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Swingler v. Swingler

BRUCE W. SWINGLER, Plaintiff, v. GWENDOLYN V. SWINGLER,
now GWENDOLYN DURHAM, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action — Law, No. 1592 of 2002

Divorce; Trial or Hearing; Decision and Findings by Master; Equitable Distribution; Valuation of Property; Methodologies of Valuation; Evidence; Sufficiency

1. While only advisory, the trial court must give a master's report and recommendation the fullest consideration, particularly on the question of credibility of witnesses, because the master has the opportunity to observe and assess the behavior and demeanor of the parties.

2. Though a master's report should be given great weight, it is not binding because it is upon the trial court that the responsibility of making the final order of equitable distribution rests.

3. The Master, and then the Court, is required to fashion a distribution after consideration of all the factors enumerated in Section 3502(a) of the Code, balancing the needs of the parties and giving such weight to the factors seems proper in the exercise of judicial discretion.

4. Mathematical precision is not required in equitable distribution, nor is it presumed that an equal distribution is proper or equitable.

5. Pennsylvania operates under a "dual classification system" of equitable distribution, such that the court must distinguish property that is marital from property that is separate prior to undertaking equitable distribution. Whether an asset is marital or separate property for purposes of equitable distribution is a matter within the sound discretion of the trial court.

6. Appreciation of pre-marital property during the marriage is considered marital property for the purpose of calculating equitable distribution. 23 Pa. C.S.A. §3501(a.1).

7. Where a party offers evidence of value which goes 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. There is no abuse of discretion on the part of the court if it adopts the only valuation submitted by the parties.

8. Under Pennsylvania Rule of Civil Procedure 1920.33, each party is required to file both an Inventory, including a specific description of all property in which a spouse has a legal or equitable interest claimed to be excluded from marital property and the basis for such exclusion; and a Pre-Trial Statement, setting forth a list of marital and non-marital assets, their value, and the date of valuation.

9. Wife did not identify her tax sheltered annuity in her Inventory or Pre-Trial Statement, but had notice that Husband would stake claim thereto via his lists, which were filed of record. When Wife, with notice the annuity was in issue, failed to list the asset or submit documentation regarding it at trial, she lost the opportunity to oppose Husband's claim thereto and cannot now submit further evidence as to any changes in value.

10. The general rule is that the dispossessed party is entitled to a credit for the fair rental value of jointly held marital property against a party in possession of that property, provided there are no equitable defenses to the credit.

11. The party in possession of the marital residence is entitled to a credit against the rental value for payments made to maintain the property on behalf of the dispossessed spouse.

12. A party's medical conditions are a consideration in equitable distribution. 23 Pa. C.S.A. §3502(a).

13. Husband was on notice his health could affect the distribution of assets, and elected not to present evidence other than his own testimony thereupon. The Master's determination he could return to work following a medical sabbatical has support in the record, including in the form of a letter from Husband's doctor which contradicted his sworn testimony. The Court will not allow the record to be re-opened to allow submission of further evidence on the issue.

14. For Husband to continue to assert changed circumstances in the form of his allegedly deteriorating health is without merit. This marriage lasted only five (5) years, and ended more than five (5) years ago. Obviously, the multi-year delay in litigating the matter to conclusion has allowed the passage of time to alter the parties' positions both from the period during which they were married, as well as from their separation. However as the years pass, so that the time the two have been separated surpasses the duration of the intact marriage, such changes must be given less and less weight in making a just and equitable distribution of the marital estate.

Appearances:
Janice M. Hawbaker, Esq., *Counsel for Plaintiff*
Michael B. Finucane, Esq., *Counsel for Defendant*

OPINION

Van Horn, J., February 21, 2011

Statement of the Case

Following one (1) year of co-habitation, the above captioned parties were married on July 19, 1997. (See Transcript of Proceedings, Master's Hearing, March 11, 2010 [hereinafter T.P.], at 6:11-12, 9:24-10:2.) The marriage was the second for Wife, the fourth for Husband. (See id. at 49:22-50:6 (as to Wife), 46:13-47:9 (as to Husband).) Five (5) years later, Husband filed a Complaint in divorce under Sections 3301(c) or (d) of the Divorce Code, including a count for equitable distribution and alimony pendente lite. Following proper service on July 29, 2002, Wife answered the Complaint with similar counter-claims on August 26, 2002.

Though Husband filed his Affidavit of Consent and Waiver of Notice of Intention to Request Entry of Divorce Decree on November 6, 2002, little more activity occurred in the litigation until early 2003, when Wife petitioned the Court for special relief. The Petition, filed April 23, 2003, asked the Court to grant Wife exclusive possession of the marital residence, alleging she was unable to benefit from the property she was financially maintaining. Following a timely Answer, hearing upon Wife's Petition was held June 19, 2003, with the Court granting Wife her requested relief, but giving Husband until July 30, 2003 to vacate the premises. Possession was conditioned by the Court upon Wife's continued payment of the mortgage, homeowner's insurance, taxes, and other required maintenance.

On April 8, 2005, Wife filed both a Notice of Intention to Retake her Maiden Name, as well as a Petition to Bifurcate the divorce proceedings. Husband answered the request for bifurcation on June 17, 2005, arguing against Wife's desired relief. No further action appears to have been taken to bifurcate the proceedings.

The next activity in the matter was the filing by Husband, on February 20, 2006, of a Petition for Special Relief requesting exclusive possession of the marital home. Husband alleged Wife had not made mortgage payments or payments for the property taxes on the residence, and refused to cooperate with Husband's efforts to obtain an appraisal of the home. On March 31, 2006, Wife answered denying any violation of the prior order granting her exclusive possession, and stating she would not oppose an appraisal but had not been requested to make the premises available for one. Hearing was held on April 10, 2006, with the Court thereafter denying Husband's request, and ordering each party to cooperate with arranging an appraisal.

The case then languished with no action taken until July 14, 2009, when Husband moved the Court for appointment of a Master in Divorce, filing his Inventory the same date. The Master was appointed by Order dated July 21, 2009, the Master qualifying to his commission July 23, 2009. The following day, the Master noticed the parties of his appointment, thereafter setting a pre-hearing conference for September 22, 2009. Wife filed an Income and Expense Statement August 24, 2009, as well as an Inventory, on September 18, 2009. Pre-Trial Memoranda were timely submitted to the Master prior to the conference by each party, which occurred as scheduled. The hearing was ultimately held March 11, 2010. At the conclusion of the hearing, the Master directed the record be held open for submission of several items of evidence from the parties, including Husband's 2007 W-2 form, a statement regarding Wife's retirement account and a pay stub for 2010 from her current employer, as well as a current mortgage statement. These items were received in May of 2010.

On July 6, 2010, the Master issued Notice of the Report of the Master to the parties, filing the same with the Prothonotary. Wife's exceptions were filed July 26, 2010, with Husband filing his exceptions thereafter, on August 16, 2010. Briefs were filed in support of the exceptions, by Wife on December 1, 2010, and by Husband on December 21, 2010. Argument was held before this Court on February 10, 2011.

Wife raises two exceptions, objecting to the Master's treatment of a tax-sheltered annuity in her sole name, as well as to his refusal to grant rental credit for the time from 2002 to 2003 during which Husband was in sole possession of the marital residence. Husband submits a single exception, believing the statutory factors entitle him to at least sixty percent (60%) of the marital estate. The Court having reviewed the transcript of proceedings before the Master, the entirety of the case file, and having heard argument and reviewed the applicable law, will now dispose of the parties' exceptions in this Opinion and Order of Court.

Discussion

A. Standard of Review of Master's Report and Recommendation

Our appellate courts have stated that "a master's report and recommendation is to be given the fullest consideration particularly on the question of credibility of witnesses, because the master has the opportunity to observe and assess the behavior and demeanor of the parties." Moran v. Moran, 839 A.2d 1091, 1095 (Pa. Super. Ct. 2003). Yet at the same time, a master's recommendation is "advisory only" such that a reviewing court "is not bound by it and it does not come to the court with any preponderate weight or authority which must be overcome." Rothrick v. Rothrick, 765 A.2d 400, 404 (Pa. Super. Ct. 2000). The report is entitled to "great weight" but is not binding because it is upon the trial court that the responsibility of making the final order of equitable distribution rests. Trembach v.

Trembach, 615 A.2d 33, 35 (Pa. Super. Ct. 1992).

The Court must consider the distribution scheme as a whole, and has a duty to completely and independently review the proceeding below. See Rollman v. Rollman, 421 A.2d 755, 758 (Pa. Super. Ct. 1980). Mathematical precision is not required, nor is it presumed that an equal distribution is proper or equitable. See Smith v. Smith, 938 A.2d 246, 248 n.2 (Pa. 2007); Schenk v. Schenk, 880 A.2d 633, 640 (Pa. Super. Ct. 2005). Rather, the Master, and then the Court, is required to fashion a distribution after consideration of all the factors enumerated in Section 3502(a) of the Code, balancing the needs of the parties and giving such weight to the factors seems proper in the exercise of judicial discretion. See Schenk, 880 A.2d at 644; 23 Pa. C.S.A. §3502(a). The particular circumstances of the case must be measured against the stated objective in distribution under the Divorce Code: "effectuating economic justice between the parties and achieving a just determination of their property rights." Schenk, 880 A.2d at 639.

B. No Error in Disposition of Wife's Tax Sheltered Annuity

Wife's first exception challenges the propriety of the Master's deter-mination regarding her tax sheltered annuity with Prudential [hereinafter TIAA-CREF]. Wife asserts the asset is non-marital, citing her own testimony regarding its acquisition sixteen (16) years before the marriage, in 1981. She argues the Master erred in failing to leave the record open for submission of evidence to substantiate her testimony regarding the annuity. Wife maintains that equity and fairness demand she be allowed to submit further evidence on the characterization of the asset, believing the Master was confused as to whether it was marital or non-marital. Wife misunderstands or mischaracterizes the Master's determination. It is clear to the Court the Master understood the nature of the asset at issue, and that he also understood the procedural rules regarding the dispute over which he presided.

As to characterization, the Master's determination was proper. Pennsylvania operates under a "dual classification system" of equitable distribution, such that the court must distinguish property that is marital from property that is separate prior to undertaking equitable distribution. Drake v. Drake, 725 A.2d 717, 721-22 (Pa. 1999). Timing, rather than the method such property was obtained, determines the character of assets. See id. at 722. Whether an asset is marital or separate property for purposes of equitable distribution is a matter within the sound discretion of the trial court. See Carney v. Carney, 673 A.2d 367, 368 (Pa. Super. Ct. 1996).

The Divorce Code provides that "marital property" includes "all property acquired by either party during the marriage and the increase in value of any non-marital acquired property pursuant to paragraphs (1) and (3) as measured and determined under subsection (a.1)." 23 Pa. C.S.A. §3501(a) (2011). Subsection (a)(1) includes "property acquired prior to marriage or property acquired in exchange for property acquired prior to the marriage." Id. at (a)(1). As to the valuation, subsection (a.1) provides:

> Measuring and determining the increase in value of nonmarital property.-The increase in value of any non-marital 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 a lesser increase. Any decrease in value of the nonmarital property of a party shall be offset against any increase in value of the nonmarital property of that party. However, a decrease in value of the nonmarital property of a party shall not be offset against any increase in value of the nonmarital property of the other party or against any other marital property subject to equitable division.

23 Pa. C.S.A. §3501(a.1).

Thus, it is clear that appreciation of pre-marital property during the marriage is considered marital property for the purpose of calculating equitable distribution. See, e.g., Smith v. Smith, 653 A.2d 1259, 1265 (Pa. Super. Ct. 1995). Because marital property is defined by statute, the Court cannot utilize "moral grounds" or consider factors meant to apply for purposes of equitable distribution to assist in the characterization of assets. Smith v. Smith, 749 A.2d 921, 926-27 (Pa. Super. Ct. 2000).

In the instant case, these rules make the appreciation in the value of Wife's annuity marital property to be included in equitable distribution. The annuity was acquired prior to the marriage, as set forth in Section 3501(a)(1). Thus, under subsection (a), the appreciation in its value is indeed marital property, the value of which is governed under (a.1). Wife offers no case law in her brief to support her assertion the asset is non-marital, other than simply asserting it was acquired prior to the marriage. While this is indeed the case, the fact has no practical effect on the characterization of the instant asset. Rather, the sole issue is whether the asset appreciated in value, and, if so, the amount of such appreciation, as it is the amount of increase which in fact is marital property.

Understanding the appreciation of the annuity was marital, to most accurately determine its value, the Master

required evidence regarding its value at purchase, at the date of marriage, and upon separation. Yet at hearing, the sole evidence regarding the annuity is the admission by Wife regarding its existence, and her nebulous statement the value was around twenty thousand (20,000) dollars the last time she checked. The Court does not believe that Wife or her attorney planned to offer evidence regarding the property prior to trial, the testimony regarding the asset having been elicited on cross-examination and clarified by the Master. (See T.P., at 101:20-102:8.) Indeed, the sum total of the testimony regarding the annuity follows:

> Q [by attorney Finucane]: Now, you heard Mr. Swigler say that he had a savings type vehicle besides his retirement?
>
> A: He had what?
>
> Q: A savings type IRA?
>
> A: Uh-huh.
>
> Q: What types of vehicle like that do you have?
>
> A: Tax sheltered annuity.
>
> Q: What do you have?
>
> A: I have a tax sheltered annuity with Prudential.
>
> Q: And how much is that?
>
> A: I haven't looked at that in a while.
>
> Q: What was it the last time you looked at it?
>
> A: Maybe twenty.
>
> By the Master: Twenty dollars.
>
> A: Thousand.

(Id. at 101:15-102:8.) The Master clarified following the cross-examination:

> Q: You mentioned you had a tax sheltered annuity with Prudential. When did you start that annuity?
>
> A: In my first marriage in 1981. And can I add something? May I add something?
>
> Q: So you had the Thrift Savings Plan or the tax sheltered annuity for many years now?
>
> A: Yes.

(Id. at 109:12-19.) Prior to leaving the stand, Wife added, in response to a question about a newly acquired retirement plan:

> Q [by the Master]: Something you've established since separation?
>
> A: Yes, yes. But during the other one, I wanted to mention about the one that I had since '81. When this whole procedure began, when my former lawyer mentioned something about the tax sheltered annuity, we had to call to find out if I had put any monies into the account during the time of the marriage and I had not. So that's something that can be proven.
>
> The Master: You can step down.

(Id. at 111:3-13.)

Thus, the only evidence presented as to the value of the annuity was through the testimony by Wife that placed it at twenty thousand (20,000) dollars. Where a party offers evidence of value which goes 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." Baker, 861 A.2d 298, 302 (Pa. Super. Ct. 2004); Litmans v. Litmans, 673 A.2d 382, 395 (Pa. Super. Ct. 1996). There is no abuse of discretion on the part of the court if it adopts the only valuation submitted by the parties. See Baker, 861 A.2d at 302.

The Court believes this principle must apply all the more forcefully where one party controls all the evidence regarding an asset, and is on notice that the other is aware of the asset, and that their adversary does not consider it excluded from distribution. The issues in any judicial proceeding must be clearly defined, so that the parties thereto are able to prepare and present their cases effectively, and the finder of fact is able to fairly decide the questions presented. The procedural rules regarding preparation and conduct of a Master's hearing are essential in ensuring the purpose of the Divorce Code, to effectuate economic justice, is carried out. Where the Rules are followed by one

party, and the other ignores the clear statement of issues such adherence creates, the Court will not condone such omission by later allowing further, untimely evidence to the detriment of the party in compliance.

Under Rule 1920.33, each party is required to file both an Inventory and a Pre-Trial Statement. See Pa. R.C.P. 1920.33(a), (b). The inventory is required to include "a specific description of all property in which a spouse has a legal or equitable interest which is claimed to be excluded from marital property and the basis for such exclusion." Id. at (a)(2). The Pre-Trial Statement is required to set forth a list of assets including "the non-marital assets, their value, the date of valuation" as well as a similar listing of marital assets. Id. at (b)(1)(i), (ii). Failure to file either document can result in imposition of sanctions under Rule 4019(c). See id. at (c). Further, failure to comply with the requirements set forth for the Pre-Trial Statement in subsection (b) "shall" bar a party, "except upon good cause shown" from "offering any testimony or introducing any evidence in support of or in opposition to claims for the matters not covered therein." See id. at (d)(1). Where a party does not disclose items in their pre-trial statement, the rule bars admission of evidence either in support of or in opposition to the undisclosed items. See Anderson v. Anderson, 822 A.2d 824, 832 (Pa. Super. Ct. 2003) (Bowes, J., dissenting)

The purpose of the Rule is "to put all the issues on the table before the parties and the master so as to eliminate surprise and effectuate the fairest possible distribution." Box v. Box, 25 Pa. D. & C.3d 219, 221 (C.P. Pike 1983). See also Anderson, 822 A.2d at 832 (Bowes, J., dissenting) (citing Box) ("the apparent rationale underlying the rule is to alert the parties to all the possible issues, to eliminate surprise, and to allow the master to effectuate the fairest possible distribution"). In Otteni, the trial court faced a non-compliant defendant who offered testimony regarding the value of a marital asset, but then requested permission to submit additional documents or testimony regarding valuation to contradict the evidence of the plaintiff. See Otteni v. Otteni, 45 Pa. D. & C.3d 40, 44-45 (C.P. Erie 1987). The Court directed the Master to accept the testimony offered, judge credibility, and make a determination concerning the value of the asset in dispute. See id. at 45. However, the Court would not permit the defendant to offer additional evidence or documents, as the Rules clearly provided notice as to the consequence of failing to comply. See id.

Similarly, in Falasco, the trial court wrote that inventories and appraisements are "necessary to the court's task" in effecting equitable distribution. Falasco v. Falasco, 14 Pa. D. & C.4th 123, 127 (C.P. Chester 1992). The Court held that failure to comply with Rule 1920.33 would result in the preclusion of evidence from the wife regarding the value of property raised by the husband, and precluded her from offering evidence in contradiction to the values which he ascribed to the assets. See id.

Instantly, neither party included the annuity on the initial "Assets of Parties" section of their filed Inventory, both failing to check the box for annuities. Wife did not include the annuity either under the "Marital Property" or the "Non-Marital Property" sections of the Inventory. Wife also failed to include the annuity in her Income and Expense Statement, failing to fill in the "Other Income" section in any manner, and leaving blank the "Annuity" row of the chart. (See Income and Expense Statement of Defendant, at 2 of 6.) Neither does Wife's pre-trial statement refer to any annuity, leaving the "Non-Marital Assets" section of the memoranda blank.

However, Husband did include "Wife's TIAA-CREF" under the "Non-Marital Property" section of his Inventory, leaving blank the "reason for exclusion" column.[1] So, too, did Husband include "Wife's TIAA-CREF" in the "Non-Marital Assets" portion of his Pre-Trial Statement. (See Pre-Trial Statement of Plaintiff, at 5.) Thus, at all times disclosure of potential issues was required, Husband has consistently included this asset as an issue. Further, Husband did not indicate he considered this asset excluded from marital distribution. In the "Non-Marital Assets" section of his Pre-Trial Statement, "Wife's Vehicle" and "Husband's Vehicle" are both listed, but next to each asset, Husband has filled in the "Reason for Exclusion" column next to the vehicles by indicating "Post-separation." (See id.) He clearly excludes the vehicles from distribution, stating the two were purchased after separation. No such exclusion is stated for the TIAA-CREF account, and the law is clear that even assets which are not marital may in fact be partially marital due to appreciation during the marriage.

Here, the only statement as to the value of the asset in question was given by Wife, such value given for "the last time she checked." There was no evidence submitted as to the initial value of the annuity in 1981 or at the time of the parties' marriage or separation. Yet any fault associated in the omission clearly rests with Wife. She did not identify the asset as non-marital as required by the Rules of Civil Procedure in her Inventory or her Pre-Trial Statement. She had notice that Husband would stake claim to the asset in that he listed the annuity as non-marital and did not state it would be excluded from distribution. The treatment of the annuity in his statements of the issues clearly contrasts to his characterization of other assets to be excluded from distribution, such as the two vehicles purchased by the spouses following separation. When Wife, with notice the annuity was in issue, failed to list the asset or submit

[1] Husband did not file an Income and Expense Statement. Such filing is not required under the Pennsylvania Rules of Civil Procedure.

documentation regarding it at trial, she lost the opportunity to oppose Husband's claim thereto.

Further, Wife had control of the asset and the documentation regarding it, such that Husband could not have supplied such information to the Master independently. Wife's statement regarding the asset's value was the only evidence thereof on the record. The case law states clearly that accepting such evidence is not an abuse of discretion. Indeed, the Court may adopt an uncontradicted statement of value "even though the resulting valuation would have been different if more accurate and complete evidence had been presented." Baker, 861 A.2d at 302. It is not an abuse to accept the only value submitted. See id. Wife has not given any reasons for her failure to put forth evidence in response to the issues outlined by Husband that the Court would consider "good cause." Indeed, principles of equity and fairness she cites militate far more strongly toward preclusion of such evidence, in fairness to Husband.

The Master understood the question at issue — that being, the **value** of the marital asset represented by the annuity. Clearly, he understood the annuity itself was non-marital, but that the appreciation in value of the annuity during the marriage was marital property to be distributed. Rather than needing more information to make a determination regarding characterization, more information was required to more accurately ascribe value to the asset. Thus, Wife requests to submit evidence regarding a question which clearly is meritless — the annuity cannot be proven a purely non-marital asset. Rather, the value of the marital asset it represents could conceivably proven to be zero (0), if its value did not appreciate during the marriage. No further information is required to characterize the asset, while the value of the asset was unclearly proven and could indeed be clarified. However, because Wife was on notice the TIAA-CREF would be at issue and failed to present evidence regarding its value at hearing, she cannot have another "bite" at the proverbial apple.

C. No Error in the Master's Treatment of the Marital Residence

Wife also takes exception to the Master's refusal to credit her for amounts paid on the mortgage, homeowner's insurance, and real estate taxes during the time Husband resided in the marital home. In Trembach, the Pennsylvania Superior Court set forth the procedure which should be followed in disposing of a request for rental credit:

> First, the general rule is that the dispossessed party is entitled to a credit for the fair rental value of jointly held marital property against a party in possession of that property, provided there are no equitable defenses to the credit. Second, the rental credit is based upon, and therefore limited by, the extent of the dispossessed party's interest in the property. Generally, in regard to the marital home, the parties have an equal one-half interest in the marital property. It follows, therefore, that in cases involving the marital home that the dispossessed party will be entitled to a credit for one-half of the fair rental value of the marital home. Third, the rental value is limited to the period of time during which a party is dispossessed and the other party is in actual or constructive possession of the property. Fourth, the party in possession is entitled to a credit against the rental value for payments made to maintain the property on behalf of the dispossessed spouse.

Trembach v. Trembach, 615 A.2d 33, 37 (Pa. Super. Ct. 1992)(Citations omitted).

Given the facts and the disparate interests possessed by the parties in the residence, the Master properly balanced the equities of the situation to dispose of this asset. Just as he denied Wife credit against the months Husband was in possession of the residence, so too did he deny Husband rental credit for the years which Wife has resided in the home. The facts amply support his determination, as this was not a situation of equal interest, equal periods of possession, or equal expenditures for maintenance or costs associated with the property.

The residence was initially owned solely by Wife, having been purchased in August of 1996 during the parties' relationship for the amount of eighty-three thousand six hundred and forty (83,640) dollars. (See T.P., at 10, 13:2-8, 56, 94.) Though Husband testified he contributed closing costs, Wife disputed this assertion. (See id. at 52-53.) Husband testified the two equally shared expenses related to the residence, while Wife maintained the Husband made clear the debt was hers, and contributed only sporadically. (See id. at 10, 23 (as per Husband), 52 (as per Wife).) The home was refinanced by a process completed in 2001, which formally placed the property into Husband's name as well as Wife's, the stipulated amount of the mortgage and the home at the time being one hundred fourteen thousand seven hundred (114,700) dollars. (See id. at 12.) The refinancing also added thirty thousand (30,000) dollars of debt, which Husband reports contributed toward Wife's Ph.D, Wife reporting the amount was used to consolidate debts incurred in repairing the marital residence. (See id. at 23 (Husband), 51-52 (Wife disputes added debt for school), 56-57.)

At separation, Husband remained in the home for a period of ten (10) to twelve (12) months, paying the utilities, and contributing over three thousand (3,000) dollars to the mortgage. (See id. at 29, 30, 41-42 (lump sum payment of $3500.00 paid after receipt of check for totaled car), 70-74 (Wife on amounts paid), 99-101. See also

D.E. No. 10, 11.) At separation, there was little equity in the home. (See id. at 45.) Eventually, a hearing was held before President Judge Douglas W. Herman and Wife was awarded possession of the marital residence, Husband given thirty (30) days to vacate. (See id. at 37.) When Wife returned to the home as provided by the Court's Order, she discovered the residence in a deplorable state with several strange arrangements of personal property throughout. (See id. at 74-87; D.E. Nos. 13.) At the time of hearing, the mortgage remained in the amount of one hundred fourteen thousand (114,000) dollars, Wife having almost exclusively made payments of the interest due, declining to pay upon the principal. (See id. at 14.)

The Master was required to resolve several irreconcilable differences between the parties' testimony, and made several factual findings to do so. The Master placed the fair market value of the home at one hundred forty-one thousand (141,000) dollars. (See Master's Report, at 5 (citing N.T. at 60, D.E. No. 1).) While recognizing Husband's testimony thereupon, the Master found Wife more credible in her assertion that Husband did not provide sums for the closing costs, provided minimal help with the mortgage payments during the intact marriage, and that Husband was clear the debt was in Wife's name and solely her own. (See id. at 6.) The Master found Wife's testimony about the refinancing of the mortgage having nothing to do with her student loans, and more to do with consolidation of debts for repairing the residence, more credible. (See id. at 14.) The Master found the current value of the mortgage is one hundred six thousand two hundred seventy-eight (106,278) dollars, therefore setting the equity value of the residence at thirty four thousand seven hundred twenty-two (34,722) dollars. (See id. at 9 (current mortgage value, citing D.E. No. 15), 15.) The Master did state, however, that he believed the home has increased in value from a negative equity of ten thousand (10,000) dollars in 2001 when Husband vacated the residence in a state of disrepair, to the current amount which was attributed to the efforts by Wife. (See id. at 18.)

Both parties admitting the residence became jointly titled only seven (7) months prior to separation, the Master found Wife credible in her assertion that during the marriage, Husband viewed the debt as solely hers. (See id. at 16.) The Master believed Wife as to the state of the residence upon her resumption of occupation, including her testimony that four thousand five hundred eighty-eight dollars and ninety-six cents ($4,588.96) was spent to repair and clean up after Husband's spiteful and intentional acts to desecrate the home. (See id. at 17.)

The Divorce Master stated his determination regarding distribution of the residence was based on several considerations. First, he found that Wife had both brought the asset to the marriage and had worked to ensure the equity present in the home for distribution. Wife was credited with keeping up the payments on the residence post-separation. The Master declined to award Husband rental value for the property following the grant of exclusive possession to Wife. This is because for each month Wife was in possession of the residence, one thousand (1,000) dollars was paid toward the mortgage, whereas for the ten (10) months of Husband's possession, he paid only an average of three hundred (300) dollars per month. The Master also recognized that whichever party had right to the residence would be required to refinance the mortgage, estimating the cost to do so at three thousand five hundred (3,500) dollars. See id.

In the end, the Master directed Wife refinance the home in her sole name, the costs to do so be credited to Wife, and Husband be compensated for his interest in the home. However, because Wife brought the asset to the marriage, rehabilitated it after Husband damaged the home, and took some of Wife's non-marital crystal, Wife received a credit on this amount. Given the facts, the Master's determination was within his discretion, and reflected a proper balancing of the equities of the situation.

D. The Master's Proposed Distribution is Equitable and Shall Stand

Husband, in his single filed exception, objects generally to the proposed distribution on the grounds his lesser income, age, and asserted precarious health merit an award of at least sixty percent (60%) of the marital estate. Citing his elder years, Wife's more prestigious position, and arguing any increase in the value of the marital home is due to the real estate market rather than Wife's effort, Husband seems to allege in his brief the Master reached his determination by relying not on statutory considerations but instead upon the parties' gender. The Court finds this argument meritless, and, indeed, slightly offensive.

Reversing the gender of the two parties does not alter the Court's view that the Master's recommendation for distribution was equitable and proper. (See Pl. Br. On Exceptions at 6.) The Master's determination was clearly based upon those factors set forth by statute which the legislature has mandated must control equitable distribution, rather than on stereotypes about gender roles and responsibilities. The parties separated after only five (5) years of marriage. The marriage was Husband's fourth, Wife's second, and did not result in any children, though Wife had responsibilities during the marriage and after separation in raising her daughter from a prior relationship. For most of the time during the marriage, the parties had relatively equal incomes and skill levels. If Wife has increased her

earning capacity, it is due to her own monetary investments and her hard work. Further, Wife completed her education largely post-separation, giving Husband little claim upon the fruits of her labor. The Master was, in light of his findings that Husband depleted the value of the marital home, and Wife maintained it, even generous to Husband in giving him a share of the equity accrued therein during the marriage.

Husband requests the Court direct the record be re-opened, so that he may submit further evidence on the state of his health and its effect upon his earning capacity. Certainly, in making an equitable distribution of marital property, the Court is required to consider all relevant factors, including the health of each spouse. See, e.g., Taper v. Taper, 939 A.2d 969, 974 (Pa. Super. Ct. 2007). Yet it is also clear that the Master had ample testimony regarding Husband's physical health to consider. Husband set forth his current medical condition on direct examination by his attorney. (See T.P., at 7:1-8:18.) On cross, Husband again testified to having a heart attack in November of 2009, and to being treated for high blood pressure, anxiety, and depression. (See T.P., at 34:13-20.) The Master's Report takes account of this testimony. (See id. at 10 ("Mr. Swigler testified he is on a medical sabbatical from his employment . . . is being treated for high blood pressure, anxiety, depression as well as receiving psychological counseling. Mr. Swigler testified that he had a heart attack on November 17, 2009.").)

However, as Husband omits in his invitation to "reverse the positions of the two parties," the Master also found that his testimony as to his health extremely incredible. Husband's assertion of a heart attack in November of 2009 was directly contradicted by a letter sent to the Master by Husband's doctor in support of a request for continuance, which stated Husband had medical issues but did **not** have a heart attack. (See id. at 11.) The Master found it likely Husband would return to teaching following his year long sabbatical. (See id.) There is support in the record for such determination. Not only did the Master find Husband's heart condition less severe than he maintained, Husband also testified to being treated for depression and anxiety during the marriage, and working full time while engaging in treatment for all but two (2) months. (See id. at 34:21-36:3.) Having had twelve (12) months on a medical sabbatical for treatment of a condition the Master found was exaggerated by Husband, it is reasonable to believe he would return to work while continuing treatment for his mental health issues.

Thus, the Master was aware of Husband's asserted medical problems, but found his testimony regarding their severity incredible. The Court will respect the determination of the Master in this arena. As our appellate courts have repeatedly expressed, "in determining issues of credibility, the master's findings must be given fullest consideration, as it was the Master who observed and heard the testimony and demeanor of various witnesses." See Anderson v. Anderson, 822 A.2d 824, 830 (Pa. Super. Ct. 2003). Additionally, it is hornbook law that a party's medical conditions are a consideration in equitable distribution. See 23 Pa. C.S.A. §3502(a)(requiring the Court to consider "[t]he age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties" prior to equitably dividing marital property). Husband was on notice his health could affect the distribution of assets, and elected not to present evidence other than his own testimony thereupon. As Wife must be barred from presenting more evidence upon an issue clearly necessitating resolution of which she was on notice prior to hearing, so too must Husband be barred from entering further evidence on the record regarding such a factor.

Finally, the Court notes this marriage lasted only five (5) years, and ended more than five (5) years ago. For Husband to continue to assert changed circumstances is without merit. Obviously, the multi-year delay in litigating the matter to conclusion has allowed the passage of time to alter the parties' positions both from the period during which they were married, as well as from their separation. However as the years pass, so that the time the two have been separated surpasses the duration of the intact marriage, such changes must be given less and less weight in making a just and equitable distribution of the marital estate.

Conclusion

The Court having reviewed the evidence and the applicable law finds neither of the parties' exceptions meritorious. Wife having notice her TIAA-CREF would be in issue, has failed to demonstrate any good cause for omitting to present documentary evidence as to the annuity's value, and shall be precluded from doing so. Instead, she shall be held to the testimonial evidence given despite the fact that if additional proof were submitted the value given to the asset would have been more accurate. Wife, in sole control of such evidence, cannot now complain of her own failure to aid the Master's determination of its marital portion. Nor will the Court upset the Master's disposition of the marital residence, which given the parties' interests therein and the length of the marriage, was reasonable and fair. Finally, the Court does not give credence to Husband's assertion of entitlement to sixty percent (60%) of the marital estate. The circumstances of the case lead the Court to find the Master properly considered the required statutory factors and constructed a just and equitable scheme of distribution. The attached Order implements this determination.

ORDER OF COURT

February 21, 2011, the Court of Common Pleas of the 39th Judicial District of Pennsylvania, having referred this case to a Master under Pa. R.C.P. 1920.51; and a hearing having been held on March 11, 2010 at the Office of the Master in Divorce under Pa. R.C.P. 1920.53; the Report of the Master filed under Pa. R.C.P. 1920.54(a), and exceptions thereto being filed by each party which have been decided in accordance with the Opinion issued this date, it is hereby ordered and decreed that:

A. Divorce

1. Plaintiff, Bruce W. Swingler, and Defendant, Gwendolyn V. Swingler, now Gwendolyn Durham, are divorced from the bonds of matrimony.

B. Economic Matters

1. Plaintiff, Bruce W. Swingler, shall receive sole right, title and interest in the following assets:

i. His pension through PSERS;

ii. The Volkswagen Jetta and all proceeds related thereto;

iii. A 1979 pick-up truck and a gold van;

iv. Tax-sheltered annuity in his name;

v. All personal property currently within his possession and control unless otherwise specified by this Order of Court.

2. Defendant, Gwendolyn V. Swingler, now Gwendolyn Durham, shall receive sole right, title and interest in the following assets:

i. The PSERS pension in her name;

ii. A 1991 Plymouth white van;

iii. Prudential tax-sheltered annuity in her name;

iv. Real estate located at 1336 Warmspring Road, Chambersburg, Pennsylvania;

v. All personal property currently within her possession and control unless otherwise divided by this Order of Court.

3. Within sixty (60) days of the date of this Order, Gwendolyn shall re-finance the mortgage on the Warm Spring Road real estate into her sole name. At that time, she shall pay Bruce $18,011.00 for his equitable share in the marital estate, plus an additional $202.05, representing one-half of the court reporter's fee advanced by Bruce.

4. Gwendolyn Durham shall be solely responsible for any and all debts related to the marital residence.

5. Gwendolyn Durham shall be solely responsible for any debt related to the Plymouth Voyager.

6. Gwendolyn Durham shall be solely responsible for the FCTCU personal loan.

7. Gwendolyn's counsel will prepare a deed to the Warm Spring Road property transferring the property into Gwendolyn's sole name. Said deed shall be presented to and signed by Mr. Swingler within ten (10) days of the entry of this Order of Court, and he shall have five (5) days to return the signed deed to Gwendolyn's attorney. Gwendolyn's attorney shall hold the deed in escrow, and shall not release the deed for recording until Gwendolyn has made full payment pursuant to Part B, Paragraph Three (3) of this Order of Court.

8. Unless otherwise specified within this Order, the parties are solely liable for any debt attached to any asset they are to receive in distribution.

9. The parties shall bear the cost of preparing and recording the documents including deeds or titles for assets they are to receive under this Order for distribution.

10. Unless otherwise specified, the parties shall execute all releases or other documents presented by opposing counsel within ten (10) days of their presentation which are reasonably necessary to effectuate this Order.

11. Unless otherwise noted in this Order, the parties are solely responsible for debts and liabilities in their own name.

12. Jurisdiction is retained by the Court of Common Pleas of the Thirty-Ninth Judicial District of Pennsylvania to the fullest extent necessary to enforce this Order.

13. The Report and Recommendation of the Master is approved and the findings of the Master are adopted by

the Court in all respects not contrary to the foregoing Order.