Herman Munster as their realtor. (See attached Exhibit A, which is executed by Husband, Wife and Mr. Munster).

4. The property was initially listed for 4000 bones.

5. In connection with a potential buyer (which sale ultimately fell through), an inspection was performed on the marital residence in January 1939.

6. The inspection identified a number of areas of significant deficiency, including a weak foundation, faulty electrical wiring, and severe water damage (See attached Exhibit B).

7. Mr. Munster, the parties' realtor, communicated these issues to both Husband and

Wife, and recommended that they be remedied immediately.

8. Husband has refused to make any of the necessary repairs, and further has refused to lower the listing price as suggested by Mr. Munster.

9. Husband's conduct in refusing to follow the recommendations of the realtor constitutes obstructionist tactics, and further constitutes dissipation of the marital estate.

10. It is in the interests of both parties to market and sell the marital residence as effectively as possible, and the realtor has every interest in doing so, for the highest price that can reasonably be obtained.

11. Husband's conduct in this matter constitutes obdurate, dilatory and vexatious conduct, and is designed solely to increase the cost to Wife, who is the sole party paying all of the carrying costs of the marital residence.

12. If Husband wishes to hold up the effective marketing and sale of the residence, he should be saddled with paying all (or even some) of the carrying costs thereof, rather than simply saying "no" to the many attempts by the realtor to effectively market the property, and have Wife continue to pay for it at no cost to him.

WHEREFORE, Plaintiff Morticia Adams respectfully requests this Honorable Court to enter an Order in the form attached hereto.

_____

Morticia Adams, Plaintiff

Date: _____

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

MORTICIA ADAMS,	)	
	)	
Plaintiff	)	
	)	
vs.	)	No.
	)	
GOMEZ ADAMS,	)	
	)	
Defendant	)	

ORDER OF COURT

AND NOW, this _____ day of _____, 1938, upon presentation of the foregoing Petition For Special Relief—Marital Residence on behalf of Plaintiff Morticia Adams, it is hereby ORDERED as follows:

1. The listing price of the marital residence shall be immediately lowered to 3000 bones, per the recommendation of the jointly selected realtor.

2. All repairs/fixup expenses recommended by the realtor prior to the date of this Order shall be undertaken and completed immediately. The home equity line of credit at First Dead Bank shall be drawn upon to pay for those repairs/fixup expenses.

3. Husband shall not interfere in any way with the reduction o the listing price, or the completion of the repairs/fixup expenses.

4. All claims and defenses as to the characterization or treatment of the repairs/fixup expenses, and all claims and defenses as to the ultimate sales price of the marital residence and all potential dissipation arguments, are preserved to equitable distribution.

_____J.

979 A.2d 892
Superior Court of Pennsylvania.

Tracy L. BIESE, Appellee
v.
Lee C. BIESE, Appellant.

Argued June 9, 2009. | Filed July 21, 2009.

Synopsis
Background: Wife sought divorce. The Court of Common Pleas, Berks County, Civil Division, No. 06-12474, Rowley, J., denied exceptions to master's report and recommendation and granted divorce. Husband appealed.

Holdings: The Superior Court, No. 1797 MDA 2008, Allen, J., held that:

[1] debt from home equity line of credit secured by husband's separate property was his sole responsibility even after he transferred proceeds to parties joint estate;

[2] assigning half of credit card debt to wife was not required by master's goal of 50/50 split of the marital estate; and

[3] as a matter of apparent first impression, value of marital residence at time of master's hearing, not higher value at time of separation, should have been used to determine increase in value.

Affirmed in part, reversed in part, and remanded with instructions.

West Headnotes (13)

[1] **Divorce**
Discretion of court in general

A trial court has broad discretion when fashioning an award of equitable distribution.

1 Cases that cite this headnote

[2] **Divorce**
Disposition of Property

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.

1 Cases that cite this headnote

[3] **Appeal and Error**
Abuse of discretion

Superior Court will not find an abuse of discretion unless the law has been overridden or misapplied or unless 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.

Cases that cite this headnote

[4] **Divorce**
Equity and proportionality in general

In determining the propriety of an equitable distribution award, courts must consider the distribution scheme as a whole; they 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.

1 Cases that cite this headnote

[5] **Divorce**
Financial institutions and credit cards

Debt from home equity line of credit secured by former husband's separate property was his sole responsibility even after he transferred proceeds to parties joint estate; that transfer was a gift.

Cases that cite this headnote

[6] **Divorce**
Financial institutions and credit cards

Assigning half of credit card debt to former wife was not required by master's goal of 50/50 split of the marital estate; former husband was credited with reduction in the purchase money and home equity loans which occurred during the marriage, he received the entire increase in value of the marital residence, and almost $5,000 in credit card debt was due to his losses in playing online poker.

Cases that cite this headnote

[7] **Divorce**
Separate or marital character

Characterization of debt as marital is not necessarily determinative of which party is liable for its satisfaction upon divorce.

Cases that cite this headnote

[8] **Divorce**
Valuation and allocation in general

Value of marital residence at time of master's hearing on equitable distribution, not higher value at time of separation, should have been used to determine increase in value of the house, former husband's nonmarital property, during the marriage; statute on measuring and determining the increase in value of nonmarital property required use of date resulting in lesser increase. 23 Pa.C.S.A. § 3501(a.1).

Cases that cite this headnote

[9] **Divorce**
Valuation of Property or Interest in General

When valuing assets upon divorce, trial court must exercise discretion and rely on the estimates, inventories, records of purchase prices, and appraisals submitted by both parties.

Cases that cite this headnote

[10] **Divorce**
Weight and sufficiency

When determining the value of marital property upon divorce, trial court is free to accept all, part, or none of the evidence as to the true and correct value of the property.

Cases that cite this headnote

[11] **Divorce**
Weight and sufficiency

Where the evidence offered by one party is uncontradicted, trial court in divorce case may adopt this value even though the resulting valuation would have been different if more accurate and complete evidence had been presented.

1 Cases that cite this headnote

[12] **Divorce**
Valuation of Property or Interest in General

A trial court does not abuse its discretion in adopting the only valuation submitted by the parties in divorce case.

Cases that cite this headnote

[13] **Divorce**
Resources of wife in general
Divorce
Other particular items and services

Awarding attorney fees of $1,000 to former wife and $300 in costs was not abuse of discretion; former wife incurred attorney fees and costs for appraisal of former husband's nonmarital real estate and established a need.

Cases that cite this headnote

Attorneys and Law Firms

***893** James E. Gavin, Wyomissing, for appellant.

Gary R. Swavely, Jr., Reading, for appellee.

BEFORE: ALLEN, FREEDBERG, and CLELAND, JJ.

Opinion

OPINION BY ALLEN, J.:

¶ 1 Lee C. Biese ("Husband") appeals from the order entered by the trial court which resolved the economic claims between Husband and Tracy L. Biese ("Wife") in their divorce proceedings. We affirm in part and reverse in part, and remand with instructions.

¶ 2 The trial court ably summarized the pertinent facts as follows:

> The parties were married on August 7, 2004, in the Bahamas. This was the third marriage for [Wife] and the second marriage for [Husband]. The parties separated in September 2006, after approximately two (2) years of marriage. There were no children born of the marriage. Husband continues to reside in the marital home in Berks County, a home he owned prior to the marriage. Wife now resides in Camden, New Jersey, although she works in Berks County as a CAT scan technician for the Reading Hospital and Medical Center. Husband is employed as a financial analyst.

***894** Trial Court Opinion, 12/19/08, at 2. Wife filed a *pro se* divorce complaint on October 24, 2006. Husband filed an amended answer in which he requested that the parties' marital estate be equitably distributed. Wife retained counsel and filed an amended complaint on March 8, 2007, which included counts for equitable distribution, no fault divorce, alimony *pendente lite*, and alimony, as well as a

request for an award of counsel fees, costs and expenses. Following the appointment of a Special Master ("Master"), a hearing was held on February 22, 2008. Both parties appeared with counsel and presented testimony and documentary evidence.

¶ 3 On June 10, 2008, the Master filed his report and recommendation ("Master's Report"). According to the trial court:

> The Master found that the income of each party fluctuated throughout the course of the marriage, and that Wife obtained training in her profession during the marriage which increased her earning capacity. Despite this, the Master found that neither party presented evidence that they overwhelmingly provided financial support to the other party during the marriage. The Master also found that both parties made relatively equal contributions to the marital estate. Based on these findings, as well as the short duration of the marriage, the Master decided that the marital estate should be divided in an equal manner.

Id. Specifically, in his report, the Master stated:

> The testimony of the parties and the evidence that each has introduced into the record leads the Master to recommend that the parties be treated equally in the resolution of the issue of equitable distribution. The Master has awarded to each party the property that he or she maintained in his or her custody or control at the time of the parties' separation and has equalized the benefit received by Husband in the increase in value of the former marital residence, by an award of cash to Wife. With the award of a payment of $6,300.00 to Wife, it is the intention of the Master to achieve a 50/50 split of the marital estate, and the Master recommends that such a division be awarded to the parties as a resolution of the related claim of equitable distribution of marital property.

Master's Report, 6/10/08, at 12. In addition, while the Master recommended denying Wife's request for alimony *pendente lite* and alimony, he did award her $1,000 in counsel fees and $300.00 in costs.

¶ 4 Both parties filed exceptions, and the trial court heard argument on August 29, 2008. Thereafter, the trial court denied both parties' exceptions and entered a decree of divorce. Husband's timely appeal followed.

Both Husband and the trial court have complied with Pa.R.A.P. 1925.

¶ 5 Husband raises the following issues on appeal:

> A. WHETHER THE EQUITABLE DISTRIBUTION AWARD WAS BASED ON MULTIPLE ERRORS OF OMISSION AND ERRORS IN CALCULATION THAT RESULTED IN AN INEQUITABLE DISTRIBUTION OF MARITAL PROPERTY?
>
> 1. WHETHER THE EQUITABLE DISTRIBUTION AWARD WAS IN ERROR FOR FAILING TO APPORTION $43,400 OF MARITAL DEBT FROM A HOME EQUITY LOAN BETWEEN THE PARTIES?
>
> 2. WHETHER THE EQUITABLE DISTRIBUTION AWARD WAS IN ERROR FOR FAILING TO APPORTION ANY MARITAL ***895** DEBT BETWEEN THE PARTIES?
>
> 3. WHETHER THE EQUITABLE DISTRIBUTION AWARD WAS IN ERROR SINCE IT RELIED UPON AN INCORRECT OUTSTANDING HOME EQUITY LOAN BALANCE TO THE VALUE OF THE PROPERTY?
>
> B. WHETHER THE TRIAL COURT ERRED BY DISMISSING THE EXCEPTIONS TO THE MASTER'S REPORT ASSERTING THE MASTER ERRED BY FAILING TO FOLLOW THE DICTATES OF 23 PA.C.S.A. § 3501(a.1) WHEN DETERMINING THE INCREASE IN VALUE IN THE RESIDENCE?
>
> C. WHETHER THE ERRORS OF FAILING TO PROPERLY APPORTION DEBT AND IMPROPERLY VALUE THE INCREASE OF THE VALUE IN THE RESIDENCE RESULTED IN THE FURTHER ERROR OF AWARDING $7,600.00 IN ASSETS, ATTORNEYS' FEES AND EXPENSES?
>
> 1. WHETHER THE TRIAL COURT ERRED BY DISMISSING THE EXCEPTIONS TO THE MASTER'S REPORT AWARDING ATTORNEY'S FEES AND COSTS?
>
> 2. WHETHER THE TRIAL COURT ERRED BY DISMISSING THE EXCEPTIONS TO THE MASTER'S REPORT AWARDING WIFE $6,300.00?

Husband's Brief at 4-5. We will address these issues in the order presented.

[1] [2] [3] [4] ¶ 6 A trial court has broad discretion when fashioning an award of equitable distribution. *Dalrymple v. Kilishek*, 920 A.2d 1275, 1280 (Pa.Super.2007). 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." *Smith v. Smith,* 904 A.2d 15, 19 (Pa.Super.2006) (citation omitted). We do not lightly find an abuse of discretion, which requires a showing of clear and convincing evidence. *Id.* 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." *Wang v. Feng,* 888 A.2d 882, 887 (Pa.Super.2005). In determining the propriety of an equitable distribution award, courts must consider the distribution scheme as a whole. *Id.* "[W]e 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." *Schenk v. Schenk,* 880 A.2d 633, 639 (Pa.Super.2005) (citation omitted).

[5] ¶ 7 In support of Issue A(1), Husband asserts that "[t]he primary error of omission was the failure to apportion debt between the parties. This included the largest debt being [$43,400.00] in home equity debt. Although identified in the Master's Report, it was not assigned to either party[;] it was thereby assigned by default to [Husband]." Husband's Brief at 9. According to Husband, the trial court should have ordered Wife to pay half of the amount due and owing on the home equity line.

¶ 8 The trial court rejected Husband's claim:

> Clearly, the Master considered the $43,400.00 amount, but found that it was ***896** not a marital debt. Contrary to Husband's argument, the Master found that after the pre-marital debt was paid off, the remaining money from the $75,000.00 distribution was a cash contribution to the marital estate. The Master's reasoning is supported by case law. In *Lowry v. Lowry,* [375 Pa.Super. 382, 544 A.2d 972 (1988) (citations omitted)], the Superior Court held: Where a spouse places separate property in joint names, a gift to the entireties is presumed absent clear and convincing evidence to the contrary.
>
> The Court supported the Master's decision regarding this issue due to the fact that the home was [Husband's] non-marital, or separate property. Accordingly, it was [Husband] who was responsible for securing the home equity line of credit. Further, Husband had the benefit of satisfying the pre-marital debt his residence was encumbered with at the time of the marriage. Husband could have set aside the remainder of the loan as his property, but he chose to transfer the remainder of the loan to the marital estate. Thus, as the Master correctly ruled, the remainder of the loan ceased to be separate property when Husband transferred the proceeds to the parties' joint estate. As this transfer was a gift, the responsibility for paying back the loan remains Husband's sole responsibility.
>
> The Court does note that the home equity line of credit was used to purchase an automobile for [Wife]. Wife retained this automobile following separation, but in doing so, she made a payment of $10,000.00 in order for Husband to transfer the title to the automobile to her. Accordingly, these facts do not change the Court's analysis of this issue.

Trial Court Opinion, 12/19/08, at 4-5 (citation omitted).

¶ 9 Our review of the record and relevant case law supports the trial court's conclusion. Husband's attempt to distinguish *Lowry, supra,* is unpersuasive. Thus, we conclude Husband's first issue lacks merit.

[6] [7] ¶ 10 In Issue A(2), Husband asserts that all of the parties' credit card debt should not have been apportioned to him. According to Husband, if the Master's goal was a 50/50 split of the marital estate, he should have assigned half of the $10,584.00 credit card debt to Wife. We cannot agree. Just "because a debt is characterized as marital[, this delineation] is not necessarily determinative of which party is liable for its satisfaction." *Hicks v. Kubit,* 758 A.2d 202, 204 (Pa.Super.2000). The trial court rejected Husband's claim:

> Between divorcing parties, debts which accrue to them jointly prior to separation are marital debts. See *Duff v. Duff,* 510 Pa. 251, 507 A.2d 371 (1986). However, this does not mean that the debts have to be divided between the parties. What [Husband] fails to consider is that the Master determined a 50-50 division of the Marital estate was appropriate, meaning each party would retain half of the marital estate when the division was completed. One of the options for the Master in dividing the property was to assign the debt to [Husband] and offset the debt with an award of marital assets. The Superior Court has noted that it is "within the trial court's discretion to credit marital expenses to one of the parties and take such credit into account when dividing marital property." *Winters v. Winters,* [355 Pa.Super. 64, 512 A.2d 1211, 1216 (1986)]. The Master chose this method of distribution. For example, in addition to the marital debt assigned to [Husband], Husband was also credited ***897** with $16,500.00 for the reduction ... in the purchase money and home equity loans which occurred during the marriage. Accordingly, there was no error by the Master in failing to apportion the debt between the parties. The Court was satisfied that the global division of the marital estate resulted in the 50-50 division of the marital estate the Master was seeking to achieve.

Trial Court Opinion, 12/19/08, at 5-6. Once again, our review of the record and relevant case law supports the trial court's determinations. We additionally note that the Master awarded the entire increase in value of the marital residence to Husband, and Husband admitted that almost $5,000.00 in credit card debt was due to his losses in playing online poker.

¶ 11 In Issue A(3), Husband contends that the Master used the sum of $71,000.00 in its calculation of the net increase in value of the marital residence when the actual outstanding balance due and owing on the home equity loan was $72,081.00. The trial court acknowledges this error, but found it to be de minimus, since "dividing the marital estate with mathematical precision is unnecessary." Trial Court Opinion, 12/19/08, at 9 (quoting *Smith v. Smith,* 595 Pa. 80, 938 A.2d 246, 248 n. 2 (2007)). While we agree with the trial court that any change in the Master's calculation would be

minimal when the correct number is used, we find merit to Husband's next claim, and therefore remand this issue for the correct calculation of the outstanding balance due and owing on the home equity line close to the date of the evidentiary hearing.

[8] ¶ 12 In Issue B, Husband asserts that the Master erred by failing to follow the dictates of 23 Pa.C.S.A. § 3501(a.1) when determining the increase in value of the marital residence. We agree.

[9] [10] [11] [12] ¶ 13 "The Divorce Code does not specify a particular method of valuing assets." *Smith,* 904 A.2d at 21. Thus, "[t]he trial court must exercise discretion and rely on the estimates, inventories, records of purchase prices, and appraisals submitted by both parties." *Id.* at 21-22. When "determining the value of marital property, the court is free to accept all, part or none of the evidence as to the true and correct value of the property." *Schenk,* 880 A.2d at 642 (citation omitted). "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." *Id.* "A trial court does not abuse its discretion in adopting the only valuation submitted by the parties." *Id.*

¶ 14 Section 3501(a.1) of the Divorce Code provides, in pertinent part, as follows:

> **(a.1) Measuring and determining the increase in value of nonmarital property.-**
>
> The increase in value of any nonmarital property acquired pursuant to subsection (a)(1) and (3) shall be measured from the date of marriage or later acquisition date to either the date of final separation or the date as close to the hearing on equitable distribution as possible, whichever date results in the lesser increase.

23 Pa.C.S.A. § 3501(a.1). An accompanying official comment provides the following: "Section 3501(a.1) is new. The first sentence of this subsection essentially codifies the decision in *Litmans v. Litmans,* [449 Pa.Super. 209, 673 A.2d 382 (1996)], as it pertains to when to measure the increase in value of nonmarital property."

¶ 15 The Master accepted Wife's expert appraisal with regard to the value of the marital residence. Within his report, the ***898** expert opined that the house was worth $266,000.00 when the parties separated in 2006, and worth $255,000.00 in January 2008, the time of the evidentiary hearing. The Master decided to use the higher sum of $266,000.00, subtracted a $136,000.00 mortgage liability and a $71,000.00 home equity liability, to yield a net home equity of $59,000.00. The Master then determined that, because the net home equity at the time of marriage was $39,000.00, the net increase in the value of the marital residence was $20,000.00. Husband asserts that, had section 3501(a.1) been followed, the proper calculation would have resulted in the following: $255,000.00, the value in January 2008, less the $136,000.00 mortgage and less $72,000, the accurate amount of the home equity loan, resulting in a net home equity of $47,000.00, and a net increase in the value of the marital residence of $8,000.00.[1]

¶ 16 The trial court supported the Master's use of the separation date valuation:

> The Master used the value of the home at the time of separation in his report and for equitable distribution purposes. [Husband] believes that the Master should have used the value of the home at the time of the Master's hearing as it was a lower value and cites to 23 PA.C.S. § 3501(a.1) to support this argument.
>
> * * *
>
> The explanatory notes following 23 PA.C.S. § 3501(a) states that section (a.1) is intended to be a codification of the holding in [*Litmans, supra. Litmans*] states in part "[w]e must conclude, as husband in the instant case has argued, that the [Pennsylvania Supreme Court's] statement in footnote eleven [in *Solomon v. Solomon,* 531 Pa. 113, 611 A.2d 686 (1992)] is mere dictum, and that the reinstatement of the trial court's order, **which limited the increase in value of the non-marital asset to that which occurred prior to final separation, represents the actual decision of the *Solomon* court.**" (emphasis added). Further, [*Litmans*] states the following:
>
> > In the instant case, the lower court used the date of distribution to determine the increase in value of the non-marital asset, the residence at Dunmoyle Street. Under the above authority, this was error. The proper date for determining the increase in value of the residence was the date of separation. As to the delay in distribution which followed (1985 to 1993), we find footnote eleven in [*Solomon*] to refer to a situation in which the increase in value of the non-marital asset is determined as of the date of separation, then there ensues a long period of delay between separation and distribution, and the asset itself then decreases in value by the time of distribution. In such a case, footnote eleven would require the trial court to consider the "change in value" of the non-marital asset as a result of the delay. In the instant case, however, it is clear that the residence did not decrease, but increased in value during the period of delay. (1985 to 1993). Accordingly, the increase in value of this non-marital asset should have been determined as of the date of separation. *Litmans,* [449 Pa.Super.] at 235-236[, 673 A.2d at 394-395].
>
> ***899** Thus, the *Litmans* case and the notes to 23 PA.C.S. § 3501(a.1) indicate that if the property in question decreases in value from the time of separation until the time of the Master's hearing, the value at the time of the Master's hearing should be used only if there was an extended period of time between separation and the Master's hearing. Such a delay did not occur in this case as the Master's hearing was held less than eighteen months following separation. Accordingly, the Master committed no error, and as he stated in his report "the only legal title owner of the realty was Husband. Thus, he solely bears the benefit or detriment of such ownership after the date of the parties' separation." (Master's Report, pg. 6).

Trial Court Opinion, 12/19/08, at 7-8.

¶ 17 Although section 3501(a.1) became effective in 2005, our review has disclosed no appellate court decision discussing its effect on the proper valuation of non-marital property. While the trial court correctly cites the section and this Court's holding in *Litmans,* its conclusion that section 3501(a.1) applies only when there is an extended delay between separation and distribution is inconsistent with the clear language of the section, which contains no such limitation. When the words of a statute are clear of all ambiguity, they are not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S.A. § 1921(b). We read the statutory language at issue to be consistent with the *Litmans* decision; in *Litmans,* despite the post-separation increase in value, this Court accepted the value of the marital residence at the time of separation because it was the lesser amount. This is consistent with the language of section 3501(a.1). In short, the statutory language cannot be read as intending anything other than the lesser of the valuations at separation vis-à-vis the time of the Master's hearing be used when establishing the increase in value of the non-marital property. Thus, in this case, because the valuation of the former marital residence was lower at the time of the Master's hearing, the clear language of section 3501(a.1) requires that it be used to determine any increase in value during the parties' marriage. We therefore reverse this part of the trial court's equitable distribution order and remand for a recalculation of the marital increase in value of former marital residence, using the value of the house at the time of the Master's hearing.

[13] ¶ 18 In Issue C(1), Husband asserts that the trial court erred in adopting the Master's recommendation that Wife be awarded counsel fees in the amount of $1,000.00, as well as $300.00 in costs. We cannot agree. As this Court has summarized:

> 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 by enabling the dependent spouse to maintain or defend the divorce action without being placed at a financial disadvantage; the parties must be "on par" with one another.
>
> * * *
>
> Counsel fees are awarded based on the facts of each case after a review of all the relevant factors. These factors include the payor's ability to pay, the requesting party's financial resources, the value of the services rendered, and the property received in equitable distribution.

Teodorski v. Teodorski, 857 A.2d 194, 201 (Pa.Super.2004) (citation omitted). "Counsel fees are awarded only upon a showing of need." *Id.* "Further, in determining whether the court has abused its discretion, ***900** we do not usurp the court's duty as fact finder." *Id.*

¶ 19 Stated differently, "[o]ur ability to review the grant of attorney's fees is limited, and we will reverse only upon a showing of plain error." *Diament v. Diament,* 816 A.2d 256, 270 (Pa.Super.2003) (citation omitted). "Plain error is found where the decision is based on factual findings with no support in the evidentiary or legal factors other than

those that are relevant to such an award." *Id.*

¶ 20 According to Husband, "both parties incurred attorney fees and costs for appraisals. Both parties are of similar age and are both employed. During the marriage both parties had periods of unemployment. There was nothing presented in this case that suggests [Wife's] financial circumstances dictated an award of counsel fees and costs." Husband's Brief at 21. Within his report, the Master reasoned:

> Wife in her Amended Complaint in Divorce filed in March 2007 has requested an award of counsel fees, costs and expenses. In furtherance of her claim for counsel fees, Wife submitted evidence of her attorney's fees incurred during the course of the litigation totaling approximately $7,900.00, of which she has been able to pay approximately $5,000.00. Wife presented her claim for counsel fees at a time when, in reviewing the prior year[']s income for 2006, Wife had gross wages of approximately $14,000.00 and Husband had gross wages of approximately $25,600.00. Since that time the parties' incomes have equalized, reducing the need to consider a significant award to Wife for counsel fees incurred during the course of the divorce litigation.
>
> Wife also introduced evidence of the fact that she incurred an expense of $500.00 in securing an appraisal of [the former marital residence] and furthermore incurred the expense of $100.00 in arranging to have [the expert] appear at the time of the Master's hearing to testify with regard to the results of his appraisal. In considering the differences in the parties' incomes for calendar year 2006, the Master recommends that Husband contribute $1,000.00 toward the cost of Wife's counsel fees in this matter. With regard to the expenses incurred by Wife in obtaining an appraisal of Husband's non-marital real estate and incurring the expense of arranging to have [the expert] come to the hearing to testify about his appraisal, it is the recommendation of the Master that Husband contribute $300.00 toward the costs incurred by Wife regarding the [expert's] appraisal.

Master's Report, 6/10/08, at 12-13.

¶ 21 The trial court determined that the above analysis by the Master "was a reasonable resolution as to" the issue of counsel fees and costs. Trial Court Opinion, 12/19/08, at 10. We discern no abuse of discretion, as our review of the record reveals that Wife established a need for such an award. Thus, Husband's claim to the contrary is without merit.

¶ 22 In Issue C(2), Husband's final claim, he asserts that the trial court erred by adopting the Master's cash award of $6,300.00 to Wife in order to achieve the intended result of a 50/50 split of the marital estate. We have already determined that a remand is necessary for recalculation of the equitable distribution scheme, given the use of the wrong figure when determining the increase in value of the former marital residence. Thus, we need not consider Husband's claim further. Nevertheless, we note that neither the Master nor the trial court included any calculations or adequately explained otherwise how the $6,300.00 awarded to Wife equally split the marital estate. Thus,

***901** upon remand and recalculation, sufficient explanation must be provided in order to facilitate any future appellate review.

¶ 23 In sum, we affirm the trial court's order in all respects save the figures used in calculating the net increase in value of the marital residence. Upon remand $255,000.00 shall be used as the value of the home, and an accurate amount for the balance owed on Husband's home equity line close to the time of the evidentiary hearing shall be used. An adequate explanation of this recalculation and any cash award to Wife in order to effectuate the goal of a 50/50 split of the marital estate must be provided.

¶ 24 Order affirmed in part and reversed in part. Case remanded with instructions. Jurisdiction relinquished.

Parallel Citations

2009 PA Super 142

Footnotes

1 We reject Wife's argument that, if remanded, the value of the marital residence will again have to be determined because the marital estate has yet to be distributed. Section 3501(a.1) does not require a "date of distribution" valuation, but rather, a value close to the time of the equitable distribution hearing. As this value has already been determined, no new evidence is required upon remand.

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509 Pa. 282
Supreme Court of Pennsylvania.

Joseph P. SEMASEK, Appellee,
v.
Theresa A. SEMASEK, Appellant.

Agued April 16, 1985. | Decided Nov. 27, 1985.

Husband and wife were divorced, and Court of Common Pleas, Schuylkill County, Civil Action No. S–1050–1980, ordered equitable distribution of property and held three rings given by husband to wife were part of marital property and subject to distribution, and wife appealed. The Superior Court, No. 01964, Philadelphia, 331 Pa.Super. 1, 479 A.2d 1047, affirmed. The Supreme Court, No. 174, Hutchinson, J., held that: (1) interspousal gifts were not marital property for distribution in divorce; (2) trial court's valuation of two parcels of real property was not sufficiently explained; and (3) charging wife with funds she appropriated from joint property prior to distribution under divorce decree was proper.

Affirmed in part, reversed in part, and remanded.

Nix, C.J., concurred in result.

McDermott, J., filed opinion concurring in result.

Larsen, J., filed concurring and dissenting opinion.

West Headnotes (9)

[1] **Statutes**
Clarity and Ambiguity; Multiple Meanings

Words used in statutes must be given their plain meaning, unless doing so would create ambiguity. 1 Pa.C.S.A. § 1921.

5 Cases that cite this headnote

[2] **Divorce**
Gifts and inheritance

Term "gift," in divorce code provision excepting property received by gift from concept of marital property, 23 P.S. § 401(e)(3), includes gifts between spouses, and is not limited to property received from a third person.

8 Cases that cite this headnote

[3] **Divorce**
Personal and household goods

Diamond rings given by husband to

wife were her separate property and were not marital property to be distributed in divorce decree under 23 P.S. § 401(e)(3).

2 Cases that cite this headnote

[4] **Divorce**
⇐Real estate and proceeds thereof in general
Divorce
⇐Sufficiency and clarity
Evidence
⇐Value

Failure of judge to explain why he assigned value of $10,000 to real estate, ignoring uncontradicted opinion of valuation expert that property had fair-market value of $52,800 in spite of moratorium on sewer connections in area, was improper.

6 Cases that cite this headnote

[5] **Evidence**
⇐Real property

Owners of property are considered experts when testifying as to property's value.

3 Cases that cite this headnote

[6] **Evidence**
⇐Value

Although court was not bound by testimony of wife that property involved in divorce decree was worth $45,000, placement of lower valuation on property was improper where nothing on record supported court's finding of lower value.

4 Cases that cite this headnote

[7] **Divorce**
⇐Findings and failure to make findings

That findings of law regarding valuations of marital property for divorce decree were facially contradictory was not reversible error, where figures in final accounting properly credited proceeds of sale of property to husband and wife's joint bank account.

Cases that cite this headnote

[8] **Divorce**
⇐Recapture in general

Charging wife with all funds she appropriated from joint property several years before divorce decree as if she had received distribution of them for her sole use and not expressly dealing with issue in terms of dissipation, was not improper, where trial court plainly felt that charges against wife were based on her failure to properly explain disappearance of large part of assets she took under her sole control, and correctly considered interests that joint funds wife appropriated should have earned and applied it toward support of wife and children.

6 Cases that cite this headnote

[9] **Divorce**
Recapture in general

Charging wife's share of marital property with assets she appropriated for her own use prior to marital property distribution by assigning wife 44% and husband 56% of total marital assets was not abuse of discretion. 23 P.S. § 401(d)(10).

5 Cases that cite this headnote

***284 **110** Clayton T. Hyman, Peter S. Steinberger, Allentown, for appellant.

Anthony J. Urban, Ashland, for appellee.

Before NIX, C.J., LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON, ZAPPALA and PAPADAKOS, JJ.

*285 OPINION OF THE COURT

HUTCHINSON, Justice.

In this appeal we examine, *inter alia,* whether an absolute gift of tangible, personal property from one spouse to another remains within the pool of marital property for purposes of equitable distribution under section 401 of the Divorce Code of 1980, Act of April 2, 1980, P.L. 63, 23 P.S. §§ 101–801, *as amended.*[1] The Court of Common Pleas of Schuylkill County, in arriving at an order of equitable distribution in the course of these divorce proceedings, held that three rings given by appellee husband to appellant wife were a part of the marital property and subject to equitable distribution. A divided Superior Court panel, 331 Pa.Super. 1, 479 A.2d 1047, affirmed. We now reverse that holding and remand the case to Common Pleas with instructions to modify its decree of equitable distribution, after also reexamining or explaining its ruling on the valuation of one parcel of real estate and otherwise revising its calculations in accord with this opinion.

Attorneys and Law Firms

I.

The parties in this case were married in September 1959. They have two children. The couple separated in October 1976 after several years of marital disharmony. On August 5, 1980, the husband instituted an action for divorce under Section 201(d) of the Divorce Code. The wife counterclaimed for equitable distribution of the marital property, alimony, alimony pendente lite, and counsel fees. The case was referred to a Master. He recommended a divorce and then held separate hearings on the economic issues. The court considered his report and granted the divorce on May 4, 1981. However, a decision on the other matters did not occur until June 7, 1982, when Common Pleas entered various orders dealing with the financial aspects of this divorce. These latter orders are the subject of this appeal. In them, Common Pleas ordered that the marital property ***286** be split, with 56% awarded to the husband and 44% to the wife. The court also ordered the husband to pay the wife rehabilitative alimony for a future period of three years for the specific purpose of covering educational expenses, not to exceed $2,750 per year. The court refused to award alimony pendente lite, but did award appellant wife counsel fees and costs of $3,910.00. On appeal, Superior Court affirmed. We granted the wife's petition for allocatur.

II.

As appellant, the wife first contends that Common Pleas abused its discretion when it treated three diamond rings given her by the husband as marital property. That court held § 401(e)(3) of the Divorce Code does not exclude these gifts from marital property. This section excepts property received by a party by "gift, bequest, devise or descent" from the concept of marital property except for its increase in value during the marriage.

****111** [1] The section nowhere expressly says that gifts between spouses nevertheless remain marital property, nor can we find any implication that the Legislature intended to specially treat inter-spousal gifts as marital property. Words must be given their plain meaning, unless doing so would create an ambiguity, and we must interpret statutes in accordance with the legislative intent. 1 Pa.C.S. § 1921.

[2] Here, the language itself creates no ambiguity. The term "gift" has a definite meaning. Our law requires only donative intent, delivery and acceptance. *Post's Estate v. Commonwealth Bank & Trust Co.*, 500 Pa. 420, 456 A.2d 1360 (1983); *In re Sipe's Estate*, 492 Pa. 125, 422 A.2d 826 (1980). Nothing in the statutory definition excludes gifts between spouses, nor does their special nature require exclusion. The words "bequest, devise or descent" following the term "gift" in the phrase modifying and limiting this excluded property do not show us an intent to limit this exclusion to property received from a third person. They would do so only if we construed "gift" as a generic term ***287** further limited by the specific kinds of gifts which follow it, under the maxim *inclusio unius est exclusio alterius.* However, construction by that maxim is inconsistent with other sections of the Divorce Code. For

example, § 401(e)(2) allows spouses to exclude specific properties from the pool of marital property by agreement. § 401(e)(3). A contrary interpretation including inter-spousal gifts as marital property would deprive § 401(e)(2) of much of its meaning.

[3] In this case, the record itself indicates that the rings were given absolutely to the wife as her separate property. Diamond rings are not for joint use. They are solely for the use of the recipient. This is evidenced by the husband's statement that he bought the rings because he never gave the wife an engagement ring. Reproduced Record ("R.R.") at 57a. The Divorce Code states simply that gifts are not marital property. We see no reason to treat gifts from one spouse for the sole use of the other any differently. *Accord Sorbello v. Sorbello,* 21 D & C 3d 187 (1981).

III.

Appellant also contests Common Pleas' valuation of various items of property, including real property in Kline Township and the City of Pottsville, both in Schuylkill County.[2]

A.

Appellant wife argues that Common Pleas abused its discretion when it ignored her expert witness's testimony that the Kline Township real estate had a fair market value of $52,800 in spite of a moratorium on sewerage connections ***288** in that area. The Common Pleas judge, as factfinder, assigned a value of $10,000 to it.

The record is inadequate for proper appellate review of this issue. Common Pleas does not tell us how it reached the value of $10,000 when the only record evidence was the appraiser's opinion, and therefore we cannot tell whether he properly exercised his discretion in this matter. Appellant's expert appraisal states that the value of $52,800 was already discounted because of a local moratorium on sewer hook-ups. She said that she based her valuation on the property's use as two separate residential parcels, although it would be better suited for a subdivision if sewer hook-ups were available. She went on to say, however, that continuing the property in its current use as two residences would allow immediate connection to the public sewer lines and was therefore the best current use of the property.

****112** [4] Common Pleas, without official view or recommendation from the Master, did not explain why it ignored this testimony. Although a factfinder need not accept even the uncontradicted opinion of a valuation expert, Common Pleas should offer some explanation of the basis on which it sets value where that value varies from the only value given in evidence to the extent it does here. *See Appeal of F.W. Woolworth Co.,* 426 Pa. 583, 235 A.2d 793 (1967); *Avins v. Commonwealth,* 379 Pa. 202, 108 A.2d 788 (1954). Without such explanation, meaningful appellate review is not possible. On remand, Common Pleas will have an opportunity to appropriately support its conclusion or take additional evidence, if the

taking of additional evidence is requested and the court thinks its receipt is necessary or appropriate.

B.

Similar problems surround the valuation of the office building in Pottsville. Appellant placed a $45,000 value on it. Appellee testified only that it was worth at least that much. No other evidence was produced on the question. The master recommended that the building be sold and the ***289** proceeds split. The trial court established a value of $35,000 and awarded the building to the husband at that value.

[5] [6] Owners of property are considered experts when testifying as to the property's value, *Sgarlat Estate v. Commonwealth,* 398 Pa. 406, 158 A.2d 541, *cert. denied,* 364 U.S. 817, 81 S.Ct. 49, 5 L.Ed.2d 48 (1960). Although the court is not bound by such testimony, the record here is inadequate for our review of the court's valuation of this property since there is here, too, nothing on the record to support the court's finding of a lower value. Thus, it should, on remand, explain or modify its action with reference to the portion of this record or any supplemental record relied upon.

IV.

Appellant next claims that Common Pleas misapprehended the record evidence in two respects.

A.

[7] She first says that findings 60 and 78 concerning the sale and deposit of the proceeds of the parties' interest in Delaware real estate are inconsistent. Finding 60 says:

> 60. During their marriage, the parties acquired an interest in real estate in the State of Delaware. Following their separation, this property was sold for $10,000.00 and the entire proceeds were retained by the [appellant], and were deposited by her in a bank account registered in her name only.

Finding 78 says:

> 78. On December 16, 1976, the proceeds from the sale of a property owned by the parties in Delaware in the amount of $10,406.75 was deposited in account ## 20–021681–06.[3]

***290** Appellant claims that Finding 60 improperly credits her with assets that went into a joint account under Finding 78. This is facially contradictory. However, the figures in the final accounting properly credit the proceeds of this sale to the joint account. *Compare* Conclusion of Law 5.15 with Findings of Fact Nos. 70, 80, 81, 82, 83

and 85. Thus, the facial contradiction is washed out by the Conclusions of Law and this finding is affirmed.

B.

Appellant also says that the trial court improperly charged her with appropriating $3,550.00 in joint property. This money originally came from joint accounts with her husband, R.R. at 587a, and was deposited in accounts with her sons as co-owners. The later withdrawals from these accounts with her sons are offset by corresponding deposits into the parties' joint checking account. **113 R.R. at 518a. This record also shows that the day after those deposits were put back into the joint account, checks totaling $3,351.14 were drawn on it payable to the Internal Revenue Service and the Pennsylvania Department of Revenue. R.R. at 625a–626a. If these sums went to cover joint tax liabilities of the parties, appellant would be correct in her contention that this sum was improperly charged to her. On remand, Common Pleas may wish to reconsider its finding on this issue.

V.

Appellant argues that Common Pleas also erred in charging against her all of the funds she appropriated from joint property in 1977 as if she had received a distribution of them for her sole use; and not expressly dealing with this issue in terms of dissipation, as permitted by § 401(d)(7). She contends that the amount charged against her should have been reduced by her necessary expenditures for the support of herself and the two children, then dependent, and for maintenance on the properties.

*291 [8] Although Common Pleas did not expressly consider this problem in terms of dissipation, it is plain from its opinion that its charges against appellant were based on what it felt was her failure to properly explain the disappearance of a large part of the assets she took under her sole control. We do not believe Common Pleas abused its discretion in refusing the credits she seeks. Appellant took possession of the funds in 1977. From the parties' separation in that year until the decree in 1980, she also received all the rent from the properties owned by the parties, as well as the benefit of payments appellee directly applied for expenses of her household. Both parties testified that appellee paid for heat, telephone, electricity, and taxes on the marital home as well as the use and occupancy of that home. In addition, the husband provided $100.00 per week for appellant and $10.00 per week for each of the children, *see* R.R. at 70a, 200a. The court correctly considered interest that the joint funds appellant appropriated should have earned, and applied it toward her support. These determinations are well within Common Pleas' discretion. We will not disturb them on appeal. Appellant's own evidence on the disposition of the funds she took and on the household deficits which reasonably remained after use of her other resources is not precise and the factfinder was not required to consider it. *Glider v. Commonwealth*, 435 Pa. 140, 255 A.2d 542 (1969).

[9] Many of appellant's other arguments are based on her inadequately supported premise that she properly spent the joint assets she appropriated for the support and maintenance of her household. She claims that the percentages assigned the parties in the order of equitable distribution (44% for her and 56% for appellee) do not reflect her necessary expenditures during the separation. It does not seem to us that Common Pleas abused its discretion in charging appellant's share with the assets she appropriated ***292** for her own use, *see* § 401(d)(10). Therefore, these arguments must also fail.[4]

The record is remanded to the Court of Common Pleas of Schuylkill County for further proceedings consistent with this opinion.

NIX, C.J., concurs in the result.

McDERMOTT, J., concurs in the result and files a Concurring Opinion.

LARSEN, J., files a Concurring and Dissenting Opinion.

McDERMOTT, Justice, concurring.

A gift may be given to anyone. The law is cold in its definition, it does not ask a reason for the giving, only an intention, ****114** delivery and acceptance of the thing are required. The majority pertinently notes that the Divorce Code does not include gifts from one spouse to another as "marital property", nor should we, therefore, do otherwise. The majority, however, seems to imply a distinction between personal gifts and "gifts" for joint use. Slip op. p. 4. While the giving of a washing machine or other household item may not be the epitome of selfless gallantry, if it is a gift, it is a gift. A gift can be a unique moment in life, the selfless desire to please, to mend a slight, fend a loss, gain an end or to share in the good it will bring to the life of another. The question ought not to be what is the subject or the purpose of the gift, but rather was it intended as a gift, delivered and accepted.

I otherwise concur in the result.

LARSEN, Justice, concurring and dissenting.

I adopt the dissenting opinion authored by President Judge Edmund B. Spaeth, Jr. and would remand the case to the trial court for further proceedings consistent with President Judge Spaeth's opinion.

Parallel Citations

502 A.2d 109

Footnotes

1 Hereafter, all section references unless otherwise specified are to the Divorce Code, *as amended.*

2 Having concluded that the three rings were a gift properly excepted from the definition of "marital property" under § 401(e)(3), we need not discuss their valuation. The record discloses that an appraisal of these items found them to be worthless. They have no material impact on the economic circumstances of the parties which the court should consider under § 401(d)(10) over and above the necessary effect of their elimination from the pool of marital property and the items charged against the wife's share of that pool for property received.

3 This account was identified in Finding 76 as an account in the American Bank and Trust Co. of Pa. in the names of Joseph or Theresa Semasek.

4 For the same reason, we will not disturb the finding that appellant had sufficient money to pay a portion of her counsel fees, nor Common Pleas' conclusions on the amount of rehabilitative alimony which she should receive.

904 A.2d 15
Superior Court of Pennsylvania.

Dianna L. **SMITH**, Appellant
v.
Richard L. **SMITH**, Appellee
Dianna L. **Smith**, Appellee
v.
Richard L. **Smith**, Appellant

Argued April 18, 2006. | Filed July 14, 2006.

Synopsis
Background: Dissolution proceeding was brought. The Court of Common Pleas, Indiana County, Civil Division, No. 12179 D 2000, Hanna, J., granted divorce, equitably divided marital property 55/45, and awarded wife permanent alimony. Husband and wife appealed.

Holdings: The Superior Court, Nos. 1343 WDA 2005 and 1369 WDA 2005, Orie Melvin, J., held that:

[1] date of distribution was date which best worked economic justice between husband and wife as to valuation of husband's business;

[2] failure to consider tax ramifications to wife on interest income from equitable distribution as well as alimony award required vacation and remand; and

[3] remand was required to adequately value husband's business for purposes of equitable distribution.

Affirmed in part, reversed in part, and remanded.

West Headnotes (19)

[1] **Divorce**
Disposition of Property

The standard of review in assessing the propriety of a marital property distribution is whether the trial court abused its discretion by a misapplication of the law or failure to follow proper legal procedure; an abuse of discretion is not found lightly, but only upon a showing of clear and convincing evidence.

4 Cases that cite this headnote

[2] **Divorce**
Scope, Standards and Extent, in General

When reviewing an award of equitable distribution, appellate court measures the circumstances of the case against the objective of effectuating economic justice between the parties and achieving a

just determination of their property rights.

Cases that cite this headnote

[3] **Divorce**
Vehicles, vessels, and other forms of transport
Divorce
Businesses and associated assets in general

Date of distribution was date which best worked economic justice between husband and wife as to valuation of husband's business; there was significant passage of time between parties' separation and stipulated date of distribution, volatility of assets involved was great, as trucks used in business depreciated each day as they were used continuously to haul load, and husband's paramour was sole owner of her own trucking business and two businesses were separate entities, and, although husband guided his paramour in start and operation of her business, husband did not influence, impede, or dissipate marital business to affect its value during pendency of parties' divorce.

Cases that cite this headnote

[4] **Divorce**
Time of valuation in general

In determining the value of marital assets, a court must choose a date of valuation which best works economic justice between the parties; the same date need not be used for all assets.

Cases that cite this headnote

[5] **Divorce**
Businesses and associated assets in general

In determining the value of marital assets, since a business' value may be subject to great fluctuation, the date selected is generally close to the date of distribution, rather than the date of separation.

Cases that cite this headnote

[6] **Divorce**
Valuation

Appellate court will only reverse the decision of the lower court in regard to the setting of the date for the valuation of the marital assets on the basis of an abuse of discretion.

Cases that cite this headnote

[7] **Divorce**
Questions of law
Divorce
Spousal Support
Divorce
Spousal Support

The role of an appellate court in reviewing alimony orders is to determine whether there has been an error of law or abuse of discretion by the trial court; absent an abuse of discretion or insufficient evidence to sustain the support order, appellate court will not interfere with the broad discretion afforded the trial court.

1 Cases that cite this headnote

[8] **Divorce**
Relative needs and abilities to pay in general
Divorce
Standard of living and station in life

Alimony is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor's ability to pay.

Cases that cite this headnote

[9] **Appeal and Error**
Credibility of witnesses; trial court's superior opportunity
Trial
Rulings on Weight and Sufficiency of Evidence

The finder of fact is entitled to weigh the evidence presented and assess its credibility; the fact finder 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.

1 Cases that cite this headnote

[10] **Divorce**
Tax consequences in general

State, federal, and local income tax wife might owe on interest income from equitable distribution as well as alimony award was relevant factor in determining alimony amount necessary to meet wife's reasonable needs, and failure to consider required vacation and remand; court only made specific reference to 11 of 17 statutory factors as being relevant to its decision, tax ramifications

were not referenced, and there was no indication from record that it was considered. 23 Pa.C.S.A. § 3701(b)(1-3, 12-14, 16, 17).

Cases that cite this headnote

[11] **Divorce**
Counsel Fees, Costs, and Expenses

The purpose of an award of counsel fees is to promote fair administration of justice by enabling the dependent spouse to maintain or defend the divorce action without being placed at a financial disadvantage; the parties must be on par with one another, and counsel fees are awarded only upon a showing of need.

Cases that cite this headnote

[12] **Divorce**
Financial condition and resources in general
Divorce
Effect of divorce recoveries
Divorce
Attorney Fees

Counsel fees are awarded based on the facts of each case after a review of all the relevant factors; these factors include the payor's ability to pay, the requesting party's financial resources, the value of the services rendered, and the property received in equitable distribution.

Cases that cite this headnote

[13] **Divorce**
Evidence in General
Divorce
Methodologies of Valuation and Allocation in General

The divorce code does not specify a particular method of valuing assets; the trial court must exercise discretion and rely on the estimates, inventories, records of purchase prices, and appraisals submitted by both parties.

2 Cases that cite this headnote

[14] **Divorce**
Evidence in General

In determining the value of marital property, the court is free to accept all, part or none of the evidence as to the true and correct value of the property.

1 Cases that cite this headnote

justice between parties.

Cases that cite this headnote

[15] **Divorce**
Weight and sufficiency

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.

Cases that cite this headnote

[16] **Divorce**
Weight and sufficiency

A trial court does not abuse its discretion in adopting the only valuation submitted by the parties.

Cases that cite this headnote

[17] **Divorce**
Time of valuation in general

Absent a specific guideline in the divorce code, the trial courts are given discretion to choose the date of valuation of marital property which best provides for economic

[18] **Divorce**
Division and distribution in general

Remand was required to adequately value husband's business for purposes of equitable distribution; review of the record failed to disclose whether goodwill value used by wife's expert included any professional goodwill or was solely product of enterprise goodwill, and although court suspected that much, if not all, of goodwill was that of enterprise as part of overall going-concern value of business, in absence of testimony to that effect appellate court could not be certain.

Cases that cite this headnote

[19] **Divorce**
Good will

Goodwill is not necessarily a factor in determining the monetary worth of a business for purposes of equitable distribution; it must first be determined whether the particular business at issue enjoys goodwill such that a value therefore should be

attributable.

Cases that cite this headnote

Attorneys and Law Firms

*17 William J. Leonard, Greensburg, for Diane L. **Smith**.

William C. Stillwagon, Greensburg, for Richard L. **Smith**.

BEFORE: DEL SOLE, P.J.E., ORIE MELVIN and TAMILIA, JJ.

Opinion

OPINION BY ORIE MELVIN, J.:

¶ 1 In this consolidated appeal, Dianna L. **Smith** (Wife) and Richard L. **Smith** (Husband) both appeal from the order entered June 30, 2005, which granted the parties' divorce, equitably divided the marital property 55/45 and awarded Wife permanent alimony. In her appeal, Wife contends the trial court abused its discretion *18 in choosing the date of distribution in determining the value of Husband's business, the amount of alimony, and in denying her counsel fees. In Husband's appeal, he challenges the valuation of his business. We affirm in part, reverse in part, and remand for further proceedings.

¶ 2 The facts and procedural history of this appeal may be summarized as follows. Husband and Wife were married on August 7, 1965 and separated on or about October 16, 2000. Wife filed for divorce and sought equitable distribution, alimony and counsel fees. The parties have three adult children. Husband is 60 years old and has owned and operated a trucking business since 1969. Wife is 62 years old and only finished the tenth grade. Her primary work history consisted of handling the accounting work for Husband's trucking business. After the separation Wife worked part-time as a cashier at K-Mart earning $6.50/hr. Wife's employment ceased as a result of injuries she received in an automobile accident on December 19, 2001.

¶ 3 Hearings were held before a Master on January 14, 28, 30 and February 6, 2004. The Master's report was filed on March 30, 2004, and both parties filed exceptions. On July 26, 2004, the trial court entered an order granting both parties' exceptions and subsequently scheduled the matter for a hearing before the trial court. The entire Master's Record was reviewed and considered by the trial court, and a "supplemental" trial was held before the Honorable Carol Hanna of the Court of Common Pleas of Indiana County on March 9, 2005 and March 10, 2005. Prior to trial the court directed the parties to prepare Business Valuations for both the date of separation and the date of distribution. With agreement of counsel the court decided that the distribution date would be June 30, 2004. On June 30, 2005, the trial court entered an Opinion and Order of Court granting the parties' divorce, equitably dividing the property and awarding Wife $1,000/month in alimony until she becomes eligible to draw upon Husband's social

security. Husband filed a Motion for Reconsideration, which was denied. These timely appeals followed and were consolidated *sua sponte*.

[1] [2] ¶ 4 Our role in reviewing equitable distribution awards is well-settled.

> Our standard of review in assessing the propriety of a marital property distribution is whether the trial court abused its discretion by a misapplication of the law or failure to follow proper legal procedure. An abuse of discretion is not found lightly, but only upon a showing of clear and convincing evidence.

McCoy v. McCoy, 888 A.2d 906, 908 (Pa.Super.2005) (internal quotations omitted). When reviewing an award of equitable distribution, "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." *Hayward v. Hayward,* 868 A.2d 554, 559 (Pa.Super.2005).

[3] ¶ 5 Wife first submits that since the family business is controlled by Husband, any date of valuation other than the date of separation is improper under the holdings in the cases of *Benson v. Benson,* 425 Pa.Super. 215, 624 A.2d 644 (1993) and *McNaughton v. McNaughton,* 412 Pa.Super. 409, 603 A.2d 646 (1992). We disagree.

[4] [5] [6] ¶ 6 In determining the value of marital assets, a court must choose a date of valuation which best works economic justice between the parties. *McNaughton, supra* at 649. The same date need not be used for all assets. *Id.* Since a business' value may be subject to great fluctuation, ***19** the date selected is generally close to the date of distribution, rather than the date of separation. *Sutliff v. Sutliff,* 518 Pa. 378, 543 A.2d 534 (1988). Despite *Sutliff's* stated preference for the date of distribution,

> there are limited circumstances where it is more appropriate to value marital assets as of the date of separation. *Litmans* [*v. Litmans,* 449 Pa.Super. 209, 673 A.2d 382 (1996)]. However, those circumstances are confined to situations where one spouse consumes or disposes of marital assets or there are other conditions that make current valuation difficult. *See Benson,* [*supra*] [ ] ([holding] closely held family business properly valued as of separation date; value of business, which was under husband's control, would be difficult to value after separation because husband could influence value of business); *McNaughton,* [supra] [ ] (same).

Nagle v. Nagle, 799 A.2d 812, 820-21 (Pa.Super.2002). "We will only reverse the decision of the lower court in regard to the setting of the date for the valuation of the marital assets on the basis of an abuse of discretion." *McNaughton, supra* at 649 (citing *Miller v. Miller*, 395 Pa.Super. 255, 577 A.2d 205 (1990)).

¶ 7 In *Benson*, the trial court deviated from the general rule that assets should be valued as of the date of distribution because the business was largely under the control of husband to the exclusion of wife, and husband had great influence and control over the business assets. On appeal to this Court, we reversed and ordered valuation of the property closer to the time of distribution. *Benson v. Benson*, 405 Pa.Super. 621, 581 A.2d 967 (1990) (unpublished memorandum)(*Benson I*). On remand, the trial court reinstated its original order in defiance of our remand order, relying instead on the subsequent decision by this Court in *McNaughton*. On subsequent appeal to this Court, we affirmed the reinstatement of the original order because the parties failed to comply with the trial court's order to submit current valuations for the business. Thus, the trial court was not in a position where it could comply with our remand order.

¶ 8 Instantly, we have no such problem; the business clearly was capable of being valued as of the date of distribution, thus there was no need for that preference to be disregarded. As the trial court explained:

> After closely reading *Sutliff*, it is apparent that the justifications that the [S]upreme [C]ourt had for setting the date of valuation at the date of distribution are analogous to the present case. First, there has been a significant passage of time between the parties' separation and the stipulated date of distribution. Furthermore, the volatility of the assets involved is great. Specifically, the trucks used in the rental business depreciate each day as they are used continuously to haul loads for the business. To accurately determine the true value of these assets, the date of distribution will be used.
>
> The [c]ourt is aware that there are limited circumstances that dictate the date of separation to be used. One such instance is where the assets are consumed or disposed of because of the exclusive control by one party. In the present case, Wife contends that Husband has either dissipated or diverted business from D & D Truck Lines to his paramour's trucking company, HMS Trucking. The [c]ourt does not find that the record supports this conclusion. Testimony and evidence presented shows that the husband's paramour is the sole owner of HMS Trucking and that the two businesses are separate entities, albeit performing similar services. ***20** While it is clear to the [c]ourt that Husband has guided his paramour in the startup and operation of her trucking business, the [c]ourt is not convinced that Husband influenced, impeded, or dissipated the marital business to affect its value during the pendency of the parties' divorce. Since D & D Trucking is clearly capable of being valued as of the date of distribution, there is no need for that preference to be disregarded.

Trial Court Order and Opinion, 6/30/05, at 6-7. Accordingly, we find that the trial court had legitimate reasons for preferring the date of distribution as the date which best works economic justice between the parties and find no abuse of discretion.

¶ 9 Wife next contends that the trial court failed to acknowledge or factor in Husband's income he was receiving from his paramour's trucking business in determining the amount of her alimony award. Additionally, she argues that the trial court erred when it failed to consider the tax implications of the equitable distribution and alimony awards when determining her reasonable needs and the amount of alimony to be paid.

[7] [8] ¶ 10 Our standard of review in this regard is well settled.

> The role of an appellate court in reviewing alimony orders is limited; we review only to determine whether there has been an error of law or abuse of discretion by the trial court. Absent an abuse of discretion or insufficient evidence to sustain the support order, this Court will not interfere with the broad discretion afforded the trial court.

Willoughby v. Willoughby, 862 A.2d 654, 656 (Pa.Super.2004) (citations and quotation marks omitted). "We have previously explained that the purpose of alimony is to ensure that the reasonable needs of the person who is unable to support himself or herself through appropriate employment, are met." *Teodorski v. Teodorski,* 857 A.2d 194, 200 (Pa.Super.2004) (citation omitted). "Alimony is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor's ability to pay." *Id.* The Divorce Code dictates that "[i]n determining the nature, amount, duration and manner of payment of alimony, the court must consider all relevant factors, including those statutorily prescribed for at 23 Pa.C.S.A. § 3701, Alimony, (b) Relevant Factors (1)-(17)." *Isralsky v. Isralsky,* 824 A.2d 1178, 1188 (Pa.Super.2003) (quoting *Plitka v. Plitka,* 714 A.2d 1067, 1069 (Pa.Super.1998)).

[9] ¶ 11 Wife's first contention is meritless as the trial court did not find any credible evidence to support her allegations concerning the diversion of income from Husband's business to his paramour's business. While Wife draws certain inferences and conclusions from the conflicting evidence presented, the trial court is not obligated to draw those same inferences and conclusions. The finder of fact is entitled to weigh the evidence presented and assess its credibility. *Williamson v. Williamson,* 402 Pa.Super. 276, 586 A.2d 967, 972 (1991). "The fact finder 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." *Fonzi v. Fonzi,* 430 Pa.Super. 95, 633 A.2d 634, 637 (1993).

[10] ¶ 12 Turning to Wife's argument with regard to the failure to consider the tax

implications of the awards, she submits that the trial court erred by failing to consider that she would owe state, federal and local income taxes on the interest income from the distribution as well as the alimony award. Therefore, she claims the ***21** award of only $1,000.00 per month would be insufficient to meet her reasonable needs. From our review of the record and the trial court's opinion, we are constrained to agree that the alimony award may not stand.

¶ 13 Although the trial court was well aware of the relevant factors and indicated that it made a thorough review of same, the court only makes specific reference to eleven of the seventeen factors, citing to 23 Pa.C.S.A. § 3701(b)(1-3),(5),(6),(8),(12-14),(16),(17), as being relevant to its decision. Clearly, subsection (15), requiring consideration of the "Federal, State and local tax ramifications of the alimony award," was also a relevant factor in this case. Further, we have no indication from the record before us that it was considered in determining the amount necessary to meet Wife's reasonable needs. Accordingly, we vacate that portion of the order awarding alimony and remand with direction that the trial court consider the tax ramifications and make any necessary adjustment in the award.

[11] [12] ¶ 14 Finally, Wife argues that under the rationale in *Evans v. Evans,* 754 A.2d 26 (Pa.Super.2000), the trial court erred or abused its discretion when it did not make some adjustment/award to her for counsel fees, at a minimum for the time spent by Wife's counsel to document Husband's financial misdealing.

> On review, we examine whether the court below abused its discretion. The purpose of an award of counsel fees is to promote fair administration of justice by enabling the dependent spouse to maintain or defend the divorce action without being placed at a financial [dis]advantage; the parties must be 'on par' with one another. Moreover, counsel fees are awarded only upon a showing of need.

Brody v. Brody, 758 A.2d 1274, 1281 (Pa.Super.2000), *appeal denied,* 567 Pa. 720, 786 A.2d 984 (2001) (citations and quotation marks omitted). "Counsel fees are awarded based on the facts of each case after a review of all the relevant factors." *Perlberger v. Perlberger,* 426 Pa.Super. 245, 626 A.2d 1186, 1207 (1993), *appeal denied,* 536 Pa. 628, 637 A.2d 289 (1993). "These factors include the payor's ability to pay, the requesting party's financial resources, the value of the services rendered, and the property received in equitable distribution." *Id.*

¶ 15 Wife cites to *Evans* as a factually analogous case where the trial court awarded counsel fees to wife as a penalty against husband and as compensation for the extraordinary efforts necessary in order to document husband's financial misdealing. Wife's brief at 38-39. There are two problems with Wife's argument. First, *Evans* is an unpublished memorandum

decision, which has no precedential value. Second, and more importantly, her argument is premised upon a finding that Husband engaged in some sort of collusion with his paramour to diminish the value of his trucking business. As previously discussed, the trial court never made such a finding and specifically rejected this contention. *See* Trial Court Opinion, 6/30/05, at 7 *supra* (stating "The [c]ourt does not find that the record supports this conclusion."). In light of the trial court's finding and our standard of review, we find the trial court properly exercised its discretion in declining to award counsel fees.

[13] [14] [15] [16] [17] [18] ¶ 16 Turning to Husband's appeal, he challenges the trial court's acceptance of Wife's valuation of D & D Truck Lines, Inc. The Divorce Code does not specify a particular method of valuing assets. The trial court must exercise discretion and rely on the estimates, inventories, records of purchase prices, and appraisals ***22** submitted by both parties. ***Smith*** *v.* ***Smith***, 439 Pa.Super. 283, 653 A.2d 1259, 1265 (1995), *appeal denied,* 541 Pa. 641, 663 A.2d 693 (1995).

> In determining the value of marital property, the court is free to accept all, part or none of the evidence as to the true and correct value of the property. *Litmans v. Litmans,* 449 Pa.Super. 209, 673 A.2d 382, 395 (Pa.Super.1996) (citing *Aletto v. Aletto,* 371 Pa.Super. 230, 537 A.2d 1383 (Pa.Super.1988)). "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." *Id.* (quoting *Holland v. Holland,* 403 Pa.Super. 116, 588 A.2d 58, 60 (Pa.Super.1991), *appeal denied,* 528 Pa. 611, 596 A.2d 158 (1991). *Accord* ***Smith*** *v.* ***Smith***, 439 Pa.Super. 283, 653 A.2d 1259, 1267 (Pa.Super.1995), *appeal denied,* 541 Pa. 641, 663 A.2d 693 (1995) (stating if one party disagrees with the other party's valuation, it is his burden to provide the court with an alternative valuation). A trial court does not abuse its discretion in adopting the only valuation submitted by the parties. *Litmans, supra* at 395. Absent a specific guideline in the divorce code, the trial courts are given discretion to choose the date of valuation of marital property which best provides for "economic justice" between parties. ***Smith***, *supra* at 1270.

Baker v. Baker, 861 A.2d 298, 302 (Pa.Super.2004).

[19] ¶ 17 Husband submits the trial court erred in accepting the valuation of his business that was provided by Wife's expert because a portion of that valuation was based upon his personal (professional) goodwill. He argues that it is well established that if goodwill is attributed principally to an individual it cannot be taken into consideration in valuing a business.

> [G]oodwill is not necessarily a factor in determining the monetary worth of a business. Rather, it must first be determined whether the particular business at issue enjoys "goodwill" such that a value therefore should be attributable to the actual business for purposes of equitable distribution. *See,*

e.g. Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975).

As ... noted in *Solomon v. Solomon,* 531 Pa. 113, 611 A.2d 686 (1992), goodwill is essentially the positive reputation that a particular business enjoys.... [I]t is "the favor which the management of a business has won from the public, and probability that old customers will continue their patronage." *Buckl* [*v. Buckl*], 373 Pa.Super. [521,][ ] 530, 542 A.2d [65,] [ ] 69 (1988). As such, goodwill is clearly property of an intangible nature.

As [our Supreme Court] held in *Solomon,* in determining whether goodwill should be valued for purposes of equitable distribution the courts must look to the precise nature of that goodwill. That goodwill value which is intrinsically tied to the attributes and/or skills of certain individuals is not subject to equitable distribution because the value thereof does not survive the disassociation of those individuals from the business. *Solomon,* 531 Pa. at 124-125, 611 A.2d at 692. In other words, where such goodwill is attributable solely to an individual's attributes it cannot be viewed as a value of the business as a whole. On the other hand ... goodwill which is wholly attributable to the business itself is subject to distribution. 531 Pa. at 124-125, 611 A.2d at 692.

* * * * * *

[As further explained in *Fexa v. Fexa,* 396 Pa.Super. 481, 578 A.2d 1314 (1990):]

***23** If the nature of the economic good will is purely personal to the professional spouse, it is not alienable; hence, it cannot actually be realized and may not be included in the equitable distribution. If, however, a portion of the economic good will is attributable separately to the corporation or business and can be realized by sale to another (by selling the enterprise in whole or in part, buy-in's and buy-out's included), then to that extent, there is good will value subject to equitable distribution.

Fexa, 396 Pa.Super. at 487, 578 A.2d at 1317 (emphasis in the original) (citations omitted). The rationale behind this is clear: professional goodwill may be inextricably tied to the individual professional's ability to generate future earnings and because future income is not subject to equitable distribution, *Hodge v. Hodge,* 513 Pa. 264, 520 A.2d 15 (1986), goodwill of a personal nature should not be considered for purposes of equitable distribution. Moreover, where there has been an award of alimony, as in the case *sub judice,* to also attribute a value to goodwill that is wholly personal to the professional spouse, would in essence result in a double charge on future income. *See also, McCabe v. McCabe,* 525 Pa. [25,] 30, 575 A.2d [87,] 89 [(1990)].

Butler v. Butler, 541 Pa. 364, 378-379, 663 A.2d 148, 155-156 (1995).

¶ 18 As further explained in *Gaydos v. Gaydos,* 693 A.2d 1368 (Pa.Super.1997) (*en banc*):

> "Going-concern value refers generally to the ability of a business to generate income without interruption, even where there has been a change in ownership, whereas goodwill represents a preexisting relationship arising from a continuous course of business which is expected to continue indefinitely." *Butler,* supra at 372 n. 9, 663 A.2d at 152 n. 9 (emphasis added). Goodwill is, therefore, one benefit among many of owning a fully-functional business rather than a collection of assets. It follows that goodwill value is a component of the going concern value of a business; goodwill and going concern are not "separate methods" of valuing the same intangible thing.
>
> Plainly, any long-standing business such as Husband's dental practice has a going-concern value-i.e., a value related to the business's enhanced power to earn future revenues based on the fact that the business is already organized, rather than a startup. This value exists independent of whether Husband or another dentist owns and operates the business. Husband's dental practice also has a separate goodwill value attributable to its reputation and preexisting relationship with its customers.
>
> The goodwill value may, per *Solomon,* be further subdivided into professional goodwill and enterprise goodwill. For purposes of equitable distribution, the enterprise goodwill of a business ... may be included in the marital estate as part of the overall going-concern value of the business. Professional goodwill, on the other hand, cannot be included for equitable distribution purposes because this value is considered the exclusive property of the professional spouse.

Id. at 1375.

¶ 19 Instantly, the trial court accepted Wife's expert's valuation of $279,000.00, which included a value for goodwill, and rejected Husband's expert's valuation that was based solely upon the adjusted net assets value of $56,044.00. However, our review of the record fails to disclose whether the goodwill value used by Wife's expert included any professional goodwill ***24** or was solely the product of enterprise goodwill. While we suspect that much, if not all, of the goodwill was that of the enterprise as part of the overall going-concern value of the business, in absence of testimony to that effect we cannot be certain. Therefore, we must also remand for further proceedings in this regard. *See Gaydos, supra* at 1375 (directing the trial court "to determine whether or not Husband's business [has any] professional goodwill. If it does, the value of that goodwill must be excluded from the overall value of Husband's [business] and must not be included in the marital estate for equitable distribution.").

¶ 20 In sum, we vacate that portion of the order awarding alimony and remand with direction that the trial court consider the tax ramifications and make any necessary adjustment in the award. We also vacate the decision of the trial court with respect to the goodwill issue and remand for a recalculation of the value of Husband's trucking business. In all other respects, the decision of the trial court is affirmed. To the extent on remand that the trial court determines that a new equitable distribution

scheme is necessary, our discussion and affirmance of the remaining issues should not preclude the trial court from proceeding with a new distribution scheme.

¶ 21 Order affirmed in part and reversed in part. Case remanded for further proceedings in accordance with this opinion. Jurisdiction relinquished.

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End of Document

2006 WL 4843833 (Pa.Super.) (Appellate Brief)
Superior Court of Pennsylvania.

Ronald C GILMER, Appellee,
v.
Patricia A. GILMER, Appellant.

Nos. 1296 MDA 2006, 1369 MDA 2006.
October 27, 2006.

Cross Appeals
Appeal from the Orders dated June 29, 2006 and May 26, 2006 from, respectively, the Honorable Lawrence F Clark, Jr, and the Honorable Jeannine Turgeon of the Court of Common Pleas of Dauphin County, Pennsylvania, No. 2002-CV-2214, Pacses Case Number 749104485

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... employment at his current position beyond age 60 was highly unlikely at the time of trial.[7] As age 60 is the earliest age Husband can retire with full benefits, and in light of the testimony from both parties, the trial court should have utilized age 60 as the retirement age, which would increase the marital estate by $29,862.

III. THE TRIAL COURT COMMITTED AN ERROR OF LAW, AND THEREFORE ABUSED ITS DISCRETION, IN CALCULATING THE AMOUNT OF FAIR MARKET RENTAL CREDIT OWED TO WIFE AS THE COURT ERRED IN FINDING WIFE WAS NOT A "DISPOSSESSED SPOUSE" FOR THE ENTIRE PERIOD OF SEPARATION AND WHERE HUSBAND FAILED TO SATISFY HIS BURDEN OF PROVING EXPENSES RELATED TO THE MAINTENANCE OF THE MARITAL RESIDENCE THAT WOULD OTHERWISE JUSTIFY THE REDUCTION IN THE ESTABLISHED MONTHLY FAIR MARKET RENTAL VALUE.

Where both spouses have an ownership interest in the marital residence, and one spouse is dispossessed of the residence to the exclusive use and **possession** of the other spouse during separation, that spouse can pursue a claim for **fair** market **rental** credit at the time of **equitable distribution**. *Trembach v. Trembach,* 419 Pa. Super. 80, 615 A.2d 33 (1992). Such credit is not mandatory, but, rather, it is entirely within the sound discretion of the trial court. *Id.* At trial Wife raised a claim for **fair** market **rental** credit, and the trial court awarded Wife credit in the amount of $10,250, representing a credit for ***30** the period of October 2002 until trial, November 2004, or a period of twenty-five months. The facts of record establish that Wife was dispossessed of the marital residence throughout the entire period of separation despite her limited ability to access the **property** between March of 1998 and October of 2002.[8]

A. Because Wife's access to the marital residence between March 1998 and October 2002 was extremely curtailed, and such access inured to Husband's benefit, she was unable to exercise full possession of the residence during this time: therefore, she was "dispossessed" of the residence so as to be entitled to fair market rental credit.

At trial, evidence was proffered as to the circumstances surrounding Wife's vacation from the marital residence on March 23, 1998. On that evening, Husband physically assaulted the parties' son, a minor at the time. (R. at 36a-37a). After the altercation, Husband angrily directed Wife and the child to "get the hell out" of the house and, fearing for her and her son's safety, Wife sought refuge at her mother's residence, which is in close proximity to the marital residence, where she and her son have been constrained to reside for the last eight years. From the night of March 23, 1998 forward, neither Wife nor the son resumed residing within the marital residence. They both fled the residence that evening to escape the wrath of Husband and diffuse an extremely volatile situation that had been brewing throughout the marriage.

***31** Wife testified as to the history of abusive behavior towards her by Husband In addition to Husband's generally

demeaning attitude towards Wife, Wife reported documented instances of physical abuse to her and the children. She further conveyed Husband's explosive temper and issues of anger management Wife's vacation from the marital residence on March 23, 1998 was abrupt and done so solely out of fear and concern When Wife left the residence that evening, she had no intention of forever abandoning the residence; hence the fact Wife took no personalty and furnishings from the residence that evening. Instead, it is Husband's behavior that forced Wife to involuntarily relinquish **possession** of the residence upon separation and move in with her mother.

A spouse who is dispossessed of the marital residence is entitled to seek his or her share of the **fair** market **rental value** of the residence for the time it is in the exclusive use and **possession** of the other spouse so long as no **equitable** defenses are available to negate or mitigate the **rental** credit. *Trembach v. Trembach*, 419 Pa. Super. 80, 87-88, 615 A.2d 33, 37 (1992). The intent of **fair** market **rental** credit is to compensate a spouse who is dispossessed of his or her interest in the residence and is deprived of his or her right to use and enjoy fully the joint **property** *Trembach*, 419 Pa Super. at 87, 615 A.2d at 37. An award of **rental** credit must be evaluated in light of the totality of the circumstances and the **equitable distribution** order as a whole. *Butler v. Butler*, 423 Pa. Super. 530, 546, 621 A.2d 659, 668 (1993).

***32** The trial court correctly found the **fair** market **rental value** of the marital residence to be $1,150.00 per month, which was an average of the two figures submitted by the parties at trial. The court nonetheless erred in finding Wife was not a "dispossessed spouse" for the first fifty-five months of separation. The question of dispossession is a critical area of inquiry in evaluating a claim for **rental** credit, and the meaning of "**possession**" is the focal point in answering that question.

"**Possession**" connotes an ability to use and enjoy fully the complete bundle of rights afforded to an owner of **real** estate. Black's Law Dictionary defines **possession** as "[h]aving control over a thing with the intent to have and exercise control." Black's Law Dictionary 806 (6th ed. 1991) Dominion and control are essential to **possession** Limited access to **property** and the ability to perform menial tasks therein do not equate to **possession** of **property**. Any semblance of dominion and control is absent. After March of 1998, Wife had no control over the marital residence; she was unable to enjoy the bundle of rights afforded to a **property** owner; and she certainly did not **possess** the residence as that term is envisioned by the law.

Wife acknowledges her ability to have limited access to the marital residence between March of 1998 and October of 2002, but such limited access in no way destroys her claim for **fair** market **rental** credit during this period of time. Wife's access was limited to buying Husband's groceries and paying Husband's bills. Typically, her access to the residence was at a time when Husband was not present. While Wife fled the residence to avoid a violent situation, and she remained separated thereafter because of Husband's anger control Issues, Wife never lost her love of Husband, nor did she necessarily want a divorce. Out of love for Husband, she continued to care for him ***33** following separation just as she had done so for virtually her entire life. Because of her continued love and affection, the parties did have sporadic sexual relations until March of 2002. Nevertheless, Wife's limited access to the residence, and her ability to perform menial tasks therein do not constitute "**possession**" of the residence. Wife remained a dispossessed spouse notwithstanding her limited access, and in light of the prevalent theme of abuse, this case is readily distinguishable from existing case law on the subject of **fair** market **rental** credit. *See, e g, Schmidt v. Krug*, 425 Pa Super. 136, 624 A 2d 183 (1993) (trial court denied the wife's request for **fair** market **rental** credit given wife's pattern of staying at the marital residence overnight on weekends). Wife simply lacked the ability to **possess** and use the residence as a true owner.

Consequently, the trial court erred in limiting Wife's **fair** market **rental** credit for the last twenty-five months of separation. Wife is entitled to **fair** market **rental** credit for the entire eighty months of separation.

B. ***The trial court erred in reducing the fair market rental by claimed expenses on the marital residence where Husband failed to satisfy his burden of proving such expenses.***

When **fair** market **rental** credit is awarded, the court must reduce a credit by any expenses paid by the spouse in **possession** of the residence designed to maintain or increase the **value** of the **property**. *Trembach*, 419 Pa. Super. at 88, 615 A.2d at 37. It is the burden of the party in **possession** of the residence to prove those expenses before a deduction from the monthly **rental** amount that made.

***34** Pursuant to the Rules of Civil Procedure, Husband submitted an income and expense statement prior to trial in which he

reported paying $330 00 per month for home maintenance, **real** estate taxes and homeowner's insurance At trial, however, Husband presented no solid evidence as to such expenses. Instead, Husband focused primarily on expenditures that neither maintained nor increased the **value** of the **property**. For example, Husband presented evidence of spending $35,000.00 for a new family room furnishings. Understandably, the court was not persuaded by such claimed expenses, and it did not consider such expenses in reducing the **fair** market **rental** credit Nevertheless, the court did accept the $330.00 per month figure contained on Husband's income and expense statement even though Husband provided no testimony at trial as to such expenses. Husband simply failed in his burden of proof, and the trial court erred in reducing the month **fair** market **rental value** by any claimed expenditures.

Accordingly, the trial court should have determined that Wife was entitled to **fair** market **rental value** in the amount of $575.00 per month (one-half of the $1,150.00 per month **rental value** established by the court) for the full eighty months of separation, or $46,000.00.

***35 IV. THE TRIAL COURT ABUSED ITS DISCRETION IN FASHIONING AN EQUITABLE DISTRIBUTION AWARD THAT AFFORDS WIFE ONLY 54% OF THE MARITAL ESTATE, AND WHICH AWARDED THE MARITAL RESIDENCE TO HUSBAND, WHERE THE TRIAL COURT FAILED TO CONSIDER ALL THE EQUITABLE DISTRIBUTION FACTORS SET FORTH WITHIN THE DIVORCE CODE, PARTICULARLY, THE SIGNIFICANT INCOME DISPARITY BETWEEN THE PARTIES, THE LENGTH OF THE MARRIAGE, AND, MOST IMPORTANTLY, TAX RAMIFICATIONS AND COST OF LIQUIDATION, BOTH OF WHICH WERE MANDATED BY THE 2005 DIVORCE CODE AMENDMENTS.**

A trial court is obligated to **equitably** divide a marital estate whenever such a claim is raised as part of a divorce action 23 Pa C.S.A. § 3502(a) (2001) To aid in that endeavor, the General Assembly has propounded thirteen factors for courts to consider, including, *inter alia* the length of the marriage; income disparity; and tax ramifications and cost of liquidation. *Id,* Likewise, trial courts must be mindful of the underlying policy of the Divorce Code, which is to effectuate economic justice between the parties and ensure a **fair** settlement of **property** rights. 23 Pa.C.S.A. § 3102(a)(6) (2001). Trial courts sit in **equity** when addressing issues under the Divorce Code, and they are afforded considerably broad **equitable** powers to effectuate the **purposes** of the Divorce Code. *See* 23 Pa C.S.A. § 3323(f) (2001) ("in all matrimonial cases, the court shall have full **equity** power and jurisdiction ...").

A. The length of the parties' marriage and the established income disparity, between the parties justify an award of 60% of the marital estate to Wife.

The trial court found the parties' marital estate totaled $815,860.00 The court awarded Wife slightly less than 54% thereof, or $438,414.00, as and for **equitable distribution**. Of that sum a considerable percentage is composed of retirement accounts.

***36** A trial court is afforded considerable discretion in fashioning an **equitable distribution** award, and it is well established that all factors propounded by the General Assembly under Section 3502 of the Divorce Code, which have bearing on a particular case, must be considered by a trial court. No one factor is considered dispositive. Nevertheless, guided by the underlying principle of effectuating **equity** and justice between the parties, the trial court's **equitable distribution** award must logically effectuate the goals of the Divorce Code.

Unquestionably, the length of the parties' marriage, and the number of marriages each party has had, are critical factors in **equitable distribution**. Instantly, the parties separated after twenty-five years of marriage, the first manage for both; in fact, it is the only serious relationship Wife has ever had her entire life. By any benchmark, the parties' manage was enduring, with Wife having invested approximately one-half of her entire life with Husband. The parties' separation occurred abruptly with Wife having been forced to reside with her mother along with the parties' youngest child for the last eight years. It is Husband who has formally sought to terminate this union, and Wife is now faced with the daunting prospect of being a 54 year old divorcee with little prospect for future sustained relationships offering essential emotional and financial support and little ability to reconstruct a life similar to that which she had during marriage. The evidence established that Wife is the dependent spouse, with an income roughly one-half of Husband's established income/earning capacity.

*37 With the trial court's **equitable distribution** award, Wife leaves this marriage lacking a home and financial security Husband, conversely, is involved in a serious romantic relationship, he maintains a residence (and he is fully capable of purchasing another residence if he so desires), and his financial position is essentially identical to, if not now superior, to his position during marriage; thus, of the two parties, Husband has the greater potential of successfully segueing into a new, stable, long term and supportive relationship upon divorce as well as maintaining a standard of living nearly identical to that which she became accustomed during marriage. Husband is more able to leave this union without experiencing a significant financial and emotional impact The trial court correctly found that Husband focused on self gratification during manage to the detriment of Wife and his children by dissipating the marital estate to fund luxury purchases. The record established it is Wife who was the primary care taker of the two children as well as primary homemaker notwithstanding her own full time employment. Despite all of this, Wife simply cannot, armed with the trial court's **equitable distribution** order, leave her mother's residence and restart her life.

In addition to the long term nature of the marriage, the significant income disparity further militates in favor of Wife receiving 60% of the marital estate. The court found Wife to have an income of $54,830.88 as a Technical Analysis for Capital Blue Cross, her employer since 1970. At this time, Wife has essentially reached her earnings plateau with her employer, and the prospect of any significant income increases in the future is remote. Conversely, the court found Husband earned $98,066.00, inclusive of overtime, in 2004 with PPL, his employer since 1972. The record further established that Husband continues to enjoy negotiated salary increases as a union worker. By the trial *38 court's own...

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... income disparity between the parties, the trial court should have awarded Wife 60% of the marital estate. The court has awarded Husband the parties' marital residence and all of the personalty and furnishings therein. Wife was unable to take any marital items of personalty and furnishings upon abruptly vacating the marital residence in March of 1998. The trial court's order will severely handicap Wife in her attempt to acquire and furnish a new residence at age 54, eight years removed from retirement and in the twilight of her earnings potential. The court's ruling requires Wife to undertake significant financial obligations, all based upon her secondary earning capacity, and in all likelihood Wife will be constrained to liquidate retirement assets awarded to her **property** division to obtain the necessary footing on her post-divorce life.[5]

*39 **B.** ***The trial court committed an error of law in failing to consider the 2005 Amendments to the Divorce Code, notably the requirement that the court consider tax ramifications of an equitable distribution order and cost of sale.***

Since the 1988 Amendments to the Divorce Code, Section 3502 has required, as an **equitable distribution** factors, that a court consider the economic impact to each party upon divorce and **equitable distribution**, including federal, state and local tax ramifications of the division. 23 Pa.C S.A. § 3502(a)(10) (2001) Nevertheless, case law interpreting this statute, relying erroneously upon *Hovis v. Hovis,* 515 Pa. 581, 527 A.2d 541 (1988), a case where the Pennsylvania Supreme Court actually interpreted the Divorce Code prior to the 1988 Amendments, limited the impact of this factor by requiring tax consequences to be immediate and certain before it could be considered by a court in **equitable distribution** *See, e g. Smith v. Smith,* 439 Pa. Super. 283, 653 A.2d 1259 (1995).

While the instant action was being litigated before the trial court, the General Assembly promulgated new amendments to the Divorce Code. In February of 2005, three months after the divorce master's hearing, and while this case was pending before the trial court on exceptions, the new amendments became effective. One specific change, designed to correct prior mis-interpretation of established factor number ten, *i.e,* requiring consideration of tax ramifications of **equitable distribution**, reiterated the need for courts to consider tax ramifications associated with each asset, and the amendment made it clear that such consideration must be made regardless of whether such *40 consequences are immediate and certain. 23 Pa.C.S.A. § 3502(a)(10.1) (2005). As this case remained pending before the trial court at the time the amendments became effective, the trial court was obligated to consider the new amendments despite the fact the actual divorce hearing occurred prior to the effective date of the amendments. Yet the trial court did not remand the matter back to the master for consideration of the Divorce Code Amendment. This was an error of law.

Had the trial court considered fully the tax ramifications associated with its **equitable distribution** award, the court would

have realized the need to award Wife at least 60% of the marital estate. The court awarded Wife roughly $309,750.00 in retirement assets, a sum that composes roughly 71% of the total assets awarded to her. It is without question that Wife earns significantly less income than Husband. It is also established that Wife cannot retire until age 62; thus, at the time of hearing, she had an additional ten years of employment before being eligible for retirement. Accordingly, she is not able to utilize currently the retirement funds awarded to her in **equitable distribution** without incurring ordinary income tax on withdrawals and significant penalty (*i e,* 10%) imputed by the government for early withdrawal. If Wife accesses the bulk of her **equitable distribution** award at this time, approximately 30% of its **value** will be loss to taxes and penalties. While the trial court did award Wife $50,000.00 in cash as and for **property** division, along with $10,250.00 in **fair** market **rental** credit, Wife will still have to liquidate some of her retirement monies to purchase and furnish a new residence.[10] ***41** When the tax ramifications associated with the retirement monies is considered, Wife in actuality is receiving significantly less **value** in the **equitable distribution** award then the **value assigned** by the court. It is without question that Wife needs some level of retirement assets, and the court was correct in awarding Wife a considerable share of the parties' overall retirement benefits, but in so doing, the court is obligated to construct a total **distribution** scheme that harmonizes the need for retirement benefits with Wife's apparent present need for funds to establish herself post-divorce.

C. The trial court erred in awarding Husband the parties' marital residence notwithstanding his continued occupancy therein in light of the significant contributions Wife made to the creation and maintenance of the marital residence both before and throughout marriage and because Husband is in a superior position to acquire and furnish a new residence upon divorce.

Wife concedes that division of particular assets is within the sound discretion of the trial court. Wife further acknowledges Husband has had constructive exclusive use and **possession** of the marital residence since March of 1998. However, because Wife vacated the marital residence abruptly to diffuse a volatile situation, she maintains she did not voluntarily relinquish **possession** of the residence to Husband upon separation, nor does she acknowledge any voluntary waiver to any entitlement thereto

The testimony at trial established the circumstances surrounding the parties' separation. Wife testified as to the history of abusive behavior towards her and the children by Husband. It is Husband's abusive behavior throughout marriage that precipitated the separation and forced Wife to relinquish **possession** thereof. The trial court must remain cognizant of the **equitable** nature of divorce proceedings and its need to effectuate **equity** and justice in its **property** division orders. *See* ***42** 23 Pa. C.S.A § 3323(f) (2001). In adjudicating claims of **equity**, the trial court must further consider the established maxim that he who seeks **equity** must do **equity**. *Black v. Hoffman,* 312 Pa. 89, 165 A 489 (1933) ("he who seeks **equity** must do **equity**"); *Harbor Marine Co. v. Nolan,* 244 Pa. Super. 102, 366 A.2d 936 (1976) ("he who seeks **equitable** relief must do so with clean hands").

Instantly, the trial court's order of **equitable distribution** is simply contrary to established **equitable** principles. Husband cannot be permitted to capitalize from his own abusive behavior by receiving the marital residence as and for **property** division where Wife has specifically not waived her interest in the house, as she testified categorically of her desire to receive the residence as and for **property** division. The trial court's order provides Husband not only the marital residence but also all of the personalty and furnishings contained therein that the parties acquired over their twenty-five year marriage. It is simply inequitable for Husband to benefit from his own unclean hands, yet the trial court's order unintentionally facilitates this result.

Wife further testified that she and Husband both constructed the residence with their own hands prior to the marriage. (R. at 83a). She testified at length as to her contributions to the home as the primary care taker and homemaker. Wife maintained this role throughout the twenty-five year marriage despite her full time employment. In short, Wife made significant contributions to the creation and maintenance of this residence, which support an **equitable** award of the residence to her given Husband's actions.

***43** Finally, it is important to reiterate that Husband is simply in a superior position to acquire and furnish a new residence upon divorce Husband has the earning potential of approximately two times the income of Wife, which disparity will, in all likelihood, continue to grow given the plateau of Wife's earnings and Husband's ability to receive continued salaried increases. Wife concedes that, had the trial court awarded her the marital residence, in overall **distribution** of approximately

54% of the estate to her would be an **equitable distribution** of the estate given the fact that she would then have a residence and furnishings. However, not only does the trial court award Wife only 54% of the estate, it further creates injustice by requiring Wife to use a portion of her award to acquire a new residence and provide furnishings therefor. The cost to Wife in undertaking such an endeavor will be significant.

*44 *CONCLUSION*

Based on the foregoing, Appellant respectfully requests this Honorable Court:

1. Vacate the trial court's May 26, 2006 spousal support Order and remand for a new hearing to determine Appellee's spousal support obligation for the period January 31, 2006 through June 29, 2006 with the inclusion of the dollar **value assigned** by Appellee's employer for his health, dental, vision and life insurance as income for support **purposes**;

2. Reverse in part the trial court's Order of June 29, 2006 and remand in part for determination of the parties' total marital estate by correctly **valuing** Appellee's defined benefit plan and awarding Appellant: 60% of the adjusted marital estate, The marital residence, and **fair** market **rental** credit for the entire period of separation unreduced by expenses.

Appendix not available.

Footnotes

1 The pay information Husband submitted at trial actually suggested Husband would make in excess of $98,066.00 for 2004. (R. at 280a-81a). Husband's own testimony was that he is capable of earning in excess of $94,000.00 at his employment. (R. at 93a).

2 While Husband purchased this property prior to marriage, Wife provided money for the purchase. Right before marriage, the parties re-titled the property into their joint names. (R at 34a - 35a; 83a; 192a).

3 The Domestic Relations Code defines "income" as:
Compensation for services, including, but not limited to, wages, salaries, bonuses, fees, compensation in-kind, commissions and similar items; income derived from business; gains derived from dealings and property; interest; rents; royalties; dividends; annuities; income from life insurance and endowment contracts; all forms of retirement; pensions; income from discharge of indebtedness, distributive share of partnership gross income; income in respect of a decedent, income from an interest and estate or trust; military retirement benefits; railroad employment benefits; social security benefits; temporary and permanent disability benefit; workers' compensation; unemployment compensation; other entitlement to money or lump sum awards, without regard to source, including lottery winnings; income tax refunds; insurance compensation or settlements; awards or verdicts; and any form of payment due to or collectible by an individual regardless of source.
23 Pa.C.S.A. § 4302 (2001)

...

6 Husband testified he suffers from degenerative joint disease in both knees, which required surgery on the left knee in 2000; he has arthritis in both knees, and he had calcium deposits under both kneecaps with some ligament damage. (R. at 53a-54a) He further testified that he anticipated additional surgery for his knees and that his knee injuries impact his employment because "[he is] required to climb structures, towers, [he is] in and out of trucks [,] [and he is] out in all kinds of weather." (R. at 54a) Husband acknowledged it is "really hard on [him]." *(Id.)*.

7 Husband further testified as to the impact of his physical condition on his employment at the May 4, 2006 support proceeding. (R at 522a-24a).

8 Neither side disputed that Wife was dispossessed of the marital residence between October 16, 2002, the date Husband's attorney sent Wife notice that she was to desist from accessing the marital residence, and the time of trial, nor did Husband readily dispute that Wife was not entitled to **fair** market **rental** credit for that twenty-five month period.

9 Wife testified as to the fact that she and the parties' son have resided with her mother since separation. The trial court erroneously determined, sans supporting testimony thereon, that Wife intends to continue to reside with her mother and will inherit the residence upon her mother's death. Wife's own uncontraverted testimony established that she will be required to obtain her own residence once the divorce action has concluded, and there was no testimony indicating Wife's mother's demise was eminent or that it was certain that Wife would inherit her mother's home. Wife's prospects of inheritance are no greater than Husband's prospects, something the court omitted. Husband actually testified as to the prospect of his mother leaving him cash. (R. at 50a-51a).

...

812 A.2d 1241
Superior Court of Pennsylvania.

Edmund L. MIDDLETON a/k/a Edmund Lewis Middleton, Appellant,
v.
Lenora H. BROWN MIDDLETON, Appellee.

Submitted June 27, 2002. | Filed Dec. 2, 2002.

*** Start Section
... appeal period, it *may*, at any time within the applicable 120-day period thereafter, issue an order directing that additional testimony be taken.") (emphasis added). Husband points to no reason why there would have been a need to take additional testimony ***1247** or where there was prejudice from failing to take additional testimony.

2. *Credit for Payments Made Pursuant to the Parties' Stipulation*

[2] [3] ¶ 18 The trial court has broad discretion in fashioning equitable distribution awards and we will overturn an award only for an abuse of that discretion. *Oaks v. Cooper*, 536 Pa. 134, 638 A.2d 208 (1994); *Hovis v. Hovis*, 518 Pa. 137, 541 A.2d 1378 (1988); *Gaydos v. Gaydos*, 693 A.2d 1368 (Pa.Super.1997)(en banc). The Divorce Code[1] states that the trial court

> shall ... **equitably** divide, **distribute** or **assign**, in kind or otherwise, the marital **property** between the parties without regard to marital misconduct in such proportions and in such manner as the court deems just after considering all relevant factors....
> 23 Pa.C.S. § 3502(a). In assessing the propriety of an **equitable distribution** scheme, our standard of review is whether the trial court, by misapplication of the law or failure to follow proper legal procedure, abused its discretion. *Johnson v. Johnson*, 365 Pa.Super. 409, 529 A.2d 1123 (1987). "Specifically, we measure the circumstances of the case, and the conclusions drawn by the trial court therefrom, against the provisions of 23 P.S. § 402(d) [now 23 Pa.C.S. § 3502(a)] and the avowed objectives of the Divorce Code, that is, 'to effectuate economic justice between the parties ... and insure a **fair** and just determination of their **property** rights.' 23 P.S. § 102(a)(6) [now 23 Pa.C.S. § 3102(a)(6)]." *Hutnik v. Hutnik*, 369 Pa.Super. 263, 535 A.2d 151, 152 (1987). With these principles in mind, we review the trial court's **distribution** order.

[4] ¶ 19 The parties' November 1, 1993 stipulation provides in part:

> Plaintiff [Husband] shall continue to pay to or on behalf of defendant [Wife] all expenses which he is now paying such as first and second mortgages, electric, water, lawn care, child support and alimony (or a sum equivalent thereto) and miscellaneous items, all of which shall approximate a total of $3000.00 per month, until such time as the ancillary issues are resolved.

Stipulation, 11/1/93, R.R. 138a-139a. Husband maintains these payments were "on account" and therefore should be credited against Wife's **distributive** share. Wife argues that Husband agreed to make those generous payments to support Wife and child until the court resolved the economic issues and there is nothing in the stipulation to indicate that Husband would be credited upon resolution of the economic claims. We agree with Wife. Voluntary payment from Husband's own resources will not be credited at **equitable distribution**. *See Jayne v. Jayne*, 443 Pa.Super. 664, 663 A.2d 169 (1995). In fact, and as the trial court apparently realized upon reconsideration, if Husband were credited with fifteen years of these payments, $78,224.00, and also credited with one-half of the **rental value** of the marital residence, $104,105.00, *see infra*, this would wipe out all of Wife's share of the marital estate.[2]

***1248** ¶ 20 We point out that the stipulation also provided for bifurcation. Parties are free to enter into agreements that they may later regret. Absent fraud or duress, however, the agreement is enforceable. *See Adams v. Adams*, 414 Pa.Super. 634, 607 A.2d 1116 (1992).

3. *Credit for Rental Value of Marital Residence*

[5] ¶ 21 Husband claims the trial court abused its discretion in refusing to award him one-half the **rental value** of the marital residence from the time of separation, March 1985, to the hearing on **equitable distribution** in June 1999. As noted, in her first order Judge Fitzpatrick had awarded Husband one-half of the **rental value** of the marital residence for fourteen years ($104,105.00).

[6] ¶ 22 An **equitable distribution** order may include an award to the non-**possessing** spouse of one-half of the

rental value of the marital residence when **possessed** exclusively by the other spouse during the parties' separation. *Gordon v. Gordon*, 436 Pa.Super. 126, 647 A.2d 530 (1994), *reversed on other grounds*, 545 Pa. 391, 681 A.2d 732 (1996); *Powell v. Powell*, 395 Pa.Super. 345, 577 A.2d 576 (1990); *Gruver v. Gruver*, 372 Pa.Super. 194, 539 A.2d 395 (1988); *Hutnik v. Hutnik*, 369 Pa.Super. 263, 535 A.2d 151 (1987). This award, however, is not mandatory. *See* 23 Pa.C.S.A. § 3502(a)(7); *see also Schneeman v. Schneeman*, 420 Pa.Super. 65, 615 A.2d 1369 (1992) (while each party is entitled to his or her **equitable** share of marital **property**, including **fair rental value** of the marital residence, the trial court need not compute that **equitable** share as a credit to the non-possessory spouse, as long as the total distributory scheme is **equitable**); *Butler v. Butler*, 423 Pa.Super. 530, 621 A.2d 659, 668 (1993); *Sutliff v. Sutliff*, 361 Pa.Super. 504, 522 A.2d 1144, 1154 (1987) (although award of rent is permissible, refusal was not an abuse of discretion).

¶ 23 We do not dispute that Husband in all likelihood exceeded the amount the Court would require him to pay when he paid the mortgages and expenses of the marital home. The point is, he very generously and voluntarily agreed to do so. To reimburse him now, at Wife's expense, in light of the circumstances and **equities** of this case, would clearly not effectuate economic justice between the parties. The trial court's efforts to reach an **equitable** division of marital assets and its ultimate order reflects a considered weighing of the economic standings and needs of the parties. The court considered the relevant factors of the Divorce Code, 23 Pa.C.S.A. §§ 3502(a)(1)-(11), and that decision is supported in the record. We find no abuse of discretion. *See Oaks, supra; Hovis, supra; Gaydos v. Gaydos, supra.*

4. ***Alimony***

[7] [8] ¶ 24 In his final claim, Husband argues that Judge Fitzpatrick abused her discretion in granting Wife temporary alimony in the amount of $ 2,000.00 per month for six months. An award of alimony will not be reversed absent an abuse of discretion. *Perlberger v. Perlberger*, 426 Pa.Super. 245, 626 A.2d 1186 (1993); *Ruth v. Ruth*, 316 Pa.Super. 282, 462 A.2d 1351 (1983). In determining...

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....

Lord, 719 A.2d at 308.

¶ 3 I suggest the rule be modified to account for those situations where the trial court's reasons appear of record, or where the trial court knows what issues will be raised on appeal and prepares an opinion addressing those issues. For instance, in cases where post-trial or post-sentencing motions have been filed, or a single issue is raised in a dispositive motion, the trial court can set forth the reasons for its ruling.

¶ 4 Given that in many cases, trial judges do not require 1925(b) statements, and waiver is probably the least favored method of resolving issues, the interests of justice may be better served by revisiting this rule.

¶ 5 KLEIN, J., joins.

Concurring JOYCE, J.:

¶ 1 I agree with the Majority's ultimate resolution of the **equitable distribution** issues and the absence of waiver under the unique circumstances of the case at bar. However, I am compelled to write separately to express my concerns over the Majority's discussion of waiver and Pa.R.A.P.1925(b) statements.

¶ 2 Put simply, the instant case presents a situation where the trial court extended the period of time in which a Pa.R.A.P.1925(b) statement could be filed, and as a result, it is proper in this instance for our Court to decline to find waiver. The Majority's lengthy discussion and examples of situations where waiver may or may not exist pursuant to Pa.R.A.P.1925(b) is unnecessary and could cause confusion among the bench and bar.

¶ 3 The procedural history of the case at bar as it relates to Pa.R.A.P.1925 is unique, but it does not...

*** Start Section

... our Supreme Court in *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998). *Lord* made it clear that failing to timely file a concise statement of matters complained of on appeal pursuant to 1925(b), when ordered to do so by the trial court, renders issues not raised therein waived on appeal. Since the Majority Opinion could be interpreted to stand in contrast to *Lord*, I concur in the result only.

¶ 4 FORD ELLIOTT, STEVENS and ORIE MELVIN, JJ., join. 2002 PA Super 371

Parallel Citations

Footnotes

1 The Divorce Code of April 2, 1980, P.L. 63, No. 26, as amended 1988, February 12, P.L. 66, No. 13 was repealed by Act of December 19, 1990, P.L. 1240, No. 206, § 2, and substantially reenacted as Part IV of the Domestic Relations Code. *See* 23 Pa.C.S. §§ 3101 -3707.

2 The court **valued** the total marital assets at $395,748.00, the marital liabilities at $35,098.56. The court divided the net assets, $363,649.44, evenly ($181,824.72 to each party). The combined credits in the original order totaled $182,329.00 ($104,105.00 representing one-half of the **rental value** for fourteen years, and $78,224.00 representing expenses advanced to Wife prior to the hearing).

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19 Pa. D. & C. 4th 538 (1993)

Merola

v.

Merola

No. 1706-C of 1993.

Common Pleas Court of Luzerne County, Pennsylvania.

November 1, 1993.

Frank J. Skokoski, for plaintiff.

Anthony J. Ciotola, for defendant.

STEVENS, *J.*, November 1, 1993.

FACTS

In April, 1993, plaintiff filed a complaint in divorce seeking, inter alia, equitable distribution of the marital property, temporary and permanent alimony, and attorney's fees and costs.

Plaintiff and defendant have a long-standing marriage, and the parties own a residence in the city of Hazleton. Plaintiff
539 has resided in that residence for approximately *539 20 years while defendant, who is employed in Harrisburg, has maintained a separate apartment in Harrisburg for the past ten years but returns to the marital residence on weekends, depending upon weather conditions and his personal schedule in Harrisburg.

Plaintiff is a 54 year old female who has various serious medical problems, including severe rheumatoid arthritis, resulting in her being confined to a wheelchair. Although the parties have several grown children who do not reside in the marital residence, one of their children, Sandra, does reside with plaintiff, along with Sandra's young child. Sandra remains at the residence full-time with her mother, plaintiff, and assists plaintiff in everyday needs and activities, such as washing, dressing; generally, Sandra takes care of plaintiff's daily needs.

On or about August 9, 1993, plaintiff filed the within petition seeking exclusive possession of the marital residence pursuant to the Divorce Code. Several requests for continuance were made on behalf of defendant, by and through his then counsel, who himself had an illness and was unavailable. The matter was heard on October 29, 1993.

OPINION

In *Laczkowski v. Laczkowski*, 344 Pa. Super. 154, 496 A.2d 56 (1985), the Superior Court specifically found that the court of common pleas had authority to temporarily award the marital residence, pending equitable distribution of marital property, to one spouse pursuant to the Divorce Code, §3502(c). See *Laczkowski v. Laczkowski, supra* at 162, 496 A.2d at 60.

In *Laczkowski* the factual situation was slightly different than in the instant case in that there was a minor child, and
540 temporary possession of the marital real property *540 was granted to the spouse having physical custody of the minor child.

The Superior Court went on to state, that "... The equitable powers of the courts under our Divorce Code are extremely broad ..." even though "... the exclusion of a spouse from the marital home during the pendency of a divorce

proceeding is a harsh remedy that will not be awarded cavalierly...." See Laczkowski, supra, at 166-167, 496 A.2d at 62.

The Superior Court thoroughly reviewed the legislative history of the Divorce Code, as well as case law of two states whose divorce statutes are substantially similar to the Pennsylvania Divorce Code. The Superior Court, for example, in reviewing the law of those two states, specifically cited a New Jersey case, Degenaars v. Degenaars, 186 N.J. Super. 233, 452 A.2d 222 (1982), which held that a spouse may be excluded from the marital residence solely because that spouse had been living apart from the residence for a period of time. See Laczkowski, supra, at 163, 496 A.2d at 60.

In the instant case, the facts as testified to show that plaintiff is a specially vulnerable woman in that she has a serious illness, is confined to a wheelchair, and needs daily assistance from her daughter to perform everyday duties such as dressing and washing.

Moreover, plaintiff has no income other than a $350 per month rental from a property and resides in a home which has been customized to accommodate her use of a wheelchair. For example, an outside deck has been installed with a ramp to the driveway for the entrance and exit of plaintiff.

On the other hand, the husband is and has been gainfully employed in Harrisburg, earning approximately $30,000 per
541 year, and he lives in his own apartment in Harrisburg five days per week. He acknowledged *541 that he does not necessarily come home every weekend in that his travel depends on "weather conditions" and his "personal schedule" in Harrisburg.

This court finds that the Superior Court in Laczkowski v. Laczkowski, supra, did not specifically confine its ruling solely to cases in which there is a minor child. Where there is, as in the within case, a woman who is vulnerable because of her serious illness, and her mental and emotional health and welfare is compromised by the ever-present knowledge that defendant can move in and out of the marital home on weekends at defendant's own pleasure and whim, there is good reason to award temporary exclusive possession to said woman.

Thus, in the instant case and under the specific facts as testified to, plaintiff has shown enough to justify granting temporary, exclusive possession of the marital property in plaintiff, during the pending equitable distribution of marital property.

Although the court is convinced that defendant does indeed love his wife and does not want to be divorced from her, the sole issue before this court is whether or not plaintiff is entitled to exclusive possession of marital residence as stated *supra*.

Accordingly, the court grants the petition of the plaintiff for a period not to exceed one year.

ORDER

It is hereby ordered, adjudged and decreed as follows:

(1) The petition of plaintiff for exclusive possession of the marital residence located at North Wyoming Street, Hazleton, Luzerne County, Pennsylvania, is hereby granted for a period not to exceed one year; and

542 *542 (2) The prothonotary of Luzerne County is directed to mail notice of entry of this order to all counsel of record pursuant to Pa.R.C.P. 236.

7 Pa. D. & C. 4th 58 (1990)

McGinnis

v.

McGinnis

No. 1987-810.

Common Pleas Court of Crawford County, Pennsylvania.

May 31, 1990.

James R. Irwin, for plaintiff.

Joseph F. Kulwicki, for defendant.

MILLER, *J.* May 31, 1990.

Plaintiff has filed a petition for special relief asking that she be granted exclusive possession of the marital residence pendente lite.

FACTS

The parties were married several years ago. They separated in March 1987 when the defendant voluntarily moved from the marital residence. The reason for his voluntary withdrawal is not unanimously agreed upon. Plaintiff maintains that defendant had a girlfriend, was out of the house much of the time and came home in the early morning hours. She confronted him after this went on for some time and asked him to find another place to live. He moved out in late March 1987. They have not had physical relations since April 1985. Defendant claims that he did not have a girlfriend and that he left out of total frustration. He wanted companionship which he did not feel his wife was giving him. At all
59 events, he now wishes to move *59 back in. He states two reasons for that. One is that he cannot afford the support payments and the other is that he truly wants to reconcile.

In the meantime, defendant has lived in another part of town. Plaintiff has continued to reside in the marital residence, at first with her two sons and now with just the youngest, a 16-year-old. The older son now attends Grove City College.

The divorce complaint was filed in November 1987. Plaintiff claimed that she would not live with defendant, does not want to reconcile and gives us the impression that she would move out if he moved back in. She even thinks that if he lived in a separate room there would be tension in the house which would not be good for her or her son.

DISCUSSION

Before the various changes in the Divorce Code both parties had equal access to tenancy by the entireties property unless there was a protection from abuse order entered against one of them. Now the court has the power to award the right to reside in the marital residence to one of the parties pendente lite (23 P.S. §401(h)).

The legislature gives us little guidance as to the criteria we should use in making that decision other than the legislative findings and intent that appear in the preliminary provisions of the code. It is the policy of this state to deal with the realities of matrimonial experience, encourage and effect reconciliation especially where children are involved, mitigate harm to spouses and children, use available resources to deal with family problems and effectuate economic justice. 23 P.S. §102.

To some extent we have in this case a clashing of some of these purposes. Defendant maintains that he legitimately
60 has a good-faith intention to bring *60 the family back together. He has talked to plaintiff about that on several occasions, sent her flowers on one occasion and attempted to send flowers on another occasion, and moved back in to start the reconciliation process. If that is the purpose we follow we should permit the husband-defendant to have equal access to the marital residence to effectuate a reconciliation.

If, on the other hand, we take plaintiff at her word, she is not interested in a reconciliation and might move out if he moves back in.

The only reported decision from the appellate courts in Pennsylvania is *Laczkowski v. Laczkowski*, 344 Pa. Super. 154, 496 A.2d 56 (1985).

If one of the parties must be excluded then clearly it should be the husband. The custodial parent and child should remain in the marital residence so that the child's life does not become disrupted. There is authority to bar the husband from the residence once he has left.

Citing the New Jersey Superior Court, the *Laczkowski* court agreed that after the husband had voluntarily removed himself from the marital residence:

"[I]t would be inimical to the best interests and welfare of the plaintiff and the children to permit their lives, both emotionally and physically, to be traumatically invaded by defendant's unilateral decision to resume residency in the marital home. The interests and welfare of the plaintiff and children will be best served by maintaining the status quo ante as initiated by the defendant himself."

The New Jersey Superior Court held that a spouse may be excluded from the marital residence solely because that spouse had been living apart from the residence for a period of time.

61 *61 A particularly instructive portion of the New Jersey court's opinion was:

"[T]he mental and emotional health and welfare of the wife and children should not 'be compromised by the ever-present knowledge that defendant can move in, out and about the marital home with impunity'[.]"

However, the *Laczkowski* court cautions:

"Exclusion of a spouse from the marital home during the pendency of a divorce proceeding is a harsh remedy that will not be awarded cavalierly. The need for such an award must be clearly evident in the facts of each case."

This is not an extreme case where there is a young, unemployed mother with several small children running around the house where to dispossess her would be clearly wrong. Plaintiff in this case is gainfully employed. The 16-year-old son, although not a party to this action, is probably flexible enough to live somewhere else. Yet, it was defendant who left in the first place, because of his greater income he is better able to live somewhere else now and the status quo ought to be maintained. Additionally, defendant's rights and interests in the property can be properly vindicated by fair rental payments which hopefully would be the subject of negotiation or a master's recommendations. *Gee v. Gee*, 314 Pa. Super. 31, 460 A.2d 358 (1983); *King v. King*, 332 Pa. Super. 526, 481 A.2d 913 (1984); *Vuocolo v. Vuocolo*, 42 D.&C. 3d 398 (1987).

We will give plaintiff temporary exclusive possession of the marital residence. We do not think that should be forever. We also do not want to strike the critical blow to defendant's attempt to reconcile if he genuinely wants to do that. Therefore, we will enter an order that will be prospective for three months only. Hopefully, during that period of time
62 something *62 permanent will happen in this case. Either this long-standing divorce should be concluded or the parties should reconcile. Failing all of that we are not foreclosing the right of either party to file another petition for relief under section 401(h) of the Divorce Code at the expiration of the three months.

344 Pa. Superior Ct. 154 (1985)
496 A.2d 56

Linda Claire LACZKOWSKI

v.

Edward Thomas LACZKOWSKI, Appellant.

Supreme Court of Pennsylvania.

Submitted July 19, 1984.
June 7, 1985.
Reargument Denied August 20, 1985.

156 *156 Joseph P. Giovannini, Jr., Wilkes-Barre, for appellant.

Charles A. Shaffer, Wilkes-Barre, for appellee.

Before CAVANAUGH, BECK and TAMILIA, JJ.

TAMILIA, Judge:

This case presents the novel, yet important, issue of whether section 401 of the Divorce Code[1] empowers our courts to enter an Order giving a wife (and child) the right to reside in the **marital residence** until equitable distribution is made, and further ordering the husband to vacate said premises. Since this is an issue of first impression in this Commonwealth, we have reviewed the law of two leading jurisdictions which have addressed this question and conclude that the Order of the lower court should be affirmed.

The appellee, Linda Claire Laczkowski, and the appellant, Edward Thomas Laczkowski, although currently separated, are husband and wife and were married on June 17, 1967. The parties have one child born of this marriage, a daughter, Melissa, age 7. The parties and their minor daughter resided together in the **marital residence** located at 123 Oak Street, Wilkes-Barre, Luzerne County, Pennsylvania, until May 3, 1982, when the appellee, together with
157 Melissa, left the **marital residence** and went to reside at the appellee's *157 parents' home at 42 Dagobert Street, Wilkes-Barre. Appellee and Melissa resided there until May 16, 1983.

The **marital residence** is jointly owned by the parties, in the form of tenancy by the entirety, and is the only real estate owned by them and the single major asset of their **marital** estate. On June 24, 1982, the appellee filed a complaint in divorce against the appellant alleging the no-fault grounds of an irretrievably broken marriage as well as the fault grounds of indignities. The complaint further requested that the ancillary matters of permanent alimony, division of property, attorneys fees, temporary alimony, child support and court costs be determined in the divorce proceedings.

On September 15, 1982, an inventory and appraisement was filed by the appellee pursuant to the Rules of Civil Procedure. On November 19, 1982, the appellee filed a petition for special relief, requesting that she be placed in **possession** of the **marital residence** to the exclusion of the appellant on the basis that she had been subjected to harrassment and mental cruelty by the appellant and, in support thereof, cited section 401(h) of the Divorce Code and Pa.R.C.P. 1920.43(a). Along with the petition for special relief, the appellee filed a rule to show cause why the **possession** of the **marital residence** should not be granted to the appellee. Said petition and rule were duly served upon the appellant, who filed an answer to the petition on November 29, 1982. After a hearing on December 29, 1982, the lower court issued an Order directing the appellant to leave the **marital residence** and granting **exclusive possession** to the appellee. No exceptions were taken to this Order nor was an appeal perfected.

On January 27, 1983, appellant's former counsel withdrew his appearance and present counsel entered his appearance on appellant's behalf. On February 7, 1983, the appellant, by and through his new counsel, filed a motion and rule to show cause why the Order of December 29, 1982 should not be vacated for lack of jurisdiction.

158 *158 On February 22, 1983, a rule to show cause and petition for citation for contempt was filed on behalf of the appellee due to the appellant's failure to relinquish **possession** of the **marital residence**. The rule returnable was set for March 7, 1983, the same day on which the appellant's rule was returnable on his motion to vacate the Order for lack of jurisdiction.

On March 11, 1983, the lower court, after a hearing, denied the appellant's motion to vacate the December 29th Order. The Order of March 11, 1983 was entered of record on March 16, 1983, whereupon the appellant immediately filed an appeal to this Court. The Order of March 11, 1983, reads as follows:

> 'AND NOW, this 11th day of MARCH, 1983, at 10:45 o'clock, A.M., upon consideration of the Defendant's Motion, and after Hearing, this Court finds that the issues raised by the Defendant in his Motion to Vacate, could have been raised by the Defendant at the time that the hearing was held on the Plaintiff's Petition for Special Relief, and that they were not raised at that time, and not having raised them previously, the Defendant is barred from raising them now.
>
> FURTHER, even if this Court were to consider the issues now raised by the Defendant, the Court is of the opinion that the Order entered December 29, 1982, was proper under all of the circumstances; and it is hereby ORDERED that the Defendant's Motion to Vacate said Order is DENIED.
>
> BY THE COURT, /s/ Brominski, J.'

On March 10, 1983, appellant filed a petition for stay and supersedeas of the December 29, 1982 Order, pending the instant appeal. Said petition was denied and on March 11, 1983, after a hearing, the lower court found the appellant in contempt of the December 29, 1982 Order awarding appellee the right to live in the family home to the appellee. On
159 May 12, 1983, after a hearing, the lower court entered a *159 further Order which directed the appellant to purge himself of his contempt of the December 29, 1982 Order by 9:00 a.m. on May 16, 1983. Additionally, the Order stated that upon failure of the appellant to purge himself of his contempt, as provided above, the Sheriff of Luzerne County, upon request by the appellee and without further hearing, would be directed to apprehend and incarcerate the appellant in the Luzerne County Prison, until such time as the appellant assured the court that he had purged himself of his contempt.

Appellant argues (1) that the lower court lacked jurisdiction under section 401 of the Divorce Code and Pa.R.C.P. 1920.43(a) to dispossess the appellant from the **marital residence** and grant **exclusive possession** to the appellee; and (2) that because the lower court lacked jurisdiction and authority to issue such an order, the appellant cannot be held in contempt of court for noncompliance with an invalid order.

At the outset, we note that appellant has phrased the above issues in the context of a jurisdictional attack when, in fact, no such question exists. This appeal stemmed from a divorce action which the lower court clearly had jurisdiction to hear. The question concerning whether the court could dispossess the appellant from the **marital residence** and grant **exclusive possession** to the appellee during the pendency of the divorce proceedings is *not* a jurisdictional matter; rather, it involves the judicial interpretation of section 401 of our Divorce Code. Rephrased, the issue before us is whether the lower court correctly applied section 401 of the Divorce Code. Consequently, we are not concerned with subject matter jurisdiction, which is limited to the question of whether a court has the power to determine controversies of the general class to which the case belongs. *See* Nagle v. American Casualty Co., 317 Pa.Super. 164, 463 A.2d 1136 (1983). Our review of the record leads us to conclude that appellant, through his new counsel, phrased the
160 above issues in this context because an attack on the court's subject matter jurisdiction can be *160 raised at any time and cannot be waived. Encelewski v. Associated-East Mortgage Co., 262 Pa.Super. 205, 396 A.2d 717 (1978). Obviously, this was done in direct response to prior counsel's failure either to take exceptions to the December 29, 1982 Order or to perfect an appeal from that Order. While there is no Pennsylvania case on point regarding a

temporary award of the **possession** of the **marital residence**, this Court has previously held that the failure to file exceptions to an award of alimony *pendente lite* or interim counsel fees constitutes a waiver. *See, e.g., Sutliff v. Sutliff*, 326 Pa.Super. 496, 474 A.2d 599 (1984); *Carangelo v. Carangelo*, 321 Pa.Super. 219, 467 A.2d 1333 (1983); *Commonwealth ex rel. Dewalt v. Dewalt*, 309 Pa.Super. 275, 455 A.2d 156 (1983). *See also* Pa.R.C.P. 1038, 1920.1 (b), 1920.52 and 1920.55.

However, we believe that a finding of waiver would be unfair in the context of the present case as this area of the law was unsettled during the time period wherein appellant's counsel failed to file exceptions. While *Dewalt* held that the failure to file exceptions to an Order awarding alimony *pendente lite* constitutes a waiver, we emphasize that it was not filed until January 21, 1983, more than three weeks after the December 29, 1982 Order. Thus, when the final order awarding the temporary use and **possession** of the **marital** home was entered on December 29, 1982, there had been no judicial pronouncement which specifically required the filing of exceptions to an award of alimony *pendente lite* or interim counsel fees (let alone an award involving the temporary use and **possession** of the **marital** home).[2] Due to the uncertainty in the existing law at that time, we conclude that there are sufficient reasons for finding no
161 waiver here. *See Commonwealth ex rel. Nixon v. Nixon*, 321 Pa.Super. 313, 458 A.2d 976 (1983) (no waiver *161 since at time final support order was entered there existed no judicial pronouncement specifically requiring the filing of exceptions); *Jones v. State Automobile Insurance Association*, 309 Pa.Super. 477, 455 A.2d 710 (1983) (failure to file exceptions did not constitute waiver due to the considerable confusion in the existing law). *See also Pomerantz v. Goldstein*, 479 Pa. 175, 387 A.2d 1280 (1978); *General Mills, Inc. v. Snavely*, 203 Pa.Super. 162, 199 A.2d 540 (1964); *Werts v. Luzerne Borough Authority*, 15 Pa. Commw.Ct. 631, 329 A.2d 335 (1974); Pa.R.C.P. 126; Pa.R. A.P. 105.

Moreover, on January 27, 1983, appellant's former counsel withdrew his appearance and present counsel entered his appearance on appellant's behalf. While appellant seems to have a propensity for experiencing difficulty with his attorneys,[3] we are concerned that this incompatibility could have motivated prior counsel's failure to either take exceptions to or appeal the December 29, 1982 Order. Finally, as we previously stated, this is an issue of first impression which involves the welfare of a child; we believe that the necessity of addressing the merits of this appeal is evident.[4] We find no waiver in the instant case because of the above reasons. However, we wish to point out that in future cases, counsel must follow the dictates of *Sutliff, Carangelo* and *Dewalt, supra*, which require the filing of exceptions to preserve issues on appeal.

162 *162 Turning now to the issue of whether the lower court properly awarded the **marital residence** to the wife, we point out the broad equitable powers conferred upon courts pursuant to section 401(c) of the Divorce Code, which provides:

> c. In all matrimonial causes, the court shall have full equity power and jurisdiction and may issue injunctions or other orders which are necessary to protect the interests of the parties or to effectuate the purposes of this act, and may grant such other relief or remedy as equity and justice require against either party or against any third person over whom the court has jurisdiction and who is involved in or concerned with the disposition of the cause.

Moreover, section 401(h) specifically states:

> h. The court may award to one, each, or both of the parties the right to live in the family home for reasonable periods of time.

Viewing these two sections together, we hold that the lower court had the authority to temporarily award the **marital residence**, pending equitable distribution of **marital** property, to a spouse having physical custody of a minor child. Our conclusion is supported by section 102 of the Divorce Code which states in pertinent part:

> § 102. Legislative findings and intent

> (a) The family is the basic unit in society and the protection and preservation of the family is of paramount public concern. Therefore, it is hereby declared to be the policy of the Commonwealth of Pennsylvania to:
>
> (1) Make the law for legal dissolution of marriage effective for dealing with the realities of matrimonial experience.
>
> (2) Encourage and effect reconciliation and settlement of differences between spouses, especially where children are involved.
>
> (3) Give primary consideration to the welfare of the family rather than the vindication of private rights or the punishment of matrimonial wrongs.
>
> 163 *163 (4) Mitigate the harm to the spouses and their children caused by the legal dissolution of the marriage.
>
> (5) Seek causes rather than symptoms of family disintegration and cooperate with and utilize the resources available to deal with family problems. . . .

Our conclusion is supported by the case law of two states whose divorce statutes are substantially similar to our Divorce Code. In the recent New Jersey case of Degenaars v. Degenaars, 186 N.J.Super. 233, 452 A.2d 222 (1982), the New Jersey Superior Court held that a spouse may be excluded from the **marital residence** solely because that spouse had been living apart from the **residence** for a period of time. The *Degenaars* court noted that it had the power to grant the relief sought by the wife through its inherent equitable jurisdiction. In *Degenaars*, the husband voluntarily removed himself from the **marital** home and for 17 months, the wife and children planned and lived their lives in the absence of the husband as an overnight resident. The *Degenaars* court emphasized that it was faced with a *pendente lite* situation, and thus, the mental and emotional health and welfare of the wife and children should not "be compromised by the ever-present knowledge that defendant can move in, out and about the **marital** home with impunity[.]" Degenaars, supra, 186 N.J.Super. at 235, 452 A.2d at 223. Citing its *parens patriae* jurisdiction as protecting the interests of children, especially in matrimonial litigation, the *Degenaars* court noted that the legislature has vested the trial courts with broad equitable powers during the pendency of matrimonial actions, to make such orders "as to the care . . . and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just . . ." N.J.S.A. 2A:34-23. *See* Davis v. Davis, 184 N.J.Super. 430, 446 A.2d 540 (1982).

The *Degenaars* court found that:

> . . .[i]t would be inimical to the best interests and welfare of the plaintiff and the children to permit their
> 164 lives, both emotionally and physically, to be traumatically invaded by *164 defendant's unilateral decision to resume residency in the **marital** home. The interests and welfare of the plaintiff and children will be best served by maintaining the *status quo ante* as initiated by the defendant himself.

Degenaars, supra at 235, 452 A.2d at 223.

Another instructive case is Pitsenberger v. Pitsenberger, 287 Md. 20, 410 A.2d 1052, *appeal dismissed*, 449 U.S. 807, 101 S.Ct. 52, 66 L.Ed.2d 10, *reh'g denied*, 449 U.S. 1028, 101 S.Ct. 601, 66 L.Ed.2d 491 (1980), where the court ruled against the husband's due process challenge to an award of temporary **exclusive possession** of the **marital** home to one spouse without requiring said spouse to show that grounds exist for a divorce. The *Pitsenberger* court noted that the trial court had referred the *pendente lite* issues to a master, who recommended that the wife, who was given *pendente lite* custody of the parties' five children, also be given *pendente lite* **possession** of the family home so that the children could continue to attend their former school without being forced to travel a greater distance. The authority upon which the *Pitsenberger* court issued the use and **possession** award of the family home to the wife is section 3-6A-06 of the Courts and Judicial Proceedings Article from the Annotated Code of Maryland which, in relevant part, provides:

> (a) The authority conferred by this section shall be exercised to permit the children of the family to continue to live in the environment and community which is familiar to them and to permit the continued occupancy of the family home and **possession** and use of family use personal property by a spouse with custody of a minor child who has a need to live in that home. . . . In exercising its authority under this section, the court shall consider each of the following factors:
>
> (1) The best interests of any minor child;
>
> (2) The respective interest of each spouse in continuing to use the family use personal property or occupy or use the family home or any portion of it as a dwelling place;
>
> 165 *165 (3) The respective interest of each spouse in continuing to use the family use personal property or occupy or use the family home or any part of it for the production of income;
>
> (4) Any hardship imposed upon the spouse whose interest in the family home or family use personal property is infringed upon by an order issue under this section. . . .

In *Pitsenberger, supra*, 287 Md. at 31, 410 A.2d at 1058, the Maryland Court of Appeals lucidly stated that the legislative purpose and intent of section 3-6A-06 in the context of a *pendente lite* use and **possession** award is to give "special attention to the needs of minor children to continue to live in a familiar environment" and "to avoid uprooting the children from the home, school, social and community setting upon which they are dependent." *Id. See also, Kennedy v. Kennedy*, 55 Md.App. 299, 462 A.2d 1208 (1983); *Strawhorn v. Strawhorn*, 49 Md.App. 649, 435 A.2d 466 (1981), *vacated on other grounds*, 294 Md. 322, 450 A.2d 490 (1982).

We adopt the rationale of *Degenaars* and *Pitsenberger*, and hold that the lower court acted properly in awarding temporary use and **possession** of the **marital** home to the appellee.

Appellant's claim that Pa.R.C.P. 1920.43(a), which is a procedural arm of section 403(a) of the Divorce Code, precludes the award of the **marital** home in the instant case since the appellee did not allege that the property would be sold, removed, alienated or encumbered in any way, has no bearing on the issues before us. Appellant's claim is belied by the manifest language of section 102(a), which, as we have already indicated, is concerned with preserving the family unit and protecting the welfare of children in **marital** disputes. Appellant's attempt to override such a humane policy by arguing that our Divorce Code can only grant relief when there is harm to the *property* involved is contrary to the dictates of our Divorce Code, as well as being offensive to the societal needs of children caught in the
166 crossfire of domestic disputes. While common law *166 jurisdictions have traditionally treated property rights as both unique and omnifarious, we believe that in the instant case such rights must yield to the common law doctrine of *parens patriae*, the goal of which is to provide the child with a permanent home. Since the cases relied on by the appellant involve different situations, such as the award of the **marital** home as a form of child support or permanent alimony after a divorce and pursuant to equitable distribution, we need not consider them as they are totally inapposite.

Furthermore, appellant's contention that the Protection From Abuse Act, 35 P.S. § 10181 *et seq.*, preempts any alternative procedure by which one spouse may dispossess another spouse from the **marital residence** is untenable. Where a conflict exists between two statutes, the Superior Court must construe the two, if possible, so that both may be given effect. *Young v. Young*, 320 Pa.Super. 269, 467 A.2d 33 (1983), *rev'd on other grounds*, 507 Pa. 40, 488 A.2d 264 (1985). A protection from abuse proceeding is quasi-criminal in nature and seeks to protect the abused spouse and children from physical violence, whereas the relief awarded in the instant case is equitable in nature and is concerned with stabilizing the family unit. As such, this statute must be construed in *pari materia* with the Divorce Code, since they were enacted for different but not incompatible purposes. Since recourse was not had to a proceeding under the Protection From Abuse Act, we find that it has no bearing on our decision.

The equitable powers of the courts under our Divorce Code are extremely broad, and since the Code unequivocally recognizes the right of one spouse to live in the family **residence** after divorce, there is no discernible reason for

precluding such an award in a *pendente lite* situation. While our decision may appear to have wide reaching ramifications, we are mindful that the exclusion of a spouse from the **marital** home during the pendency of a divorce
167 proceeding is a harsh remedy that will not be awarded *167 cavalierly. The need for such an award must be clearly evident in the facts of each case.

Our review of the record leads us to conclude the lower court acted properly in ruling that the appellee, Linda Claire Laczkowski, met her burden of proof regarding the petition for special relief wherein she alleged:

> 1. The Plaintiff and the Defendant are the owners of a family home, which home is known as 123 Oak Street, Wilkes-Barre, Luzerne County, Pennsylvania.
>
> 2. The Plaintiff and the Defendant, and their minor daughter, resided together in the family home, prior to May 3, 1982, at which time, the Defendant engaged in such harassment and mental cruelty and intimidation, and threats of violence, as to cause Plaintiff and her minor daughter, to leave the family home.
>
> 3. The Defendant, since May 3, 1982, has had **possession** of the family home, and has excluded the Plaintiff from the family home.
>
> 4. The Plaintiff, and her minor daughter, are residing with the Plaintiff's parents, and have been residing with the Plaintiff's parents since May 3, 1982.
>
> 5. The present situation is not conducive to a harmonius home life for the Plaintiff and her minor daughter; nor is it fair to the Plaintiff's parents. The situation is progressing to the point where it will no longer be tolerable for the Plaintiff and her minor daughter, and the Plaintiff's parents, to share the home of the Plaintiff's parents.
>
> 6. The Plaintiff has tried to rent suitable living accommodations for herself and her minor daughter, but she has been unsuccessful because of her lack of a credit rating, and because of insufficient income.
>
> 7. The Defendant earns an excess of Twenty-three Thousand ($23,000.00) Dollars a year; he can easily rent an apartment, or he can live with his father, who lives alone and has adequate room for the Defendant.
>
> WHEREFORE, the Plaintiff prays this Honorable Court to enter an Order, awarding to the Plaintiff, the
> 168 right to live in the family home until such time as this Court *168 makes equitable distribution of the **marital** property of the Parties.

(Appellee's Petition for Special Relief, filed November 19, 1982).

Accordingly, the March 11, 1983 Order denying appellant's motion to vacate the December 29, 1982 Order is affirmed. [5]

BECK, J., dissenting.

BECK, Judge, dissenting:

I respectfully dissent from the majority's holding that appellant has properly appealed to this court. I would quash the instant appeal on the ground that the trial court's order of December 29, 1982,[1] was interlocutory and non-appealable. [2] Moreover, even if the trial court's order had been final and appealable, I would nevertheless quash the present appeal because appellant did not timely appeal the December 29 order.

Where, as in the case sub judice, an order does not terminate the parties' litigation or resolve the parties' entire dispute, the order may be deemed final and appealable only if it bears the following three aspects of finality: "'(1) it is
169 separable from and collateral to the main cause of action; *169 (2) the right involved is too important to be denied

review; and (3) the question presented is such that if review is postponed until final judgment in the case, the claimed right will be irreparably lost.'" *Sutliff v. Sutliff*, 326 Pa.Super. 496, 499, 474 A.2d 599, 600 (1984) (citation omitted). I conclude that the third aspect of finality is not satisfied by the trial court's December 29 order.

It is necessary to construe the mandate of *Sutliff* strictly. For this court to do otherwise would result in an undue number of piecemeal appeals from a single case. "[I]t would permit the party with greater resources to exhaust the resources of the party with less by taking repeated appeals." *Id.*, 326 Pa.Superior Ct. at 504, 474 A.2d at 603 (Beck, J., dissenting). An appeal of an order stays the entire proceeding. Appeals from interim orders create undue delay in the ultimate resolution of the parties' **marital** and economic status. "Justice is best served and harm to both parties is minimized by proceeding directly and expeditiously to a final disposition of the entire case at which a complete and fair resolution of all the economic issues may be made." *Id.*, 326 Pa.Superior Ct. at 504, 474 A.2d at 603 (Beck, J., dissenting).

The Divorce Code[3] empowers a court to adjust the parties' ultimate financial settlement (equitable division and distribution of **marital** property; permanent alimony) to reflect interim relief afforded either party during the pendency of the divorce proceedings. *Sutliff* (Beck, J., dissenting). Accordingly, an award of interim relief such as temporary occupancy of the **marital residence**, does not irreparably disadvantage the non-receiving party. *Id.* Since appellant's claimed right will not be irretrievably lost if review of the December 29 order is postponed until final disposition of the parties' divorce action, the December 29 order does not meet all three criteria of finality and is an interlocutory, non-appealable order.

However, assuming arguendo that the December 29 order was final and appealable as the majority holds, I would still
170 *170 quash the instant appeal. The majority states, and I agree, that appellant's petition to vacate the December 29 order constituted an effort to circumvent appellant's failure to file either timely exceptions to or a timely notice of appeal from the December 29 order. For the following reasons, I conclude that appellant's failure to file a timely notice of appeal from the December 29 order requires us to quash this appeal.

Citing *Commonwealth ex rel. Nixon v. Nixon*, 321 Pa.Super. 313, 458 A.2d 976 (1983); *Jones v. State Automobile Insurance Association*, 309 Pa.Super. 477, 455 A.2d 710 (1983); *Pomerantz v. Goldstein*, 479 Pa. 175, 387 A.2d 1280 (1978), and *General Mills, Inc. v. Snavely*, 203 Pa.Super. 162, 199 A.2d 540 (1964), the majority contends that appellant's failure to file exceptions to the December 29 order should not constitute a waiver of issues for appellate review. My reading of *Nixon*, *Jones*, *Pomerantz*, and *General Mills, Inc.* persuades me that the case at bar is sufficiently distinguishable to necessitate a different result.

In *Nixon* and *Jones* the respective appellants did not file exceptions to the challenged court orders, but the appellants did file timely notices of appeal from the orders in question. In *Pomerantz* the appellant timely filed a document contesting a court order, but the document was captioned motion for a new trial rather than exceptions. Finally, in *General Mills, Inc.* the appellant duly filed an answer, new matter, and counterclaims containing contradictory averments, but his pleadings were not accompanied by a Pa.R.C.P. No. 1024 verification of inconsistent allegations. The common thread in *Nixon*, *Jones*, *Pomerantz*, and *General Mills, Inc.* is that the appellant in each case took timely, affirmative action to assert his viewpoint even though the action in each instance was not in strict accordance with the applicable procedural rules. Most similar to the case sub judice are *Nixon* and *Jones* wherein the appellants neglected to file exceptions to contested court orders. Notably, however, the appellants in *Nixon* and *Jones* did file prompt
171 notices of appeal from the disputed *171 orders whereas the instant appellant permitted the appeal period to expire before he took any action challenging the December 29 order.

While the "rules shall be liberally construed to secure the just, speedy and inexpensive determination of every matter," Pa.R.A.P. 105(a), I would not liberally interpret the rules to justify an appellant's complete inaction. Since appellant wished to treat the December 29 order as a final and appealable order, he should, at the very least, have filed a notice of appeal from same. *See Nixon; Jones.* Nor am I convinced that a different result should obtain because appellant later filed a petition to vacate the December 29 order.[4] Appellant's belated challenge to the December 29 order cannot serve to enlarge the time period for appealing the December 29 order. *See* Pa.R.A.P. 105(b).

Therefore, I would in any event quash the appeal now before us.

[1] Act of April 2, 1980, P.L. 63, No. 26, §§ 101-801; 23 P.S. §§ 101-801 (Supp. 1984).

[2] The Order from which this appeal was brought is final since: "(1) it is separable from and collateral to the main cause of action; (2) the right involved is too important to be denied review; and (3) the question presented is such that if review is postponed until final judgment in the case, the claimed right will be irreparably lost." *Sutliff v. Sutliff, supra*, 326 Pa.Superior Ct. at 499, 474 A.2d at 600, quoting *Pugar v. Greco*, 483 Pa. 68, 73, 394 A.2d 542, 544-45 (1978).

[3] The record discloses that appellant's second counsel also withdrew from representing him due to their incompatability and appellant's failure to pay legal fees.

[4] The dissent would quash the instant appeal since appellant failed to file a timely notice of appeal from the December 29, 1982 Order. *See* Pa.R.A.P. 105(b); *Hesson v. Weinrebe*, 288 Pa.Super. 216, 431 A.2d 1015 (1981) (appellate courts are without authority to enlarge time period for filing notice of appeal). However, since no exceptions were taken to the December 29, 1982 Order, it was *not* immediately appealable. In light of the ambiguity surrounding the appealability of the instant Order, (see page 59 text), we feel compelled to reach the merits of this appeal notwithstanding its unusual procedural posture. We conclude that this result is in the interests of judicial economy since the issues have been briefed by both parties and argued before this Court. Pa.R.A.P. 105(a).

[5] Appellant contends that he cannot be held in contempt of court for noncompliance with a court order since the court lacked jurisdiction and authority to issue said order. However, since we have already concluded that the lower court had adequate jurisdiction pursuant to the Divorce Code to entertain this matter, we need not address this issue as it is totally meritless.

[1] The trial court's December 29, 1982, order allowed appellee and the parties' daughter to reside in the **marital residence** during the pendency of the divorce action.

[2] I note that, technically, the instant appeal is from the trial court's order of March 11, 1983, which denied appellant's petition to vacate the court's previous order of December 29, 1982. That is, appellant timely filed a notice of appeal from the trial court's order of March 11 but did not file a notice of appeal from the trial court's order of December 29. However, my analysis of the interlocutory nature of the December 29 order applies equally to the trial court's March 11 order. See further discussion *infra* of appellant's petition to vacate the December 29 order.

[3] Act of April 2, 1980, P.L. 63, 23 P.S. §§ 101-801.

[4] Appellant's petition to vacate was filed well after the expiration of the period for appealing the December 29 order.