Bisel's PA FAMILY LAW UPDATE

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ABUSE

Credibility of Witnesses – Preponderance of the Evidence to Establish Abuse – 23 Pa.C.S. §6102(a)(5)

In *Cherevka v. Pitchford*, the Superior Court, in a Non-Precedential Memorandum Decision, ruled that in order to

establish abuse under 23 Pa.C.S. §6102(a)(5), all that is required is that the petitioner establish by a preponderance of the evidence that she is in "reasonable fear of bodily injury." The "imminent and serious" requirement is necessary to support a finding of abuse only under §6102(a)(2).

Daughter filed a PFA Petition against her biological mother. Daughter testified mother had repeatedly showed up at her house despite being instructed by police not to do so. Daughter testified that mother had sent numerous emails and repeatedly called her home, her husband's parents, other family members, and her employer. Mother had called her house up to eight times in a single day. Mother also came to her house, despite knowing of daughter's desire to have no contact with her, causing daughter to feel threatened.

The PFA court determined that daughter was credible, and further, that it did not believe mother's continued insistence that she had not threatened or harassed her daughter. Thus, the PFA court granted daughter a final PFA order.

Mother appealed, challenging the sufficiency of the evidence in support of the final protection from abuse order. Mother asserted that the trial court erred in granting daughter's PFA petition because she failed to establish abuse as that term is defined under §6102(a)(5). Mother argued that the trial court was required to find that daughter was in reasonable fear of bodily injury that is both imminent and serious.

The Superior Court disagreed and affirmed, noting that daughter need only establish her case by a preponderance of the evidence to be entitled to relief. The preponderance of the evidence standard is defined as the greater weight of the evidence, i.e., to tip a scale slightly is the criteria or requirement for preponderance of the evidence.

The court found that in order to establish abuse under §6102(a)(5) ("Knowingly engaging in a course of conduct or repeatedly committing acts towards another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury), all that is required is that the petitioner establish by a preponderance of the evidence that she is in reasonable fear of bodily injury. The eminent and serious requirement is necessary to support a finding of abuse only under §6102(a)(2).

Here the trial court properly credited daughter's testimony that mother had repeatedly and incessantly telephoned her house, family and place of employment, and that she had repeatedly shown up at her residence without her permission to do so. The court further properly credited daughter's testimony that mother's course of conduct and repeated acts placed her in reasonable fear of bodily injury.

The court concluded that the record amply supported the trial court's conclusion that daughter established, by a preponderance of the evidence, that mother engaged in a course of conduct that placed daughter in reasonable fear of bodily injury under §6102(a)(5).

Cherevka v. Pitchford, Memorandum Decision, No. 1753 WDA 2015 (Pa. Super. May 27, 2016). Panella, J. 5 pp.

Expungement of PFA Records – Article

In *"Expungement of PFA Records an Important But Often Overlooked Tool,"* Aaron Weems discusses expungement for cases filed under the Protection from Abuse Act.

The author notes that Pennsylvania's appellate courts have established the availability of expungement under certain conditions, referring to *P.E.S. v. K.L.*, 720 A.2d 487 (Pa. Super. 1998), and *Carlacci v. Mazaleski*, 798 A.2d 186 (Pa. 2002). These cases provide the authority needed to pursue expungement for those PFA cases where appropriate.

Weems. ***"Expungement of PFA Records an Important But Often Overlooked Tool."*** 39 Pennsylvania Law Weekly 438 (May 10, 2016). 1 p.

Three-Year PFA Order – 23 Pa.C.S. §6108

In *Bellas v. Gaughan*, the Superior Court, in a Non-Precedential Memorandum Decision, held that while three years, the maximum allowable time period under 23 Pa.C.S. §6108(b), is lengthy, the trial court had broad discretion to make that determination.

The trial court issued a final PFA order, prohibiting defendant from having any contact with plaintiff for a period of three years. Defendant appealed, arguing that the trial court erred in directing a three-year duration given the lack of evidence of any potential future abuse and the two-month length of the parties' relationship.

The Superior Court affirmed. The court rejected defendant's argument that the trial court erred in granting a final PFA order in this case because the record was devoid of any evidence whatsoever that there was any ongoing abuse or risk of potential future abuse. Defendant argued that there was no ongoing abuse and no risk of future abuse, and therefore the PFA order here was a punishment for past transgressions, which is prohibited.

The court agreed with the trial court that "if we did or didn't enter a PFA order based on the defendant's telling us it's never going to happen again, we wouldn't enter any. But that's not the standard." The trial court listened to the testimony presented by both parties and determined that three years was an appropriate time frame.

Bellas v. Gaughan, Memorandum Decision, No. 1721 MDA 2015 (Pa. Super. May 24, 2016). Strassburger, J. 9 pp.

CUSTODY & VISITATION

Civil Contempt – Sanctions – Ability to Pay

In *V.E.B. v. A.L.W.*, the trial court held that mother did not have an absolute duty to prove father's ability to pay the sanctions imposed.

Defendant father appealed the trial court's order entered after an evidentiary or rehearing on plaintiff mother's Emergency Petition for Civil Contempt for Disobedience of Custody Order. The trial court found mother proved that father had willfully violated the terms of the Agreed Custody Order, therefore, the trial court ordered father to pay counsel fees in the amount of $1100 plus a fine in the amount of $1000 for a total of $2100.

Father conceded that he willfully violated the duties he voluntarily assumed pursuant to the Agreed Custody Order. In spite of that concession, father argued that mother was required to prove his ability to pay $2100 before sanctions could be entered against him.

The trial court disagreed and held that mother did not have an absolute duty to prove father's ability to pay the sanctions imposed. The court noted that that argument was rejected in *Hopkins v. Byes*, 954 A.2d 654 (Pa. Super. 2008), where the lower court found the appellant to be in contempt of the custody order and ordered her to pay counsel fees. Appellant argued on appeal that the matter was controlled by *Hyle v. Hyle*, 868 A.2d 601 (Pa. Super. 2005), and that the trial court erred by imposing sanctions in the form of a $500 attorney fee without first assessing her ability to pay. The Superior Court rejected that argument and distinguished *Hyle* as a case involving noncompliance with the support order, as opposed to a contempt finding for failure to comply with an Order addressing visitation and custody. The Superior Court affirmed the trial court's imposition of monetary sanctions, holding that it was not a condition precedent that the lower court first ascertain appellant's ability to pay.

V.E.B. v. A.L.W., 133 Montgomery Co. L. Rep. 229 (C.C.P. January 6, 2016). Barrett, J. 2 pp.

Grandparents – Presumption in Favor of Fit Parent – *Hiller v. Fausey* Examined

In *R.T. v. J.T. v. C.V.*, the Superior Court, in a Non-Precedential Memorandum Decision, held that in a custody action between a parent and a third-party, the scale is automatically tipped in favor of the parent and a third-party cannot prevail unless he or she adduced sufficient evidence to overcome the presumption and reorient the scale in his or her favor. Here, grandmother satisfied her burden of proving that her continued presence in the child's life was so beneficial so as to equalize the presumption in favor of mother and tilt the scale in her favor.

At issue in this case was whether grandmother met her burden in overcoming the presumption in favor of a fit parent (mother), as outlined in *Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006). For the first 26 years of her life, mother resided with her mother, grandmother. The evidence reflected that the natural father had played no part in the child's life and did not appear for any of the proceedings leading up to the trial. Mother and father were never married, had never resided together and had virtually no relationship since the birth of the child.

Mother was the primary caregiver of the child, but she also worked at a casino and would be away from grandmother's residence for significant periods of time for purposes of work and also spent overnights after work with her fiancé, with whom she now lived. When mother was not available, grandmother took over the caretaking responsibilities for the child, even to the extent of taking the child to work with her. The testimony also reflected that grandmother would handle other responsibilities for the child such as doctors' visits and matters at pre-school.

After mother moved with the child from grandmother's residence, she terminated grandmother's contact with the child.

The Superior Court affirmed the trial court's decision that grandmother overcame the presumption in favor of mother, explaining that in a custody action between a fit parent and a third-party (here, grandparent), the scale is automatically tipped in favor of the parent and a third-party cannot pre-

vail unless he or she adduced sufficient evidence to overcome the presumption and reorient the scale in his or her favor. *Hiller* requires only that the trial court consider the evidence in light of the presumption and determine if the grandparent can overcome it and demonstrate that the grant of partial custody is in the child's best interest.

The *Hiller* court outlined several components the trial court must consider: the frequency of the grandparent's contact with the child; the strength of the grandparent-child relationship; the parent's likelihood to permit continued contact; whether partial custody was in the child's best interest despite the parent's preference; and whether partial custody would interfere with the parent-child relationship. The *Hiller* court rejected the requirement to demonstrate either parental unfitness or that the child would suffer harm if the request for partial custody was denied.

The trial court reviewed the evidence adduced at trial with due consideration for the presumption in mother's favor, and it determined that grandmother met her burden in overcoming that presumption. The trial court concluded that the child shared a close relationship with grandmother based upon the latter's acceptance of many other responsibilities connected with raising the child while mother was unavailable. Grandmother accompanied the child to doctors' appointments and managed her schooling as mother's surrogate. Similarly, she cared for the child while mother was unavailable due to either employment or her social schedule.

The court agreed with the trial court that grandmother had been an integral part of the child's life for five years, and it stressed that preserving the grandparent-child relationship was in the child's best interest. The court concluded that there was no evidence that the award of partial custody for 37 days a year would interfere with the parent-child relationship. The court concluded that despite mother's protestations to the contrary, the trial court's *Hiller* analysis addressed all of the necessary components. Accordingly, grandmother satisfied her burden of proving that her continued presence in the child's life was so beneficial so as to equalize the presumption in favor of mother and tilt the scale in her favor.

R.T. v. J.T. v. C.V., Memorandum Decision, No. 1634 WDA 2015 (Pa. Super. May 19, 2016). Bowes, J. 13 pp.

Modification – Relocation to Florida Denied

In *D.K.D. v. A.L.C.,* the Superior Court ruled that the trial court erred in granting mother's petition to relocate with the parties' child to Florida, where mother's actions evidenced that she intended to relocate because of her personal desire to relocate to her home state.

Father appealed from the order of the trial court granting the motion of mother to relocate to Florida with the parties' child, who suffered from autism, specifically, Pervasive Development Disorder. The child was prescribed 30 hours per week of intense outpatient therapy, most of which was provided in the marital home. Stability and routine were paramount to the child's continued development. The parties divorced in 2015.

The trial court granted the parties shared legal custody and mother primary physical custody, while mother continued to reside in the marital residence. Father received periods of physical custody during the evening in the marital residence.

Father petitioned to modify the custody order, seeking longer periods of physical custody, more specific vacation and holiday schedules and better enforcement of this custody rights. Mother countered with notice of proposed relocation to Florida said that she and the child could reside with her mother (maternal grandmother).

After trial, the trial court denied mother's proposed relocation. The court found that the only factor that mitigated in favor of relocation concerned the anticipated enhancement to mother's quality of life. The remaining factors, including consideration of the child's quality of life, either weighed against relocation, were determined to be neutral, or were inapplicable. The trial court found that, while mother demonstrated that relocating to Florida would enhance her general quality of life, she failed to meet her burden that relocation was in the child's best interest.

Mother subsequently filed a motion for reconsideration, presenting new evidence of mother's acceptance of new employment as a claims assistant at the Department of Veterans Affairs and had devised an interim plan for maternal grandmother to care for the child in the marital residence while she began immediate employment. Mother continued that she intended to purchase a home in Florida in anticipation of the trial court's reconsideration of this denial of her prior petition for relocation. Mother asserted that the employment offer was a significant factor that was not of record during the prior hearing.

After another hearing, the trial court issued amended findings of fact and entered a custody order granting mother's relocation request. The court further found that the fact that mother was the party more likely to attend to the child's daily needs outweighed the fact of mother's lack of cooperation with father's attempts to foster a relationship with the child.

Father appealed, arguing that the trial court employed a gender bias in favor of mother, and failed to utilize gender-neutral considerations when addressing the best interest factors under 23 Pa.C.S. §5328(a), and §5337(h). Father emphasized that Pennsylvania abolished the tender years doctrine, which formed a preference in favor of mothers of preschool-aged children, and that when both parents are determined to be competent, equally-shared physical custody is favored. Father also argued that the trial court abused its discretion in finding that the relocation factors favored mother and specifically in finding that mother met her burden to prove that relocation was in the child's best interest.

The Superior Court reversed and remanded. The court first rejected father's assertion that the trial court did not issue a gender-neutral ruling, finding that father failed to present any evidence that the trial court was biased against him or operated with a presumption in favor of mother.

However, the court agreed with father that the trial court abused its discretion in finding that the factors favored relocation. As the custodial parent seeking to relocate with the child, mother had the burden of establishing that relocation was in her son's best interest. Here, the trial court initially found that mother failed to satisfy her burden of proof. However, based upon mother's motion for reconsideration, the trial court re-opened the record, and revisited the issue in light of mother's additional evidence that she had obtained employment in Florida and that maternal grandmother had committed to purchase mother a home. The trial court then reversed its course and determined that mother, in fact, satisfied her burden of proof. The court agreed with father that while mother demonstrated that moving to Florida would enhance her general quality of life, she failed to prove that relocation was in the child's best interest under the ten factors listed in §5337(h).

The court found that the trial court improperly determined that the child's schedule and routine would be similarly disrupted, regardless of who was granted primary physical custody. The court noted that father had indicated that he planned to move to keep the child in the same school, and the child would have access to the same medical care, friends and extracurricular activities if custody was granted to father. The trial court failed to acknowledge that remaining in Pennsylvania would limit the disruptions to the child's routines, friendships, and existing athletic and cultural activities. Therefore, the trial court erred in concluding that, regardless of location, the disruption of the child's stability and routine was a *fait accompli*.

The court ruled that the trial court incorrectly determined that relocation would be in mother's best interest, finding that mother's primary motivation in relocating was her personal desire to return to her home state of Florida. In contrast to mother's concern for the child, mother's actions confirmed that her desire to return to Florida, rather than realize the child's best interest, was her paramount consideration. The court pointed to the fact that mother had sold the marital home and purchased a new residence in Florida prior to the trial court's ruling and focused her job search largely on positions in Florida. The court held that this indicated that mother had no intention of living in Pennsylvania.

On remand, the court directed the trial court to fashion an appropriate custody order that accounted for the child's return to Pennsylvania in father's primary custody.

D.K.D. v. A.L.C., ____ A.3d ____, 2016 PA Super 123 (Pa. Super. June 15, 2016). Bowes, J. 28 pp.

Relocation to Toronto, Canada Denied – Reunification Therapy Upheld

In *M.T.L. v. L.P.Z.*, the Superior Court, in a Non-Precedential Memorandum Decision, rejected mother's argument that the trial court erred in ordering the parties and children to attend intensive reunification therapy, when the court's decision was premised upon information outside of the record.

Mother claimed that the trial court erred in: (1) denying her request for relocation to Toronto, Canada, based upon the factors set forth in 23 Pa.C.S. §5337(h) and §5328(a); and (2) ordering the parties to attend reunification therapy where its decision was based on evidence obtained outside of the record.

The Superior Court affirmed. First, the court relied on the trial court opinion, which it found correctly and concisely addressed each statutory factor. Accordingly, the court adopted the trial court's conclusions as set forth on the record and the court's opinion as its own and affirmed the trial court's disposition of mother's issue that the trial court erred in denying relocation.

Mother also argued that the trial court erred in ordering the parties and children to attend intensive reunification therapy, when the court's decision was premised upon information outside the record. Mother averred that the program which the trial court chose for reunification therapy was never suggested, discussed, or considered by any party, and the trial court relied on evidence outside the record to make a unilateral decision as to who the parties and children should work with towards the trial court's ultimate goal of family reunification. In support of her argument, mother cited several decisions by the Superior Court, in which it repeatedly stated that a trial court cannot consider evidence outside the record in making its determination in a particular case.

The Superior Court disagreed and affirmed, finding that, while mother had cited accurate case law, binding on the court, mother failed to recognize that such law does not apply to the circumstances of the instant case. Here, the trial court stated on the record that it was in favor of reunification therapy, that it believed the whole family should participate, and that the court needed to do its due diligence before deciding on a reunification program. The trial court did not rely on evidence outside the record when determining if reunification therapy was appropriate in this case, as it had already stated in the parties' presence, on the record, that it was in favor of such a program. The only independent research conducted was on particular programs, which the court already stated it would be performing.

Discussing two particular programs, the trial court stated that it had not done any independent research into those programs, and the court needed to do due diligence and it had not yet vetted a proposed program. Clearly, mother was aware that the trial court was researching programs and voiced no concern with the court doing so. Even though the trial court finally chose a program that was not discussed at trial, the record was clear that the court was conducting independent research on reunification programs. Since mother failed to object when the trial court stated, in her presence, that the court would be conducting independent research, the court found this issue waived.

M.T.L. v. L.P.Z., Memorandum Decision, No. 2919 EDA 2015 (Pa. Super. June 7, 2016). Strassburger, J. 9 pp.

Shared Custody – *In Re: Wesley, J.K.* Factors – 23 Pa.C.S. §5328

In *H.M.R. v. K.M.*, the Superior Court, in a Non-Precedential Memorandum Decision, held that since the promulgation of the child custody factors enumerated in 23 Pa.C.S. §5328, there is no longer a legal prerequisite for shared custody. The statute is very clear that the court must consider the 16 statutory factors in making a determination of child custody, including shared physical custody.

Mother argued that the trial court abused its discretion or committed error of law by entering an order granting shared legal and physical custody of the child at issue to mother and father. Mother contended that the parties did not meet the legal criteria for shared custody.

The Superior Court disagreed and affirmed. The court agreed with the trial court that since the promulgation of the child custody factors enumerated in 23 Pa.C.S. §5328, there was no longer a legal prerequisite for shared custody. The statute is very clear that the court must consider the 16 statutory factors in making a determination of child custody, including shared physical custody. The court explained that §5328(a) directs that the trial court shall determine the best interest of the child by considering all relevant factors, including the 16 enumerated in the statute when ordering *any* form of custody.

The court rejected mother's contention that the trial court must consider not only the §5328 factors, but also the four factors set forth in *In Re: Wesley, J.K.*, 445 A.2d 1243 (Pa. Super. 1982), which the court summarized as requiring that (1) both parents are fit, (2) both desire continuing involvement with their child, (3) both parents are seen by the child as sources of security and love, and (4) both parents are able to communicate and cooperate in promoting the child's best interests.

The court explained that a reading of the enumerated factors in §5328(a) reveals that the four *In Re: Wesley, J.K.* are fairly encompassed by the enumerated factors for awarding *any* form of custody. Here, the trial court addressed each of the §5328(a) factors in its opinion, supplemented by its Rule 1925(a) opinion. Therefore, the court rejected mother's assertion that the trial court failed to consider the relevant factors for shared custody.

The court found it clear from the trial court's analysis that while one parent or the other measured higher for some factors, the overall weighting of the factors supported the continuation of shared legal custody and the grant of shared physical custody. Accordingly, the court did not find the trial court's conclusions granting shared custody to be unreasonable.

H.M.R. v. K.M., Memorandum Decision, No. 1067 MDA 2015 (Pa. Super. May 25, 2016). Stabile, J. 21 pp.

Shared Physical Custody – Father Awarded the Decision to Select School for Child

In *L.D.W. v. B.E.W.*, the Superior Court, in a Non-Precedential Memorandum Decision, held that the trial court properly awarded primary physical custody of the parties' daughter to father and granted father the ability to decide which school the child would attend.

The trial court conducted a *de novo* hearing on remand, and granted shared legal custody of the children, granted father primary physical custody of both children and mother partial physical custody of both children on weekends and some holidays, and also gave father the ability to decide which school daughter was to attend.

Mother argued on appeal that the trial court committed an abuse of discretion and an error of law by addressing and assigning school choice and in making its own determination as to which school was better suited for the minor child. Mother argued that, not only was it improper for the trial court to consider school choice, but that the trial court should have considered the factors pursuant to 23 Pa.C.S. §5328(a) in rendering its decision. Mother contended that moving the child, age 10, from a school she had attended for two years, and for which there was no significant evidence of problems or deficiencies, was not in the best interests of the child.

The Superior Court disagreed and affirmed. The court found that the trial court clearly considered school choice in the context of its determination of best interests and examination of the §5328(a) factors. The court expressed: "On the surface, the resolution of the question of school choice would appear as a singular, discrete matter, but in the case herein, the choice of school weighs heavily on the custody arrangement that will best serve the child"

Here, the trial court discussed school choice throughout its analysis with regard to Factor 1, which party is more likely to encourage and permit frequent and continuing contact between the child and another party, Factor 4, the need for stability and continuity in the child's education, family life and community life, Factor 7, the well-reasoned preference of the child, based on the child's maturity and judgment, and Factor 13, the level of conflict between the parties and the willingness and ability of the parties to cooperate with one another.

The court noted that father had testified that he did not believe the child was getting a quality education or advancing her social skills at her current school. He noted that the school had no rating and it was not a licensed school. The trial court noted mother's lack of evidence regarding the school as compared to father's evidence in support of a different school. Additionally, mother failed to offer sufficient evidence to lead the court to believe that remaining in the current school was in the child's best interest. Father, on the other hand, provided information to the court regarding the school he preferred, including academic standing and score rating. Accordingly, the court affirmed the order of the trial court awarding father the ability to decide which school the child was to attend.

L.D.W. v. B.E.W., Memorandum Decision, No. 1264 WDA 2015 (Pa. Super. May 17, 2016). Ford Elliott, J. 19 pp.

EQUITABLE DISTRIBUTION

Income for Purpose of Calculating Support – Non-Marital Assets – Attorney's Fees

In *Galanti v. Galanti*, the Superior Court, in a Non-Precedential Memorandum Decision, reiterated that money included in an individual's income for the purpose of calculating support payments may not also be labeled as a marital asset subject to equitable distribution.

Husband filed a complaint in divorce and the parties executed affidavits of consent under 23 Pa.C.S. §3301(c) and waivers of notice of intention to request entry of a divorce decree. Wife was self-employed. A prior support order found her net income was $1163.63 per month. Husband was employed in a sales position and his net income was found to be $6200 per month.

Wife claimed that the trial court erred by failing to award her any percentage of the $1,229,314.00 in actual cash husband took from the party's closely held corporation. Wife claimed that husband took the money from a business founded by husband and a business partner, providing marketing software for businesses. Wife claimed that she should have been awarded a portion of this money. She claimed husband received $1,229,314.00 from the business in the form of loans, distributions, rental income from a Medical Arts Building, and deferred income.

The Superior Court found that the trial court did not abuse its discretion or misapply the law when it did not award wife any percentage of the money she alleged husband received. The court noted that wife relied on financial statements, without any testimony interpreting the statements. Further, wife did not establish that, if husband did receive

any distributions, they should be included as assets for distribution, particularly since husband testified that he reported any distributions received as income for support purposes.

The court cited with approval *Roher v. Roher*, 715 A.2d 463, 465 (Pa. Super. 1998) ("money included in an individual's income for the purpose of calculating support payments may not also be labeled as a marital asset subject to equitable distribution"). Also, the trial court made a credibility finding regarding the financial decline of the company, finding husband credible.

Wife also claimed that husband purchased loans from childhood friends, which he claimed became non-performing post-separation. Wife claimed that husband received all payments on the outstanding principal against one of the loans, and that she should the awarded 70% of this payment. The trial court found that monthly payments husband received were income for support purposes. The court explained that because any payment received from the loan would constitute income for support purposes, the trial court did not err in finding that any payments received were not assets for equitable distribution purposes, again citing *Roher*.

Finally, wife argued that she should have been awarded attorney's fees because husband enjoyed representation from two law firms throughout this matter, and engaged in every maneuver possible to minimize anything wife was entitled to receive. The Master and trial court found that although wife raised a claim for attorney's fees and costs, she presented no evidence in support of this claim. Pa.R.Civ.P. 1920.33(b)(8) requires that when a claim for counsel fees is raised, the party seeking the award must present evidence of the amount of fees to be charged, the basis for the charge, and a detailed itemization of the services rendered. Since no such evidence was presented, the Master and trial court recommended that wife's claim for attorney's fees and costs be denied. The court found that the trial court did not err in adopting the Master's recommendation to deny the request for attorney fees.

Galanti v. Galanti, Memorandum Decision, No. 1642 MDA 2015 (Pa. Super. May 27, 2016). Jenkins, J. 13 pp.

Inheritance – Marital Property

In *Tucker v. Tucker*, the trial court reiterated that once non-marital property is combined and co-mingled with marital property, it loses its identity as non-marital property and takes on the status of marital property.

Husband filed exceptions to the Master's Recommendation, arguing that the Master failed to consider $5000 held in a joint savings account during equitable distribution.

The trial court found that the $5000 at issue in husband's exception was marital property. The court noted that under oath, plaintiff stated the money was a gift from her mother. The court acknowledged that this would make it non-marital property under 23 Pa.C.S. §3501(a)(3) (marital property does not include property acquired by gift).

However, plaintiff also testified that she placed the $5000 into a "joint account." The court held that under Pennsylvania law, once non-marital property is placed in a joint account, it becomes co-mingled and becomes marital property, citing *Dean v. Dean*, 98 A.3d 637, 641 (Pa. Super. 2014), and *Verholek v. Verholek*, 741 A.2d 792, 797 (Pa. Super. 1999) (holding "once non-marital property is combined and co-mingled with marital property, it loses its identity as non-marital property and takes on the status of marital property.).

The court concluded that it was clear based upon plaintiff's testimony and Pennsylvania law that this money was marital property and should be distributed in accordance with equitable distribution.

Tucker v. Tucker, C.P. Monroe County, No. 1115 DR 2013 (C.C.P. April 22, 2016). Sibum, J. 9 pp.

PRACTICE & PROCEDURE

Appeals – Appealable Order

In *K.J.R. v. D.J.R.*, the Superior Court, in a Non-Precedential Memorandum Decision, held that where the trial court entered its order after conducting a hearing on the merits, and the custody order determined custody of the children without scheduling or requiring further hearings or submissions from the parties, this was a final order and, therefore, appealable.

The parties initially agreed to an interim custody agreement whereby father had the children from five o'clock to 8:00 PM on Tuesdays and Thursdays, and every other weekend from 5:30 PM on Friday until 8 PM on Sunday. This agreement was not a written custody order from the court, but instead an agreement reached by the parties following a custody conciliation.

Father filed a custody complaint seeking shared legal and physical custody of the children and requesting the existing custody schedule be modified to provide father with physical custody on a week on/week off schedule so he could have more time with the children.

The parties appeared before the trial court for a custody hearing. Following the hearing, the court entered an interim order denying father's custody request, and amending the previous custody arrangement. The custody order modified the previous arrangement by extending father's Tuesday and Thursday visitation periods by 30 minutes and directing that mother pick the children up at father's home. The custody order also modified father's weekend periods of custody to extend an extra 30 minutes, from Friday at 5 PM until Sunday at 8:30 PM. The order did not analyze or address the statutory custody factors contained in 23 Pa.C.S. §5328.

Father appealed, alleging that the trial court erred by labeling the custody order as an "interim" order. Father believed the trial court issued the order as "interim" to somehow render its custody order non-appealable.

The Superior Court disagreed and affirmed. The court initially noted that an order in a custody case is final and appealable when it is: (1) entered after the court has completed its hearings on the merits; and (2) intended by the courts to constitute a complete resolution of the custody claims pending between the parties, citing *G.B. v. M.M.B.*, 670 A.2d 714 (Pa. Super. 1996).

The court found that, although styled as an "interim order," the order was actually a final order. First, the trial court entered its order after conducting a hearing on the merits. Further, the custody order determined custody of the children without scheduling or requiring further hearings or submissions from the parties. Accordingly, the court held, this was a final order, and therefore appealable.

K.J.R. v. D.J.R., Memorandum Decision, No. 2050 MDA 2015 (Pa. Super. June 3, 2016). Jenkins, J. 10 pp.

Court Rules – Pa.R.Civ.P. 1920.33 Amended

On June 10, 2016, upon the recommendation of the Domestic Relations Procedural Rules Committee, the Supreme Court of Pennsylvania ordered that Pa.R.Civ.P. 1920.33 be amended in the attached form. The Order will be effective on October 1, 2016.

Pa.R.Civ.P. 1920.33, as Amended, June 10, 2016.

Order, dated June 10, 2016, effective on October 1, 2016. 1 pp.

Court Rules – Montgomery County Rules 1910.10 and 1910.11

On May 26, 2016, the Court of Common Pleas of Montgomery County adopted Local Rule of Civil Procedure 1910.10 (Alternative Hearing Procedure). The Court further rescinded Local Rule of Civil Procedure 1910.11 (Support Conciliation).

These Rule changes shall become effective on July 18, 2016.

Order, dated May 26, 2016, effective on July 18, 2016. 3 pp.

PROPERTY SETTLEMENT AGREEMENT

Breach of Agreement – Changes in Circumstances

In *Hess v. Hess*, the Superior Court, in a Non-Precedential Memorandum Decision, agreed with the trial court that husband confirmed that he heard and understood all of the terms of the parties' agreement as they were placed on the record; that he had an opportunity to review the legally binding language drafted by his attorney; and that he was voluntarily entering the agreement in lieu of a hearing. Nothing prevented husband from knowingly and voluntarily executing the agreement that his attorney helped to draft. The parties were bound by the agreement regardless of changes in circumstances.

Both wife and husband agreed that husband had not paid all of the money due to wife under the parties' agreement. Husband had not paid $12,000 of the equitable distribution portion of the agreement and had missed three months of the alimony portion of the agreement. Husband testified that he did not knowingly and voluntarily enter into the agreement. At the time of the agreement, husband was not represented by counsel, and he testified that he did not understand that the alimony and equitable distribution portions of the agreement were two separate things and that he

would be responsible to pay both amounts to wife in accordance with the agreement. Prior to the divorce master hearing, husband did have an attorney and that attorney helped draft the language of the agreement.

Husband appealed from the trial court order granting a petition to enforce filed by wife and directing husband to pay wife $12,000 for breach of their divorce agreement and $2525 for her attorney's fees. Husband argued that the trial court failed to address his claim of duress and placed too much emphasis on husband having an attorney prior to the divorce master hearing. Husband also argued that the trial court erred in that it placed too little emphasis on his statement that the agreement was based only on his continuing to have the current income from his business.

The Superior Court disagreed and affirmed, finding that the record supported the trial court's factual finding that husband offered no testimony or evidence of any restraint or danger, either actual or threatened. Husband raised no claims of duress regarding his entry into the agreement at the time it was placed on the record. In fact, husband confirmed that he heard and understood all of the terms of the agreement as they were placed on the record; that he had an opportunity to review the legally binding language drafted by his attorney; and that he was voluntarily entering the agreement in lieu of a hearing. The testimony husband did offer concerned financial hardships and the bitterness of divorce, none of which prevented him from knowingly and voluntarily executing the agreement that his attorney helped to draft.

The court noted that at no point did the agreement contemplate that husband could stop making payments simply because his circumstances changed. The court found that the parties intended to be bound by the agreement regardless of changes in circumstances.

Hess v. Hess, Memorandum Decision, No. 1094 MDA 2015 (Pa. Super. May 27, 2016). Shogan, J. 9 pp.

SUPPORT

Alimony – APL – Delay in Concluding Divorce Action

In *Jones v. Jones*, the Superior Court, in a Non-Precedential Memorandum Decision, concluded that the trial court erred in crediting wife's receipt of APL against her award of alimony; no authority exists that permits the fashioning of an APL award with incentives to either encourage or discourage litigation of a matter. The trial court abused its discretion and misapplied the law in crediting wife's APL against the alimony award.

The parties had been married 37 years when husband vacated the marital residence. After the parties had been separated for approximately one month, husband filed a complaint for divorce alleging irretrievable breakdown of the marriage. Wife did not file a counterclaim to the divorce, but filed a petition for *alimony pendente lite* (APL). The parties reached a "private agreement" on July 31, 2013 that APL would be paid at the rate of $7400 per month.

The Master found that with respect to the award of alimony, wife would be awarded COBRA health insurance coverage for 36 months after divorce to be paid by husband. The Master next acknowledged that wife was receiving voluntary APL payments of $7400 per month. Due to the long term of the marriage and other factors, the master awarded wife graduated alimony payments as follows: $7400 per month for 36 months followed by 36 months of alimony of $5000 per month, 36 months at $4000 per month, and 36 months at $2000 per month.

The trial court agreed with the Master's determination that wife was entitled to long-term alimony, but deemed wife's alimony to have begun on the day husband began making voluntary APL payments on July 31, 2013, to incentivize wife to conclude the divorce quickly. The trial court held that the 12-year period of alimony was deemed to have commenced on July 31, 2013, the date husband began making voluntary *alimony pendente lite* payments to wife in the amount of $7400 per month, because, as a policy matter, to do otherwise would provide no incentive to wife to conclude the divorce.

The trial court clarified that, while this policy does not appear in any appellate cases, it is derived from a long-established principle that the spouse receiving *alimony pendente lite* should not be permitted to prolong the action unreasonably in order to continue to receive *alimony pendente lite*. Hence, APL is intended to cover only the period in which the divorce proceeding may, *with due diligence*, be prosecuted to a conclusion. The trial court explained that its alimony order was intended to provide wife an incentive to conclude the divorce in a timely manner. The trial court concluded that wife had not proceeded with due diligence.

Wife appealed, contending that the trial court abused its discretion by crediting APL payments made by husband against wife's long-term alimony award. Wife asserted that by deeming husband's alimony payments to have begun on July 31, 2013, the trial court reduced her alimony by 16 months, amounting to $118,400. Wife alleged the trial

court did so to punish her, as it believed she had not proceeded with the divorce with due diligence, and argued she was not required to file a counterclaim by law.

The Superior Court vacated, in part, the trial court's Order and remanded, concluding that the trial court erred in crediting wife's receipt of APL against her award of alimony. The court noted that no authority existed that permitted the fashioning of an APL award with incentives to either encourage or discourage litigation of a matter. In doing so, the trial court violated established law that court-ordered APL is awarded based on need alone and not to punish the other spouse. By reducing wife's alimony award based on its perception that wife had not proceeded with the divorce with due diligence, the trial court allocated alimony in order to sanction, or punish, wife, instead of awarding alimony out of necessity and in accordance with the alimony factors under 23 Pa.C.S. §3701(b).

Moreover, the court held, by crediting APL against wife's alimony award, the trial court conflated the purpose each of the awards is to serve. APL is awarded *during* divorce proceedings without fault and is based upon the need of one party for support and to have equal financial resources to pursue the divorce litigation. Alimony is intended to commence *after* a final decree is entered and is based upon need and may be reduced or terminated upon remarriage or change in economic circumstances of the party receiving it. By crediting APL against alimony, the trial court improperly modified APL and reduced the amount of alimony determined to be awarded to wife without regard for the differences between these two awards.

Finally, the court held, to the extent the "private agreement" between the parties established the amount of APL to be paid to wife, the trial court was without authority to modify that agreement under 23 Pa.C.S. §3105(c), which expressly prohibits a court from modifying agreements pertaining to APL. Accordingly, the trial court abused its discretion and misapplied the law in crediting wife's APL against the alimony award.

Jones v. Jones, Memorandum Decision, No. 1859 WDA 2014 (Pa. Super. June 20, 2016). Stabile, J. 15 pp.

Income – Inheritance – *Humphries v. DeRoss* Considered

In *K.L.S. v. D.W.C.*, the Superior Court, in a Non-Precedential Memorandum Decision, concluded that the trial court did not improperly treat the corpus of mother's inheritance as income for the purpose of calculating her income for child support purposes. Rather, mother placed the money she inherited into an investment account consisting of mutual funds, which have been income-producing.

At a support hearing, an employee of PNC Bank testified that mother had established an investment account with PNC, and the funds deposited into the account consisted solely of those inherited by mother upon the death of her grandfather. As of January 1, 2015, the balance in the account was $122,092.73.

Mother testified that the monthly mortgage and other bills exceeded her monthly income, thus requiring her to dip into her investment account. Mother agreed that in past hearings she failed to disclose the existence of the investment account. Mother admitted that she works only part-time, but indicated she has done so for almost 10 years and it suits her well. She also indicated that it was the only work she could find at this time. Mother acknowledged that she is permitted to freely withdraw money from her investment account.

Father testified that he was diagnosed with stage IV neck and throat cancer, resulting in his being unable to work or make his child support payments beginning in September 2014. Father testified that he applied for Social Security disability income benefits for himself and Social Security disability income derivative benefits for mother. At that time, he started to again make child support payments to mother in the amount of $550 per month. Father testified that, prior to the instant proceedings, he was unaware that mother had an investment account.

Mother appealed from the child support order entered by the trial court, finding that no child support was warranted, noting that mother received significant distributions through an account that she had established, and that she was on target to earn from distributions $21,000 in 2015. Based on the equalization of income of the parties, in addition to those distributions and the income mother earned, the court found that mother's earning capacity was equal to father's earning capacity.

Mother appealed, contending that the trial court erred in concluding that her withdrawals from her investment account, which she established after receiving an inheritance from her grandfather, constituted income for child support purposes, relying on *Humphreys v. DeRoss*, 790 A.2d 281 (Pa. 2002). She also contended that the trial court improperly considered the withdrawals she made from the account in deviating from the support guidelines.

The Superior Court disagreed and affirmed. Noting that as it specifically relates to an inheritance, the Pennsylvania Supreme Court has held that the corpus or principle of an inheritance is not income for purposes of calculating a monthly child support obligation. However, although the corpus of an inheritance may not be considered as income available for support, to the extent the inheritance makes more income available, it may be considered when adjusting a support obligation, citing *E.R.L. v. C.K.L.*, 126 A.3d 1004 (Pa. Super. 2015).

Here, the court concluded that the trial court did not improperly treat the corpus of mother's inheritance as income for the purpose of calculating her income for child support purposes. As the evidence revealed, mother place the money she inherited into an investment account consisting of mutual funds, which have been income-producing. The court noted that the beginning balance of the investment bank account, when it was established in 2014, was $116,523. However, as of January 1, 2015, the balance had increased to $122,092.73. The court agreed with the trial court's reasoning in this regard and found no abuse of discretion.

K.L.S. v. D.W.C., Memorandum Decision, No. 1691 MDA 2015 (Pa. Super. May 17, 2016). Stevens, J. 17 pp.

Modification – Income – Vacation Pay – Double Dipping – Support Agreement – 23 Pa.C.S. §3105

In *E.B. v. A.D.B.*, the Superior Court, in a Non-Precedential Memorandum Decision, held that the amount father's lawyer paid into father's vacation account was income that father earned as part of his compensation; therefore, the trial court correctly determined that that some was income and should be included in the calculation of father's support obligation.

Mother petitioned for modification of an existing support order, requesting an increase in child support. At the hearing, the parties focused exclusively on mother's request that father be ordered to pay her 100% of the funds deposited monthly into his Vacation Savings Account through his employer. Mother argued that father was bound by a separation agreement and amendment thereto, to pay to her every month the vacation funds for the child's future education.

The trial court issued an order resulting in a $1024.97 monthly support obligation, but did not obligate father to pay mother the vacation earnings for the child's college fund. The court explained that the vacation funds would be attributed to father as income for purposes of calculating support. The failure to do so would reduce the child support owed for the child's benefit. Honoring the parties' agreement would result in having father pay less monthly child support in favor of putting away funds for this pre-school aged child's potential college education. While planning for a child's future is an admirable goal, the child's right is to have the financial support of both parents now, not sometime in the future.

The trial court rejected mother's assertion that the court should have ordered father to pay to her 100% of the vacation funds in addition to the ordered child support amount, which already took into account the vacation funds by attributing them as income to father. Mother attempted to justify the double dipping by arguing that the parties agreed to a contribution from father for the child's future education. The trial court held, however, that it is well-settled that a court will not condone double dipping, i.e., using the same revenue as a source for support and equitable distribution.

Mother appealed, arguing that the trial court should have required father to continue to contribute 100% of his vacation pay toward the child's education fund as required by the parties' agreement. Mother contended that father should have been ordered to pay either the child support calculation which included his vacation pay along with payment of 100% of his vacation pay towards the child's education fund or, in the alternative, be held to the original separation agreement which provided for child support in the amount of $250 a week along with payment of 100% of father's vacation pay made payable to mother and held for the child's education fund.

The Superior Court disagreed and affirmed. Initially, the court explained that it was troubled by the trial court's use of the "double dipping" terminology, because that term references the same revenue as a source for support and equitable distribution. Here, the issue as to the vacation funds did not concern equitable distribution. Rather, it was a question relating solely to child support, either to be counted toward monthly support or to be invested for the child's future education. The underlying question rested on whether the vacation funds was or was not income as defined in 23 Pa.C.S. §4302.

The court found that the amount father's employer paid into father's vacation account was income that father earned as part of his compensation. Therefore, the trial court correctly determined that that sum was income and should be included in the calculation of father's support obligation.

Next, the court addressed the issue of whether the parties' agreement overrode the trial court's conclusion that the vacation pay must be included in the calculation of the monthly support payment or could it be designated as a contribution for the child's future schooling. The court concluded that pursuant to *Kraisinger v. Kraisinger*, 928 A.2d 333 (Pa. Super. 2007), the court had the power to require that father's vacation pay must be included in the calculation of his income for support purposes, because failing to calculate it in that manner would reduce the monthly support payment. Accordingly, the court held, the parties' Agreement was advisory, but not controlling.

E.B. v. A.D.B., Memorandum Decision, No. 916 WDA 2015 (Pa. Super. June 2, 2016). Bender, J. 12 pp.

Termination of Child Support – Graduation from High School – Pa.R.Civ.P. 1910.19(e)(4)

In *Lukas v. Lepre. Jr.*, the Superior Court, in a Non-Precedential Memorandum Decision, held that the trial court did not err or abuse its discretion in finding that father's obligation to pay child support ceased upon the child's graduation from high school, not upon her 18th birthday.

Father filed a petition to terminate child support, alleging the parties' daughter reached the age of 18 in January 2014, and, therefore, father should no longer be obligated to pay child support. Although the child attained the age of 18 in January 2014, she did not graduate from high school until June 12, 2014.

The trial court ordered that the child support obligation was terminated effective June 12, 2014, and ordered that father pay any outstanding court costs related to his petition.
Father appealed from the order of the trial court terminating the child support owed by him as of June 12, 2014, rather than in January 2014, and ordering that father be responsible for payment of outstanding court costs related to his petition. Father argued that the trial court erred when it terminated the child support effective on the child's graduation from high school rather than from her 18th birthday, because 23 Pa.C.S. §4321(2) does not require payment of child support following the child's 18th birthday, regardless of whether he or she has graduated from high school.

The Superior Court disagreed and affirmed, noting that Pa.R.Civ.P. 1910.19(e)(4) provides that "the domestic relations section shall administratively terminate the child support charging order without further proceedings on the last to occur of the date the last child reaches 18 or graduates from high school." Moreover, the Pennsylvania Supreme Court has found that a child is entitled to support until he or she graduates from high school, citing *Blue v. Blue*, 616 A.2d 628, 633 (Pa. 1992) (notwithstanding a child reaching majority at age 18, a parental duty of support is owed until a child reaches 18 or graduates from high school, whichever event occurs later).

The court further found that a child attending high school is not emancipated, without additional evidence to support a finding of emancipation, citing *Castaldi v. Castaldi-Veloric*, 993 A.2d 903, 911 (Pa. Super. 2010) (18-year-old daughter not emancipated where she had not graduated high school, and there was no evidence she lived separately from mother, had the ability to support herself, or expressed a desire to live independently of mother).

Accordingly, the trial court did not err or abuse its discretion in finding that father's obligation to pay child support ceased upon the child's graduation from high school, not upon her 18th birthday.

Lukus v. Lepre, Jr., Memorandum Decision, No. 1690 MDA 2015 (Pa. Super. May 23, 2016). Jenkins, J. 7 pp.

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