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1499 MDA 2020

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF PENNSYLVANIA

1499 MDA 2020

ANN M. ROGERS,
Appellee

v.

ROBERT P. BAUCHWITZ,
Appellant

APPELLANT'S BRIEF

On Appeal from Judgment of the Court of Common Pleas
Dauphin County, Pennsylvania,
Docket numbers: 2017-CV-6699-DV and 01336-DR-17

Robert P. Bauchwitz
Appellant
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pro se

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STATEMENT OF JURISDICTION

Pursuant to 42 Pa. C.S.A § 742, the Superior Court has exclusive jurisdiction of all appeals from final orders of the courts of common pleas.

ORDER OR OTHER DETERMINATION IN QUESTION

ORDER OF OCTOBER 28, 2020

AND NOW, October 28, 2020, it is ordered and decreed that ANN M. ROGERS, plaintiff, and ROBERT P. BAUCHWITZ, defendant, are divorced from the bonds of matrimony.

The court retains jurisdiction of any claims raised by the parties to this action for which a final order has not yet been entered. Those claims are as follows: None.

Any existing spousal support order shall hereafter be deemed an order for alimony pendente lite if any economic claims remain pending.

BY THE COURT:

EDWARD M. MARSICO, JR., J

STATEMENT OF BOTH THE SCOPE OF REVIEW AND THE STANDARD OF REVIEW

The standard of review of the issues raised by the Appellant herein (alimony, equitable distribution, discovery) is one of an abuse of discretion. Edelstein v. Edelstein, 399 Pa. Super. 536, 582 A.2d 1074 (1990). The trial court's factual findings, however, must be supported by credible evidence of record. Wellner v. Wellner, 699 A.2d 1278, 1280 (Pa. Super 1997).

STATEMENT OF QUESTIONS INVOLVED

A. Did the trial court and/or the master abuse their discretion in refusing to award the Husband ongoing alimony and/or a larger distribution of marital assets when, at best, the record reflects that Husband can earn a maximum of $72,000 a year while Wife will continue to earn nearly $470,000 a year or more until her retirement and the distribution of sixty (60) percent of assets to the Husband adopted by the trial court primarily involved only retirement assets which would perpetuate a substantial economic disparity/economic injustice between the parties from divorce until the retirement of the parties?

Suggested Answer: Yes.

B. Did the trial court and/or the master abuse their discretion in refusing to allow Husband more time to engage in further discovery when the record reflects that Wife failed to disclose a million dollars of martial assets during the course of the proceedings?

Suggested Answer: Yes.

C. Did the trial court abuse its discretion in failing to conduct a de novo review of evidentiary rulings and credibility assessments of the master in regard to issues that were highly relevant in determining alimony and equitable distribution?

Suggested Answer: Yes.

STATEMENT OF THE CASE

A divorce decree was filed on October 28, 2020, ending the marriage of Robert P. Bauchwitz ("Appellant" or "Husband") and Ann M. Rogers ("Wife") of Hershey, Pennsylvania. (Order of Oct 28, 2020). Husband was born May 3, 1960 (currently 61 years of age) and Wife was born August 18, 1960 (currently 61 years of age). The marriage lasted twenty-seven (27) years and four (4) months until separation. (R. 0419a). Before the marriage, Wife had obtained a medical degree and postgraduate clinical training. Throughout the marriage she worked as a surgeon (*Ibid*), and testified that she intended to continue doing so until at least the age of 67 (R. 0887a-0888a). Wife's income, after a one-year fellowship ending in 2007, increased from $309,393.00 in 2008 (R. 0622a-0623a) to $468,416.00 in 2019, which was Wife's last income disclosed in the record. (R. 0420a). Wife's net income was calculated at that time to be $25,374.00 per month (R. 0420a at point 32).

Prior to the marriage, Husband was trained as a medical scientist, but Husband was never licensed to practice medicine. (R. 0421). Husband became involved in a federal *qui tam* research misconduct lawsuit in 2004, about which the master noted: "Husband did agree to

move to Hershey, Pennsylvania in 2007 for Wife's career. However, at that time, because of his whistleblower lawsuit, his career in government research was over." (R. 0460a). Instead, "[a]fter Husband relocated to Hershey, he began his own business first known as Bauchwitz Laboratory but later changed to Amerandus Research." (R. 0421a citing R. 0957-0961a). These businesses were started by "joint decision" with Wife." (Wife's testimony at R. 0908a). Husband further noted in testimony that he had been specifically harmed in moving forward with his career by a former employer's removing his academic title in 2004 without explanation, shortly after he began working with an agency of the federal government on the *qui tam* case (R. 0955a). Furthermore, Husband testified that even as late as 2017, he and his counsel were concerned about evidence indicating that the same former employer was involved in tortiously interfering with his licensing of genetically modified mice produced by his business. (R. 0961a-0962a; Ex. 3b, R. 1251a-1253a). Ultimately, Husband made no income from the *qui tam* suit (R. 0953a) or the licensing of strains of genetically modified mice he had produced in his business (R. 0421a).

Early in the marriage Husband was employed in a scientific research fellowship from which he received stipends that had no

Medicare earnings. (R. 0421a). The income history of Husband and Wife are found in Social Security statements filed with Master's Report of March 13, 2020 as exhibits P-3 for Wife (R. 0652a-0655a) and D-22 for Husband (R. 0512a-0515a). Husband's peak, full year W-2 wage earnings as a biomedical scientist were from 2001 through 2006 (*Ibid*). During this time, his average income was $67,664. Husband's last W-2 income before separation occurred in 2010 as an adjunct lecturer for $7,240 (for one semester; R. 0906a). Husband had no further income after 2010 through to separation in the Fall of 2017 since he did not earn any income from his self-employment.

Husband testified about the financial harm to his business from the unexpected separation by Wife in 2017, and to his extensive post-separation efforts to obtain employment, including through the use of recruiting firms (R. 0962a-0966a). Husband has not obtained high-income employment to the present, not only in his career field ("Wife admitted that because Husband brought a whistleblower lawsuit against his former employer, he most likely would not be able to obtain employment in the research area" (R. 0429a), but in several others as well. More specifically, Husband testified to various factors that he had come to believe might have been affecting his employability beyond the

involvement in a *qui tam* suit against a former employer, including the decade without earnings history, his lack of experience for high-paying jobs outside of his field, his advanced age, and his need for accommodations for medical limitations on work. (R. 0968a-0970a).

Regarding medical issues, the master noted that: "Husband's health has deteriorated since separation in 2017 and he has lifting restrictions". (R. 0422a point 50;). More specifically, the master also stated that Husband had been diagnosed with osteoporosis, osteoarthritis, and degenerative disc disease, had been treated for head and neck cancer in 2018, and was being followed for a mediastinal mass. (R. 0418a). With respect to the osteoporosis, Husband testified to fractures of his spinal column, including multiple fractures at T-12 in 2015. (R. 0935a). Husband further testified that he was not physically capable of working in a laboratory due to his osteoporosis with history of back fractures and osteoarthritis. (R. 0968a). Wife, a physician who had followed Husband's medical course in detail during the marriage, did not challenge any of the medical claims of Husband. With respect to post-separation employment, the master's report of March 2020 stated, "Husband is employed on a part-time basis as a substitute teacher earning $52 gross income per day." (R. 0439a citing exhibit D – 17).

Ultimately, the master adopted a sixty (60)/forty (40) split of marital assets but awarded the Husband no alimony. The master made the following observation of the economic circumstances of each party at the time the division of property is to become effective: **"**Wife's far superior income means that she will be able to contribute significantly to her retirement and other investments accounts. **Wife will be able to overcome any financial disadvantage as a result of this divorce** so long as she is capable of continuing in her current line of work. **Husband on the other hand**, if not provided a greater share of the marital assets, **will not be able to recover as easily** from the divorce as Wife. However, with an earning capacity of at least $72,000 per year and attendant employment benefits, Husband ***should be*** able to contribute (obviously not to the extent of Wife) to his retirement and investment accounts until he reaches his full Social Security retirement age. Accordingly, this favors a larger distribution to Husband." (R. 0454a-0455a) (emphasis added).

The master further noted with respect to discretionary income: "Wife's income is more than six times Husband's earning capacity. Wife's major source of income is her employment. Husband's only sources of income are his employment and alimony pendente lite paid

by Wife. Aside from the mortgage associated with the former marital residence, which will be fully satisfied upon sale, neither party has any significant debt. Wife is able to meet her reasonable monthly needs and still have a significant amount of discretionary funds remaining. Assuming Husband pays $1,000 a month for health insurance, **Husband is not able to meet his reasonable needs from his earning capacity**. However, once Husband obtains employment that provides health insurance at what ***should be*** a significantly reduced cost, Husband will be able to meet his monthly needs and as he continues to work **and his income increases overtime** he ***should be*** able to have **discretionary income**. However, Husband will most likely never have the discretionary income of Wife." (R. 0451a) (emphasis added).

With respect to the parties standard of living, the master stated that: "The parties established an upper-middle class standard of living during the marriage. Given Wife's superior income, she will have no problem maintaining and perhaps even exceeding the marital standard of living. With his earning capacity alone, Husband will not be able to maintain an upper-class standard of living. This favors an award of alimony to Husband." (R. 0461a) (emphasis added). According to Census Bureau data, the parties had a marital income in the top 5% of

U.S. incomes for the last 25 years of the 27-year marriage. (R. 1199a-1201a; R. 1223a-1224a).

The trial court presented its *de novo* review of the master's report in its opinion of October 9, 2020. The master's findings were all upheld by the trial court except for an argument by Husband of a due process violation by the master.

On November 25, 2020, Husband filed a notice of appeal to the Superior Court (1499 MDA 2020). On January 6, 2021, Husband filed a Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b), in which he specified not only his contention that the division of assets and lack of alimony recommended by the divorce master and sanctioned by the trial court would produce a significant economic injustice, but also that the *de novo* review process by the trial court was significantly impaired. Despite the seeming finality of the divorce decree of October 28, 2020, and thereby the economic matters it dealt with as summarized above, litigation in the case has continued to the present because of multiple filings by Wife to terminate Husband's APL before the conclusion of the current appeal.

SUMMARY OF ARGUMENT

The trial court and/or the master abused their discretion in refusing to award Husband ongoing alimony and/or a larger distribution of the marital assets when, at best, the record reflects that Husband can earn a maximum of $72,000 a year while Wife will earn nearly $470,000 a year until her retirement. The master's recommendation to remedy this substantial economic disparity/economic injustice was to provide Husband with sixty (60) percent of the parties' marital assets which consisted almost entirely of retirement assets. Such a distribution does not remedy the economic disparity/economic justice particularly when the parties were married for over twenty-seven (27) years and, by agreement of the parties, Husband would stay home and earn little or nothing from a self-employment venture – indeed, Husband had no W-2 earnings during the last seven (7) years of the marriage.

The trial court and/or the master also abused their discretion in refusing to allow husband additional time to engage in discovery as Wife failed to disclose a million dollars of marital assets during the course of the proceedings and the master's suggestion that wife was

possibly "confused" when she failed to disclose said assets is not supported by any credible evidence of record.

Last, the trial court abused its discretion by failing to conduct a *de novo* review of the master's evidentiary rulings and credibility assessments in regard to areas that were highly relevant in determining the alimony and equitable distribution issues.

This matter should be remanded to the trial court to award alimony to the Husband as well as to properly reassess the distribution of marital assets. If necessary, the trial court should permit additional discovery as to the nature/extent of the parties' marital assets and conduct *de novo* review of any of the master's evidentiary rulings and credibility determinations that are relevant to the issues of alimony and equitable distribution.

ARGUMENT

A. THE TRIAL COURT AND MASTER ABUSED THEIR DISCRETION IN REFUSING TO AWARD HUSBAND ALIMONY AND/OR AWARDING HUSBAND A GREATER SHARE OF MARITAL ASSETS

Husband and Wife were married for twenty-seven years. Husband was born May 3, 1960 (currently 61 years of age) and Wife was born August 18, 1960 (currently 60 years of age). Throughout the marriage

she worked as a surgeon (R. 0419a), and testified that she intended to continue doing so until at least the age of 67 (R. 0887a-0888a). Based on Wife's September 19, 2019, paystub (R. 0622a-0623a), she received a gross monthly salary of $36,409.69 along with an annual physician's "incentive" of $31,500.00; thus, Wife's total gross income from the Penn State Hershey Medical Center in 2019 equaled $ 468,416.28 (R. 0446a at point 32;). Wife received additional income for medical-legal chart reviews, speaking honorariums and serving as a national site surveyor for bariatric surgery which additional income Wife reports in the Schedule C to her tax return (R. 0420a, 0439a). On the other hand, Husband had no earnings during the last seven (7) years of the marriage (Statement of the Case and citations therein). Nonetheless, the master and the trial court imputed a $72,000 a year earning capacity to Husband (*Ibid*.). Though Husband challenges that imputed earning capacity, even assuming, for the sake of argument, that Husband had a $72,000 earning capacity, the trial court still abused its discretion in failing to award Husband *any* alimony when Wife will continue to earn, at a minimum, nearly six (6) to seven (7) times more than Husband until retirement.

The marital couple had a very high standard of living as properly assessed by income rather than actual or feigned frugality

The standard of review asserted with respect to determining economic justice in a divorce matter is that:

> "The **standard of living** to which [a spouse] is entitled is one reasonably supportable by the income and station in life of the parties, **irrespective of the frugal inclinations** of the [the other spouse]." *Edelstein v. Edelstein*, 399 Pa.Super. 536, 542, 582 A.2d 1074, 1077 (1990)."

The trial court similarly affirmed *Edelstein* (*supra*) in its October 9, 2020 opinion:

> "**Spousal incomes** are what establishes **a standard of living** throughout a marriage". (R. 0818a).

Thus, frugality, such as by one spouse's reducing living expenses, "cannot be a basis for depressing the living standard of the [other spouse], ***while permitting the*** [wealthy spouse] ***to continue to amass large financial assets after separation***." *Edelstein v. Edelstein*, 399 Pa. Super. 536, 542 (Pa. Super. Ct. 1990).[1]

[1] For example, a surgeon making nearly half a million dollars a year in income might, during a divorce action, claim to have a home rental expenditure of less than $1400/month, but the other spouse, having lived for a quarter of a century in high income conditions during the marriage (for example in a 52nd floor penthouse apartment in New York City costing many thousands of dollars per month in rent; R. 1637a-1638a), should not be held to a standard of Wife's new, "frugal" rent.

Furthermore, "[T]he standard is what is reasonable under the circumstances, and the circumstances are in large measure governed by **disposable income**." (Karp v. Karp, 455 Pa. Super. 21 (Pa. Super. Ct. 1996).

In the present action, "The Divorce Master noted that the parties had established an *upper middle class standard of living* throughout their marriage." (R. 0420a) Husband, however, notes that the master and the trial court used several varying terms to describe the standard of living in this case, including "upper middle class" (R. 0454a, 0461a), "middle class" (R. 0426a, 0454a), and "upper class" (R. 0461a). However, these terms were never defined or cited to law.

The U.S. Census Bureau uses defined quintiles to assess incomes (R. 1223a). More pertinent to this high-income case, it also has a top 5% bracket (*Ibid*.) From the Social Security statements of the marital couple as entered into the record, it can be seen that Husband and Wife were in the top 5% of U.S. incomes for the last twenty-five of the twenty-seven year marriage.[2] (*Ibid*., R. 1199a, 1224a).

The couple's marital lifestyle was consistent with a high marital

[2] Husband provided further assessments in the record indicating that they were at times in the top 1%, consistent with physicians such as Wife often having the highest employed incomes in the U.S. (R. 1344a, points c and e).

income. (R. 1199a-1201a points 8e – 8h). The preceding is notwithstanding some erroneous and incomplete descriptions of the couple's lifestyle by the master and repeated by the trial court.[3] Regardless of whether the master and trial court were mistaken about descriptive details of the parties' lifestyle at various points in the marriage, the law supports the proposition that frugality in one area does not preclude economic advantage in another. Thus, whether a marital couple in Pennsylvania puts one's money into houses, businesses, cars, vacations, or investments, etc. does not impact an overall consideration of their standard of living. (*Edelstein, supra*.)

Since almost all the high income during the latter years of the marriage was attributable to Wife's career in clinical medicine, and therefore she alone would remain in the top few percent of American income earners in the country, there is not now, nor has there ever been, any question as to Wife's ability to pay. (*See Karp v. Karp*, 455 Pa. Super. 21 (Pa. Super. Ct. 1996).

By contrast, Husband's earning capacity has been in dispute throughout the case. This point is on appeal for the reason that Husband

[3] "The parties ... owned nice, but not luxury cars." (R. 0817a) The record shows that the couple drove Acura (SUV) and Volvo (sedan) vehicles. (R. 1200a-1201a, point 8h).

asserts that its determination was an abuse of discretion in that it neither conformed to the evidence in the record nor to the law.

Earning capacity was not determined by adequate documentation or with full and realistic basis in evidence

On November 29, 2017, a Support Conference was held by Dauphin County Domestic Relations. (R. 1503a). The purpose of the conference was to make a determination about *alimony pendite lite* based on net incomes of the spouses. More specifically, the Support Order of December 26, 2017 stated in relevant part at R. 1503-1504a:

> "The plaintiff & his attorney appeared for the conference on 11/29/17. The defendant did not appear, but was represented by her attorney. The case was taken under advisement *in order to consider the earnings of the plaintiff*. … [Guideline calculation and payment discussion omitted.]
> The plaintiff [Husband] worked a regular income job back in 2007 at $35,476.00/year gross. In 2006, the parties moved to PA from NY for defendant's job. The parties agreed in 2007 that the plaintiff would stay at home with the children, who graduated in 2001 & 2013. In 2011, he established a business in which the defendant was the main investor in. He is seeking a full time job & has experience as a Fraud Examiner in which he states the staring salary is $44,000/year gross. Since the parties separated he has been living off his owns savings money. The defendant's counsel argues the plaintiff has been working on a Qui-Tam Fraud case, but plaintiff stated he is "not" a Certified Fraud Examiner. He does have a lot of consulting experience similar to Certified Fraud

> Examiners. Thus, why the plaintiff was held to an average of the $44,000.00/yearly gross & $100,000.00/yearly means of a Certified Fraud Examiner per PA job research."

The record quoted in the preceding indicates no document other than one concerning the average starting income ($44,000/year) of a person holding a fraud examiner certification (C.F.E.) was presented by Husband to the Conference Officer concerning his earning capacity. Husband also clarified in records submitted to Wife's vocational expert that he had stated that he was not a "C.P.A", which the Conference Officer apparently misheard as "C.F.E." (R. 1270a). Testimony of Husband's specified, and testimony of Wife supported, that Husband had obtained his C.F.E. in 2016, the year before the 2017 Support Conference (R. 0877a, 1037a). The importance of not having had a C.P.A. was also discussed in the vocational documents presented to Wife's expert; namely, that the $100,000/year income for those with C.F.E.'s cited by the Support Officer was for individuals with C.P.A.s at their peak career, not for those with Ph.D.'s who were within 1-3 years of having been certified. (R. 1270a-1272a). The record also shows no indication of testimony at the Support Conference about medical limitations or other issues which could affect earning capacity.

On January 23, 2018, Husband filed for a *de novo* hearing concerning the earning capacity ascribed by the Support Officer. On May 30, 2018, Husband's attorney handling the support matter filed a "Motion to Withdraw Demand for De Novo Hearing" in which she cited Petitioner's recent cancer diagnosis. (The motion was verified by the attorney "due to the unavailability of my client".) On June 1, 2018, the court ordered Wife to file a response to the motion by Husband's counsel to withdraw his request for a de novo hearing; Wife did not concur with the request to withdraw the demand for hearing. On June 14, 2018, the motion to withdraw the demand for a support hearing was denied by order of the court. During substantial times in June and July, 2018, Husband was hospitalized, and thereafter was undergoing rehabilitation for the effects of cancer treatment. (R. 0935a-0936a). On July 6, 2018, the court issued an order rescheduling the de novo hearing due. On August 29, 2018, Husband's support counsel petitioned the court to withdraw as counsel. Husband did not agree to counsel's withdrawal, despite a disagreement having arisen concerning counsel's change in strategy. (R. 1211a; see also R. 1540-1545a). The original strategy, to which Husband had agreed, relied upon Husband's expert witness and making a full record of factors affecting Husband's earning

capacity. (*Ibid*.) During Husband's hospitalization, however, his support counsel had changed her strategy to a novel insistence on focusing on cancer and its effects, which she believed rendered Husband to have a "zero" earning capacity, as the court purportedly would not be able to determine when his recovery would be sufficiently complete for employment. (*Ibid*.) Husband's divorce counsel declined to take the *de novo* hearing scheduled for September 15, 2018, citing lack of time to prepare. (*Ibid*.) Husband then retained an employment attorney who was willing to take the *de novo* support (and divorce) case if he could get a continuance, which was granted by order dated September 12, 2018. The de novo hearing ultimately was not held.[4]

A master's hearing was held on October 17, 2019. The master made note in her report of various negative factors to which Husband had testified, and which Wife, a physician who knew Husband's medical condition well, did not challenge. In the Statement of the Case, Husband noted that he had testified to <u>various factors</u> that he had come to believe might have been <u>affecting his employability beyond the involvement in</u>

[4] Wife's counsel wrote on November 20, 2018, to Husband's counsel to state "I have told you several times that I did not request a de novo hearing in the support matter. Dr. Bauchwitz had already done so, meaning that I had no reason to request a hearing", a claim seemingly at variance with the court record as cited above, but nevertheless taken as a withdrawal of demand for hearing by Wife. (R. 1863a). Husband's counsel then chose to litigate the matter at the master's hearing rather than at the de novo hearing.

a *qui tam* suit against a former employer, including the decade without earnings history, his lack of experience for high-paying jobs outside of his field, his advanced age, and his need for accommodations for medical limitations on work. (R. 0968a-0970a).

The master filed a report of her recommendations for equitable distribution of marital assets and alimony on March 13, 2020. In addition to the statements from the master's report noted above in which the effects of Husband's whistleblowing (*qui tam* relator) history and physical limitations on his employment were specified, she also noted with respect to his earning capacity that:

> "When questioned as to whether he had provided any evidence of the job searches he had undertaken, Husband indicated that that documentary evidence had been presented to the domestic relations office in the support case. T. p. 195. In regard to any medical limitations, Husband likewise testified on cross-examination that he had provided documentation regarding his health situation to the domestic relations office in the support matter. T. p. 196. Given that the domestic relations office had this documentation and considered it in its determination, whereas no such documentation was provided at the hearing, the earning capacity determined by the domestic relations office remains appropriate in this matter." (R. 0440a). [Underlining emphasis added]

Husband's testimony cited by the master at R. 1033 states:

> "Q. You said you conducted job searches at least in 2017 and 2018. You haven't provided any evidence of those job searches, correct? [Husband] A. I think a lot of evidence presented in the reports **to your party** before the support conference last year, so you should have."

Husband's testimony does not mention providing documentation of job search efforts to Domestic Relations. However, with respect to medical restrictions, as cited by the master at R. 0964a, there may be a basis for confusion:

> "Q. You haven't provided any evidence of any medical restrictions that you have as far as your vocational ability, correct?
> A. **Same answer**. I believe I've provided exhibits and the letters from all the doctors and the -- and the vocational expert was made -- same one from last year and the same doctors, all the same ***as in the support conference***. I presented -- we represented all of that information and, you know, would have expected them to testify if need be. I presented all of that information." [Font emphasis added.]

The "same answer" could reasonably be taken to mean the antecedent, "to your party". However, the master may have relied in part on the subsequent statement, "as in the support conference".

Given the materiality of several hard to comprehend, absent, or otherwise erroneous statements in the hearing transcript, such as the one preceding, Husband filed an Application for Correction of the Original Record with the Superior Court on February 26, 2021. The

Superior Court remanded the record to the trial court on March 4, 2021. By order of March 22, 2021, the trial court ordered a listing of issues with the transcript claimed by Husband. Husband filed his list of transcript issues on April 1, 2021, at which time he attached a letter from a consulting expert he had retained who examined the transcript and noted numerous likely transcription errors that warranted review and correction. The court reporter identified sixteen errors in a filing of April 19, 2021, but those corrections did not include many of those questioned by Husband and his consulting expert. The trial court quickly took the court reporter's errata as a full and complete accounting and returned the docket filings to the Superior Court by order of April 28, 2021. During that same time, Husband had submitted a Demand for Hearing (filed May 3, 2021). The Demand for Hearing was taken as a Motion for Reconsideration by the trial court and denied on May 6, 2021. Despite the factual dispute, the trial court did not provide opportunity for further discovery and hearing. On May 26, 2021, Husband filed a notice of appeal on the transcript original record matter (647 MDA 2021).

Regardless of the difficulties with the transcript in this case, the actual support order of December 26, 2017, as quoted above, makes no

claim at any point that any other documentation was presented, or factors taken into account, with respect to determination of Husband's earning capacity, including not the results of job searches or medical limitations. Furthermore, there were several other points in the master's hearing of October 17, 2019, in which Husband discussed such matters, and the master even cited those in her report (such as "lifting limitations"; see Statement of the Case). Therefore, Husband filed objections (as exceptions) to the preceding claims concerning assessment of earning capacity on April 29, 2020.

Indeed, Husband argues that it is the transcript of the master's October 27, 2019 hearing itself, which was the documentary record on this subject at the time she wrote her report.

Despite the trial court's noting that Husband had taken formal exception (objection) to the master's claims about earning capacity, the trial court nevertheless affirmed the master's assertions as follows:

> "While Husband challenges the determination of earning capacity that the Dauphin County Domestic Relations Office calculated in 2017, it is noteworthy that he withdrew his request for a de novo hearing. To now challenge the Divorce Master's reliance on that figure is misplaced." (R. 0822a)

Husband argues that this may be noteworthy, but not for the

reasons the trial court implies. Litigants cannot challenge every decision by their representative attorneys, who are professional officers of the court handling such cases. It is clear from Husband's knowledge of incomes of various groups with a C.F.E. certification that he felt he had an important case against the Support Officer's estimation of his earning capacity, and that he filed for a *de novo* hearing shortly after that decision appeared in the Support Order of December 27, 2017. However, in matters such as determining the most appropriate venue in which to make arguments, there is almost no way that a litigant could know more about which forum might give a fairer hearing than the counsel who regularly appear before such tribunals.[5] Therefore, if upon the belief and advice of a litigant's counsel, that counsel strongly preferred to make a record for litigant in front of a divorce master rather than a *de novo* support court judge, that is not an area in which a litigant could likely intercede.

Husband submits that the trial court has presented no evidence

[5] By way of further example that litigants must depend on their counsel to take action (which might not be in counsel's best career interests), even if a litigant were to learn that the opposing party had for years been lobbying a Pennsylvania state legislator who was a close relative of the trial judge, it is not at all clear that such information could be adequately questioned or investigated during the pendency of the case, or even if such relationship were confirmed, that it would give any right or opportunity in Pennsylvania to change the judge. (See also Motion of Inquiry R. 2039a et. seq.).

whatsoever on which to base its inference that Husband's withdrawal had any other import than his counsel's perceived choice of adjudicator. Indeed, the facts as to earning capacity can speak for themselves. (See below.) Therefore, any conclusions that the trial judge may have made, which appear to have been held against the legitimacy of Husband's earning capacity challenge, or the forum in which it was taken, are misplaced. It is not at all evidence based, and therefore an abuse of discretion, since as a judgment it apparently had an influence on determination of Husband's earning capacity.

Pennsylvania law is clear and reasonable concerning how earning capacities are to be defined:

> "A person's earning capacity is defined "not as an amount which the person could **theoretically** earn, but as that amount which the person could **realistically earn** under the circumstances, considering his or her age, health, mental and physical condition and training." *Perlberger v. Perlberger* 426 Pa. Super. 245 (Pa. Super. Ct. 1993)" (citations omitted).

Impediments to gainful employment must be considered, and not just the time it would take to retrain:

> "As noted by Superior Court, these **"impediment[s] to gainful employment"** exempt Mrs. Hodge from the general rule set forth in Section 501(c) that alimony shall be limited to a period of time that reasonably allows the party to obtain appropriate

> employment or develop an appropriate employable skill. 23 P.S. § 501(c). Hodge v. Hodge, 337 Pa.Superior Ct. 151, 158, 486 A.2d 951, 954 (1984)." Lawson v. Lawson, 940 A.2d 444 (Pa. Super. Ct. 2007).

The other factor this trial court cited in considering earning capacity, beyond what was or was not presented and considered at the Support Conference of November 29, 2017, was Husband's "impressive" education.

> "Furthermore, the Divorce Master not only relied on the determination made by Domestic Relations, ***she also cited Husband's impressive education*** and training in arriving at her determination. Accordingly, there was no error." (R. 0822a)

Indeed, the master had written regarding her view of the importance of the education factor:

> "Given his incredibly impressive education (the master notes he has a degree in biochemistry from Harvard College) Husband should have no problem obtaining employment at or exceeding his earning capacity." (R. 0451a.)

As noted above, the standard of review asserted here is abuse of discretion:

> "Our standard of review is one of an abuse of discretion**.** "Absent an abuse of discretion, the trial court's findings of fact, **if supported by credible evidence of record**, are binding upon a reviewing court." *Teodorski v. Teodorski,* 857 A.2d 194 (Pa. Super. Ct. 2004) (citations omitted).

The preceding case law is consistent with more general definitions of abuse of discretion:

> "1. An adjudicator's failure to exercize sound, reasonable, and legal decision-making. 2. An appellate court's standard for reviewing a decision that is that is asserted to be grossly unsound, unreasonable, illegal, **or unsupported by the evidence**." (*Black's Law Dictionary, Ninth Ed*., p. 11)[6]

Having seemingly jumped to a conclusion without any evidence in the record that Husband's "impressive education" would be determinative of employment, presumably at a level of $72,000/year, and despite evidence presented and even acknowledgment of impediments to employment, the master then attempted to support her opinion about Husband's education by example:

> "With his education and background, Husband will not be a candidate for laborer jobs that require lots of lifting and other physical tasks. Most likely he will be seeking an office job and his employers, given his superior education, ***will be willing*** to work around his lifting limitations. For instance, Husband with his

[6] Husband further notes that discretion is required in many professional fields. In science, medicine, audit, investigation, and even for sporting officials, proper discretion involves determining, and often making record of, the evidence. The determination of credible evidence is meant to allow a grounding in reality. Second, rules and laws are applied to credible, sufficient evidence through a cognitive process described as "logical" or "reasonable". Therefore, evidence of reality is the foundation, following which such evidence is logically processed according to rules and laws. Consequently, if a conclusion is not based on evidence, such conclusions would be, in essence, the production of baseless opinion or potentially fictitious material. Consequently, in general, the foundation for applying logic to the rules/law must be credible, sufficient evidence.

> medical degree, ***enabling him to decipher medical charts*** and with ***his knowledge of medical terms***, would be a tremendous asset as a paralegal for a law firm practicing medical malpractice or for an insurance company in their fraud department." (R. 0440a).

The master has pointed to no evidence to presume that employers would be "willing to work around" Husband's limitations, even though the master only cites a physical one. Would potential employers be willing to work around Husband's having acted in a lawsuit against a former employer? The resulting extended period without an earnings history? These do not even include his advanced age, as its own factor.

By comparison, see the Offer of Proof re Husband's proposed vocational expert at R. 1885a-1886a:

> "If this witness is called and put under oath, I think he will say that there are **several important factors** which make it unlikely that I will be able to find full-time, W-2 employment, including especially in my former professional field. He will testify that the two most significant of those factors is my **whistleblowing history and my age**.
>
> He will note that actions I took as a result of my acting as a *qui tam* relator in a federal lawsuit involving my employers has led to over a decade in which I have not had significant W-2 employment, in or out of my field. He will also testify that my earnings history has been negatively impacted and that "vocational experts note that **past earnings are the best predictors of future earning capacity**."
>
> He will further testify that the effects of ageism on

> employment in the United States is a well- known and well-researched phenomenon that also negatively impacts me.
>
> In addition to my work and earning history and age, the witness will note that my medical history has produced physical limitations on the work I can reasonably perform, and that this, too, is a factor which will negatively impact my ability to obtain and maintain employment.
>
> Finally, he will testify that he has examined my actual job search history since late 2017 through to the present and that the results of those searches supports the impact of the negative factors which appear to affect me. The only evidence that does exist after all these years is that temporary agencies will hire me and thereby allow me to be employed at relatively low wages as part of a group of workers, who are not specifically identified to end-employers."

(See also "Report of Expert Vocational Witness" as Exhibit J, R. 1914a-1920a)[7]

The master's statements are in further error because Husband does not have clinical medical knowledge and experience required to review charts as a paralegal; indeed, Wife, an actual clinician, makes Schedule C income to review charts.[8] Husband does not have the financial training or background to work as an insurance fraud

[7] Husband noted that an active earning capacity case has arisen in the underlying case from this this appeal is taken. The offer of proof was for a vocational expert who was intended to be questioned at a hearing begun on June 7, 2021. The hearing was aborted. A brief was filed at the direction of the trial court. (R. 1944 *et. seq*.). Husband had previously requested a stay of the briefing schedule from the Superior Court. (Applic. June 9, 2021, 1499 MDA 2020) in order to conserve resources by allowing re-consideration by the trial court of the matter appealed herein, but this was denied by the Superior Court on June 17, 2021.

[8] Nurses also get such positions.

examiner. (R. 1206a, point 25, footnote 21;).

Therefore, the master's assertions regarding the determinative importance of Husband's education are without support in any evidence, and must thereby be abuses of discretion. Having been cited by the trial court as bases for the outcome here appealed, they are also material abuses of discretion.

In addition to abuse of discretion by implying an application of law without basis in evidence (*Teodorski, supra),* abuse of discretion is also asserted based on error of law (*Perlberger, supra)*, in that in determining earning capacity, a requirement exists to make a "realistic" assessment, not a "theoretical" one without other evidentiary support. As wonderful as a Harvard education might appear to some, there is no evidence in the record, other than by implication of the master's own testimony and support by the trial court for such testimony upon "review", that such an education confers magical powers that protect the degree holder from the vicissitudes of the employment markets.

The master's propensity to create her own "findings" would continue:

> "Husband has the ability to earn at least $72,000 annually and other employment benefits, but since separation, *has not seen fit* to find full-time employment. The fact that Husband has ***not taken***

> ***the initiative*** to find full-time employment when he has the ***obvious*** ability to do so, should not be a reason to award him a greater portion of the marital assets. Accordingly, this factor does not favor a larger distribution to either party." (R. 0452a)

There is no support whatsoever in "fact" for this claim by the master. Husband strongly asserts that the record clearly shows that he has taken considerable initiative to obtain employment. Furthermore, Husband denies that it is at all "obvious" that he has the ability to persuade an employer to accept him in a high-wage role outside his career field without experience. The facts of the case show the opposite. (*See e.g.* Statement of the Case and R. 1914a-1915a.)

Husband clearly testified that he had employed numerous recruiting firms to assist him in obtaining employment. (Statement of Case and citations to the record therein). Wife and her counsel had sufficient opportunity to cross examine him on this point. Furthermore, in materials disclosed to Wife during the time her vocational expert was assessing Husband, he noted:

> "I looked at well over 1000 jobs obtained through over 20 search engines and 7 recruiting firms, two of which used two independent divisions to market me to clients. Furthermore, I have had three different recruiters work with me at a large, regional recruiting firm. Hence, a total of 10 professional recruiters have worked with me, beginning in October –

November 2017." (R. 1269a).

Indeed, it is also not true that either Husband or the recruiting firms failed to obtain *any* jobs. They did obtain work for Husband. The master noted that Husband had worked as a substitute teacher (R. 0439a), and Husband testified to also working in clerical roles (R. 0945a, 0964a), as well as direct care staff (R. 1205a).

The same confusion as to whether the discussion of economic justice has to do with getting *any* job or wage was also noted by the trial court:

> "while certain circumstances might have prevented Husband from obtaining lucrative employment during the marriage, he is not precluded from earning *any* wages. While his physical condition may have diminished, Husband provided no medical evidence which suggested that he was unable to earn *any* wages." (R. 0820a).

However, Husband asserts that it does matter whether he can get *lucrative* employment. Earning capacity is not merely a matter of all or none, job or no job. Husband concedes that the data show he can be employed in temporary, part-time positions in teaching, clerical roles, and even in limited (non-physical) caregiving. Earning capacity determinations require more.

With respect to evidence in the record that Husband was

somehow resisting employment, Husband notes that while Wife and her counsel did try to make such a case, upon any reasonable review of the record, it could have been established that such claims were specious. For example, there was abundant evidence in the record that Wife had long ago, by 2006, acknowledged that Husband would no longer be able to work in his career as a researcher due to involvement in a *qui tam* case, and that he would ultimately attempt to be self-employed in his own businesses to produce and license genetically modified mice, and thereafter also to become involved in research audit and oversight. (See Statement of the Case and citations to the record therein.) Nevertheless, Wife's counsel repeatedly insinuated, such as by loaded questions, that Husband had not been "working" because of a whistleblowing case:

> "[Wife's counsel] Q. Is it -- I want to clarify. Is it your contention that being involved in this lawsuit somehow stopped you from working, prevented you from working?
> A [Husband]. That's a very broad -- you mean from working? I think that I -- I don't know what you mean by "working." (R. 1034a-1035a).

Remarkably, the master found it appropriate to find Husband's questioning the premise of Wife's counsel "evasive":

> "However, when asked twice on cross examination whether it was his contention that being involved in the whistle blower lawsuit prevented him from working, Husband's answer can only be

described as evasive. T. pp. 196 - 198." (R. 0428a.)

As the subsequent testimony showed, Wife's counsel persisted in pushing the view that not having a wage income or profit was equivalent to "not working", despite the evidence of Husband's businesses in terms of activity and product (mice, publications, websites, paying contractors) having been evident and made of record. (Aside from numerous points of testimony cited elsewhere in this brief such as the Statement of the Case, see also Exhibits 3 and 3b at R. 1241a-1253a).

The trial court also seemed to give credence to this theory that somehow what Husband really lacked was "motivation", despite testimony to actual impediments to Husband's obtaining high-income employment after many years of self-employment and with a variety of negative factors:

> "By recommending that Husband not be awarded alimony and, instead, receive 60% of the marital assets in equitable distribution, the Divorce Master noted that Husband will be motivated to find employment close to his earning capacity and will not be discouraged from entering into another relationship, which could potentially jeopardize his income." (R. 0819a).[9]

[9] What other relationship? Where in the record was it shown that Husband has any such "relationship" in mind?

It is hard to understand the "logic" by which the master found Husband, whom she notes is a graduate of Harvard College, has a "motivational" flaw. Clearly, Wife and her counsel attempted to create a *de facto* "fault case", or one which could be used as cover to blame Husband for a potentially economically unjust outcome (here on appeal). In particular, they repeatedly sought to portray Husband as chronically "unemployed" and not "working" (see above), when the record showed that he was not only self-employed, but had been quite productive. Not making profit in a business is not reasonably equated with lack of effort. Husband noted that he was subjected to loss of his academic title without basis after beginning to work with an agency of the federal government, and then the same former employer strongly appeared to have been involved in tortiously interfering with his licensing of his genetically modified mice as recently as 2017. (See Statement of the Case, and citations therein.)

Therefore, Husband has asserted here that the claims made by the master and accepted by the trial court on key points upon which the trial court relied for making a determination against alimony, were in fact based on no evidence at all, or clearly specious claims (Husband not working or unmotivated). These baseless conclusions constitute an

abuse of discretion. However as also asserted here, they are an error of law, as they are at best most charitably characterized as "theories" and not at all realistic. (*Perlberger, supra.*) Indeed, the master's theorizing is very dangerous. What if Husband is a very motivated man but despite this, for a variety of reasons he has cited (and is prepared to have vocational experts opine upon as shown by his offers of proof), he actually continues to have much less earning capacity than the master imagines? Then what is Husband's recourse?

Nevertheless, the trial court did sustain a 10% supplement from the marital estate to Husband. This was based on Husband's earning capacity:

> "For this reason, the Divorce Master indicated a larger distribution to Husband was appropriate. In assessing this factor, it is necessary to look at the parties' earning capacity." (R. 0818a)

Husband has above argued that the evidence provided of his earning capacity was subjected to significant abuses of discretion. Nevertheless, in moving beyond factors and decision-making to the actual funds involved, Husband next presents a fiscal assessment of the decisions made by the trial court, in order to establish whether or not such outcomes, even if not credibly based or reasoned, actually are of

financial import.

Estimation of the value of an additional 10% of marital assets if needed as supplemental income to cover basic expenses or to provide discretionary income

The master has claimed, and the trial court supported, the proposition that "Given Wife's greatly superior income, this factor favors a greater distribution to Husband." (R. 0451a). Husband does not question this conclusion. The question is whether the funds awarded in additional marital assets are sufficient to effectuate economic justice.

Husband was awarded an extra 10% of the marital estate and no alimony. This was based on Husband's ascribed earning capacity, as largely attributed to a lack of motivation by Husband to find "lucrative" work which, by implication, would be cured by the pressure of not being provided alimony:

> "By recommending that Husband's request for alimony be denied and instead recommending that Husband receives sixty-percent of the marital assets in equitable distribution, Husband should be motivated to find employment close to his earning capacity." (R. 0466a). To the preceding, the trial court concluded: "the Divorce Master not only relied on the determination made by Domestic Relations, she also cited Husband's impressive education and training in arriving at her determination. Accordingly, there was

no error." (R. 0822a).

Despite all the gross abuses of discretion Husband has asserted above inherent in the claims of the master, and as seemingly verified by a purported *de novo* review of the record by the trial court, the question remains whether regardless of such alleged improper and inadequate performance by the court officials, do the financial outcomes actually represent an economic injustice?

With respect to assets, the master noted that "Husband's income until retirement should be focused on first meeting his needs so that he does not have to raid his retirement accounts until retirement." (R. 0445a). For the purposes of this analysis, Husband takes the master's position, supported by the trial court, that retirement funds were intended for use only beginning at the age of 67, except presumably for any funds that she has termed "a greater distribution", i.e. within the additional 10% of the marital estate.

The additional 10% of the marital estate that was awarded, if valued as shown in the master's report of March 13, 2020, would come to *$176,127*.[10] (R. 0456a-0457a). Of that, *$154,345* would be in taxable

[10] An error in transferring the preceding fiscal number, now marked in italics, from a table in the master's report of March 13, 2020, was propagated in some of the

retirement funds if taken before retirement age (to cover basic expenses) and *$21,782* in non-retirement funds, some portion of which would be post-tax. The master did not show any tax consequences for the almost 88% of retirement funds which made up the recommended asset distribution:

> "[T]he master is aware that generally retirement assets are subject to federal and sometimes state income tax and other marital property may not be subject to tax. The precise tax effects of the distribution cannot be calculated at this time. Even so, the master has considered the forgoing in her recommended distribution. Therefore, while this factor impacted upon the method of distribution, it did not favor a larger distribution to either party." (R. 0455a).

Nothing appears in the record to show how the tax considerations were factored in to the distribution, or why a larger distribution would not have been appropriate to compensate for such taxes.

In his exceptions to the master's report, Husband noted this potential tax issue, assuming Husband were to have to use such funds, as the master seemingly intended to provide some discretionary funds or otherwise elevate his standard of living:

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following dollar amounts in Appellant's advanced brief (also shown in italics). A corrected description of the numbers intended can be found at R. 2028a-2031a. There was no material change in the conclusions.

> "The master's recommended distribution affords Husband a distribution that is almost exclusively comprised of retirement assets. Husband will incur ordinary income tax on any retirement withdrawals." (R. 0759a)

After taking out taxes owed on retirement funds, including in Delaware, Husband's state of residence, an estimate could be made of the total income which could be derived from the 10% supplemental marital assets provided to Husband. (R. 1887a-1888a). The funds included those obtained after sale of the marital home. The potential post-tax income from the supplemental assets, when amortized from the date of the master's report to Husband's 67th birthday (86 months), was estimated to provide an additional *$1948*/month in net income. (*Ibid*.)

For the present illustration, following the master's findings on Husband's earning capacity as accepted by the trial court, it is here taken that Husband could make a gross income of $72,000/year, which would provide a net income of *$54,144*/year or *$4512*/month. This would bring Husband's *theoretical* net income to *$6460*/month, even accounting for the supplemental 10% of assets awarded. (But see earning capacity, below).

Therefore, Husband would end up with *$6460* a month when tax

effects are factored into the use of the additional 10% of the marital estate recommended, even though he had over $7000 of *actual* expenses presented to the court. (Income and Expense Statement of January 4, 2019.) (Wife testified to $8447/month in expenses, at R. 0910a, which was also sharply reduced by the master in her report of March 2020.) Therefore, there is an issue that by setting the couple's submitted expenses much lower than had comported with their standard of living according to the record submitted by both spouses, the master created a situation by which it might appear Husband almost could meet what she *claimed* were his needs, but not the *actual* expenses.

Wife, in contrast, will continue her life with an income that is more than 600% higher than that ascribed to Husband. Her net income was reported in the record as over $25,000/month.

Furthermore, testimony was provided that Husband did quite a bit to elevate Wife's income during the twenty-seven year marriage. (R. 0892a, 0976a-0979a). This was, of course, reasonably seen as a joint investment in the future of each. The master now proposes that Husband's receipt of 10% of marital assets will adequately compensate for this very large disparity in Wife's real income vs. that theoretically

ascribed to Husband. Note that the 10% supplement from marital assets is a *one-time* payment, while Wife makes over 600% more in income *every year*.

Therefore, the preceding calculations [including as corrected; R. 2028a-2031a] support the master's contention that Husband's earning capacity could not cover his expenses, even as his expenses were very restricted and unrealistic as reduced by the master. Moreover, a 10% supplement of marital assets would not be enough to help Husband achieve some sort of similarity to his long marital standard of living.[11] Amortization of the 10% of supplemental assets, after taxes, would also not cover his anticipated reasonable expenses in the future, as presented in bracketed numbers in the Expense Statement." (R. 1878a and Exhibit G, R. 1906a-1910a.)

Such simplistic amortization of all Husband's pre-retirement assets and 10% of retirement assets, after taxes, to provide supplemental income to an already disputed earning capacity, also fails to account for the serious risk that doing so would present. There would be not only no discretionary cash, but almost no emergency cash as

[11] Husband further notes that his current attempts at frugality, e.g. by living with his 94 year old mother who is near the end of her life in a healthcare facility, will not continue with her passing.

Husband neared his 67th birthday (absent raiding his actual retirement funds).

Comparison of reduced asset distribution to Husband with alimony at the level suggested in alternative by the master

The master did provide in her report some idea of the level of alimony she would have awarded in lieu of some of the additional assets provided. As the trial court noted:

> "Were the master to recommend an award of alimony in this case, she would also have recommended that the distribution of marital assets be closer to a fifty-fifty distribution as opposed to the sixty-forty split that has been recommended. Given the incomes/earning capacities of the parties and their reasonable needs, the recommended alimony award in that event would have been around $3,000 a month terminating upon Wife reaching her full Social Security Retirement age." (R. 0465a)

While it was not made clear exactly what lesser percentage of assets she had in mind, the trial court noted:

> "Wife posits that a more equitable distribution under the factors would be 55% to Husband and 45% to Wife." (R. 0816a)

Since Wife has already herself recommended a 55% split, Husband will for the purposes of argument here take the master's "closer" to fifty-fifty as 55% and now examine the consequences of both

50% and 55% asset splits to Husband using a $3000/month alimony to 67 years of age.

First, once again, tax implications could have been explicitly estimated by the master, but they were not. In the case of alimony, since the passage of S. 2254 — 115th Congress: Tax Cuts and Jobs Act, alimony awarded after January 1, 2019 is no longer taxable to the recipient. This means that in the 86 months between the master's report and Husband's 67th birthday, he would have received $36,000/yr in net income from alimony. (R. 1887a-1888a).

As noted above, however, when taxes on use of retirement funds are taken into account, Husband has calculated that the master has added *$1948*/month [see R. 2033a] from a 10% additional marital assets (of which almost 88% are in retirement funds). If so, then the 10% additional marital assets would add *$167,528* [*Ibid*] over the same hypothetical period. If the phrase "closer to 50%" is considered, then for every 1% above 50%, Husband could expect an additional post-tax income of about *$195*/month. [See R. 2032a – 2033a.] Thus, for each additional percent over 50%, Husband might receive almost *$17,000 ($16,770*) over an 86 month period. Thus, if 55% were awarded in assets, the additional 5% could be used to generate $83,850 in after-tax

income to Husband. [*Ibid.*]

Therefore, by the preceding estimations, if Husband were to be given 55% of the marital assets and $3000/month alimony, then when the tax implications were considered, the total after-tax income would be ***$341,850***, or *2.0* fold more than from an additional 10% of the marital assets alone. [*Ibid.*]

In effect, Husband would be trading some assets composed of 88% taxable retirement funds for non-taxable alimony. Again, it is not understood why the master failed to present her tax calculations for the scenarios she noted. It is also not clear why the trial court did not do so upon review of her work.[12]

The other important point about alimony is that it is modifiable. Should Husband the Harvard graduate become very wealthy, Wife might stop paying alimony, (or perhaps start earning some). But in the more likely case, if Husband were to break his back for the last time from his severe osteoporosis, then a safety net would exist to prevent the complete and certain demise of his standard of living. In addition to the

[12] These simple calculations are meant for illustrative estimates only and are not intended as anything other than a conceptual guide for the court's consideration, and as necessary, correction. No guarantee is made that Husband has performed his tax estimations in a manner consistent with what divorce courts would do; however, Husband intends to employ an expert in economics should this matter be brought to hearing again.

preceding, by keeping his retirement funds invested, Husband might more equitably be able to participate in market growth, as Wife would.

Finally, alimony also allows additional compensation for marital misconduct, which is not afforded by the law on equitable distribution of marital assets. Husband was precluded from discovery on matters of fault by the master, and upon exception, the trial court. Both cited Husband's claims of fault as "irrelevant".

More specifically, by addressing only a physical assault in 1993 and a purported one in 2002, and ignoring the clear evidence that Wife had acted violently without any negative response from Husband at times relevant to the divorce, the master conjured the following conclusion:

> "There was no credible evidence that the marital misconduct on either party's part affected either party's financial needs or his or her ability to meet those needs. Therefore, this factor does not impact on the alimony determination." (R. 0463a).

The trial court then wrote:

> "Whether Wife's father's death contributed to the parties' separation is **irrelevant and immaterial** and, accordingly, the Divorce Master acted appropriately in denying a continuance request to obtain such irrelevant material." (R. 0826a-0827a).

Husband had argued to the contrary: 1) Of great importance,

there is no question from testimony that Wife Ann M. Rogers, M.D., was the initiator and sole employer of physical violence and assault against Husband after 2002, i.e. specifically in 2016 and 2017. (Summarized at R. 1783a-1787a). Those dates are obviously of material relevance to a separation occurring in 2017. 2) Acts of physical violence are relevant for fault considerations under Pennsylvania law with respect to alimony. However, it is important to again point out here that the fault Husband asserts as directly responsible for the separation had to do with a much more serious matter that involved what had happened to his father-in-law at his passing in August 2017. (*Ibid*.) 3) **The fate of the Husband's father-in-law directly pertained to Husband's interpretation of his safety in remaining with Wife**. Therefore, it is hard to imagine how it could possibly be more germane to an issue of fault for this divorce. Husband was precluded from discovery by the master on this topic. Her decision was upheld by the trial court on exception. Neither master nor judge cited law as a basis for denial. Rather, they simply claimed an "irrelevancy" of the issue. (For additional detail on fault, see the exhibits referenced in R. 1783a-1787a and at R. 1790a-1809a.)

Husband asserts that not allowing further discovery on fault

concerning the issue of what had happened to his father-in-law just prior to Wife's unexpectedly leaving the marriage - with the obviously massive financial impacts on Husband, contrary to the master's claim - was an abuse of discretion. Claiming "irrelevancy" and nothing more, in the face of the statements about fault made by Husband, is an error of alimony law, and an abuse of discretion as there is no evidence in favor of irrelevancy and all of it against the proposition.

Nevertheless, since the divorce court may have not wished to wade into potential criminal matters, then Husband notes that it could have taken adverse inference from Wife's failures to make response on this topic when such questions were posed. Wife did not even assert privilege with respect to documents requested in discovery, nor did she attempt to counter any of Husband's claims on the matter. If adverse inference can reasonably be taken, then it is obvious that, as Husband argued, the fate of his father-in-law could not be more germane to the loss of the marriage and the attendant, and by admission of the master and court, significant losses of standard of living likely to befall him.

Other factors impacting equitable distribution

The master considered eleven factors in equitable distribution factors. (231 Pa. Code § 350) (R. 0450a-0456a). She noted that the

majority favored an increased award to Husband. (*Ibid*.) However, Husband still notes that, to the extent that the number of such factors influences the size of an award, her assessments were factually flawed.

First, the master claimed:

> **"The contribution by one party to the education, training, or increased earning power of the other party. ... "**During the marriage, with Wife's support, Husband obtained a paralegal certification and a certified fraud examiner certification. Husband aided Wife during the marriage by helping her defend a malpractice action and by helping her obtain a better paying contract. Therefore, each party contributed to the other parties' education or earning power and this factor does not favor a larger distribution to either party." (*Ibid*.)

The master's argument is unreasonable in attempting to equate fiscal "support" for a certification, and Husband's decades long, successful and material support to Wife. Husband testified extensively, and Wife admitted by testimony, as the master also noted, that Husband provided assistance to her career on numerous occasions (more than one malpractice case and contract/promotion) that benefited her income. (R. 0891a-0892a, 0908a, 0978a-0981a). Wife, by contrast, did not pay any funds directly to Husband for his paralegal course, which regardless, even if considered fungible marital funds, would be a tiny fraction of the on-going income and career benefits Wife obtained from

Husband. On the contrary, despite Wife's vague claims that she had argued to try to get Husband to try to obtain wage income after he did so on his own in 2010, upon cross examination the reality became clear that she had not been forthright, and in fact it was she who had dissuaded Husband from attempting to get high income employment as a psychiatrist. (Discourse analysis of the relevant testimony can be found beginning at point 17, R. 1932a-1939a). Even though Wife's arguments at the time against Husband's trying to enter clinical medicine may have been meritorious and supported by subsequent events, note also that they provide further support that she, as a clinician with supervisory and hiring roles at a medical center, would herself have been prejudiced against Husband's application because of his already advanced age at the time. (*Ibid*.)

"The length of marriage. The length of the intact marriage of the parties was about twenty-seven years and four months. This factor, in and of itself, does not favor a larger distribution to either party." Husband disagrees. The meaning of such a factor must have the ability to benefit one party or the other, since it is axiomatic that in almost all instances, two parties will always be married to one another for the same period of time. (R. 0450a).

Summary

The trial court concluded:

> "Because Husband can meet his reasonable needs through his earning capacity ... and the funds he will receive through the equitable distribution of the marital assets the Divorce Master recommended, there was no error." (R. 0821a).

Husband has shown that such claims are neither evidence-based nor realistic. If Husband does not have the employability that the master claims his impressive and incredible education should afford him, despite her acknowledgment of all the impediments to which he testified, then he will have to use his non-retirement savings and the 10% of the retirement funds (after tax, see above) as supplemental, pre-retirement income support. However, this would leave Husband not only without additional discretionary funds, but with no emergency funds at all, especially as he approached the age of 67 years of age.

There is no reason to sustain the master's creation of her own theoretical assertions of the determinative nature of Husband's bachelor degree from Harvard College. The law requires a realistic assessment of earning capacity. Furthermore, the master's claims about earning capacity documentation were in error. What she claimed had been considered, had in fact not been so. Therefore, Husband's creation

of a record on such points at her hearing should have provided enough information about impediments to his earning capacity, that having acknowledged them in writing, she should have also done so in making a realistic estimation of earning capacity.

Furthermore, the trial court claimed that the master's solution would meet Husband's "reasonable needs", but economic justice requirements of the law actually go to the marital standard of living. This was a twenty-seven year marriage in which Husband provided substantial career support to Wife and enhancements to her income and promotion, as admitted in testimony. Husband worked very hard throughout his career and thereafter, befitting the motivation of one who got into the college whose powers the master seems to estimate so highly. The numbers, however, speak to the reality. Husband standard of living would drop from the top 5% (or higher) of incomes in the country to the bottom 40 – 60%, at best. It is not realistic to now claim Husband could get a position paying more in base salary than he had ever earned before. ($50,000/year; R. 1934a). The master's considerations of Husband's earning capacity are not based on the evidence in the record, but rather her own theories, and therefore represent a clear abuse of discretion. The trial court's *de novo* review

seemingly copied almost the entire report of the master.[13] Consequently, Husband asserts that the trial court's claims represent the same abuses of discretion. These abuses of discretion are asserted based on both lack of basis in evidence in the record, including ignoring employment impediments, and also on errors of law. In addition to earning capacity, Husband continues his objection that no accounting of tax consequences on the distribution were made, given the admitted likelihood that Husband will have to use such taxable funds as income until he reaches retirement age.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONDUCT A *DE NOVO* REVIEW OF EVIDENTIARY RULINGS AND CREDIBILITY ASSESSMENTS OF THE MASTER IN REGARD TO ISSUES THAT WERE HIGHLY RELEVENT IN DETERMINING ALIMONY AND EQUITABLE DISTRIBUTION

From the beginning of discovery in September 2018 through March 2019, Wife persisted in not disclosing almost $1 million in retirement funds, as well as pension and other funds. (R. 1777a-1783a). More specifically, the trial court noted that Husband had taken

[13] Even to the point that the trial court found, as master did, that the Acura and Volvo driven by the couple were not luxury cars.

exception that "by finding Wife did not intentionally withhold assets, the Divorce Master erred in her overall credibility determinations." (R. 0823a). Perhaps given the severity of the issue, the trial court made numerous, detailed restatements of the master's claims in its Opinion of October 9, 2020:

a) "The Divorce Master outright rejected Husband's argument in this regard as *disingenuous*. In so finding, the Divorce Master noted that Husband testified that he oversaw the parties' investments to a very detailed and exhaustive knowledge of the parties' finances; specifically, Wife's accounts." (R. 0823a);

b) "*By his own admission* during these divorce proceedings, Husband was largely in charge of the parties' finances, allowing them to amass such a large retirement portfolio." (R. 0821a).

Husband asserts that there was no such admission in the record or otherwise. (For example, assessment can be made by searching the transcript of the master's hearing of October 17, 2018 for "financ", "invest", "money", and "statement".) Furthermore, Wife testified that the couple kept separate accounts, and that the handling of the finances was a "slight split" (R. 0878a-0879a).

The trial court further repeated the claims of the master that Husband had been receiving Wife's retirement statements after separation:

c) "Additionally, from the date the parties separated, Husband was receiving statements for all retirement accounts. *Based on his testimony, the Divorce Master noted that Husband had exhaustive knowledge of and documentation in regard to Wife's accounts.*" (R. 0825a);

There is no basis in the record for such a statement. Husband only received retirement statements from Wife after the start of discovery in September 2018. The master herself may have created the first claim that Husband had Wife's financial documents in a memorandum she wrote concerning an off the record settlement conference – despite testimony by Husband to precisely the opposite. (R. 1259a, point 8)[14] Husband also notes that he had a retired detective with him at the time that Wife was supposed to return to the marital home on September 28,

[14] As to Husband's receiving statements of any sort, including about Wife's retirement accounts, neither Husband nor Wife testified to that (e.g. searching the testimony for "statement"). Continuing litigation in this matter by Wife has expanded the record, in this case showing that Husband did NOT open mail addressed to Wife after separation, but rather forwarded it to her. (Ex. 9, R. 1280a-1286a). Husband believes that Wife almost immediately had all her mail forwarded to her new address. Indeed, it was of great dispute in the case that Husband had opened a letter addressed to the "Bauchwitz Family", that turned out to be from a person Wife asserted was "her" friend. (*Ibid*.).

2017, after her father's passing; the detective's report also testifies to Wife's having removed documents without notice. (R. 1801a, point g).

d) "Wife was also credible in her testimony that she was *confused* by the number of retirement accounts she held. *Because Husband had the information regarding the retirement accounts in his possession at the time of separation and the mistakes were eventually corrected, Wife did not intentionally fail to disclose marital assets.* Consequently, because the Divorce Master found that, based on the record, Husband failed to establish the need for an award of counsel fees, it was appropriate to reject Husband's request for counsel fees." (R. 0825a-0826a.)

Husband asserts that the master's statements are not only unsupported by any record that he admitted anything about having Wife's financial statements, but also that it is an error of law to claim that, no matter what records he had, Wife could not have attempted to defraud him of such funds. Wife's actions could have been very intentional no matter what Husband's information was. In this particular case, as Wife did take her statements and Husband did not have them, if Wife knew he would not have access to such information, having taken them without notice on August 28 2017, then if fraud were desired, it could make sense to attempt not disclose such funds to

Husband and see if he noticed. As it turned out, Husband became suspicious and investigated, but that does not mean that an attempted fraud had not occurred. [Abridged] The trial court, in its purported *de novo* review, could have at least had someone do basic document searches to assess the veracity of the master's claims.[15]

C. THE TRIAL COURT AND /OR THE MASTER ABUSED THEIR DISCRETION IN REFUSING TO ALLOW HUSBAND ADDITIONAL TIME TO ENGAGE IN DISCOVERY WHEN THE RECORD RELECTS THAT WIFE FAILED TO DISCLOSE A MILLION OR MORE DOLLARS OF MARITAL ASSETS DURING THE COURSE OF THE DIVORCE PROCEEDINGS.

As noted in Section B., preceding, Wife had not disclosed numerous assets over extended times in the case, including most importantly, almost $1 million in retirement assets. The latter occurred despite a meeting between Husband's counsel and Wife's on November 12, 2018, at which time Wife's counsel had been placed on clear notice of the concerns. (R. 1211a-1212a; 1276a-1277a.) These extended failures of financial disclosure, along with related evidence, are reviewed at SecDecl pp. 12-17; R. 1777a-1783a.

As Husband set forth in his motion to extend discovery and continue trial which was filed on October 11, 2019, and which is

[15] For space reasons, numerous related claims were not presented in this brief, which is limited to 14,000 words.

incorporated herein by reference, despite Husband's continued efforts to obtain from Wife several financial documents, including 1099 forms, per discovery directive of March 21, 2019, as well as unredacted, unaltered and complete documents requested in discovery, specifically Wife's Capital One and Northwest Bank accounts and a Capital One credit card, Wife persistently failed to provide the requested materials. Given Wife's efforts to conceal marital assets, Husband legitimately sought unredacted documents during discovery. Notwithstanding Wife's efforts to frustrate Husband's attempts to obtain full and complete information, the master denied Husband's motion to extend discovery and continue the hearing. In several documents filed with the Court, including Husband's pretrial statement, which pleadings are also incorporated herein by reference, Husband repeatedly pointed out Wife's failure to pursue full and complete information. In denying Husband's motion for further discovery, the master erred and abused her discretion.

After Husband filed his exceptions, the trial court ruled in its opinion of October 9, 2020 that: "The Divorce Master noted that Husband had ***ample time*** to request a continuance prior to the October 17, 2019 hearing and much of what was requested regarding financial

information he sought, could have been handled by him prior to the hearing. Alternatively, Husband complained that he did not receive other financial documents that Wife was not required to give him. Because Husband had ***adequate time*** to collect the discovery he claims to have been prohibited from obtaining prior to the October 17 2019 hearing, it was not error for the Divorce Master to deny his request for a continuance." (R. 0826a).

However, the record shows that it was Wife who resisted providing **required** information until Husband's counsel had filed to extend discovery on October 11, 2019.

For example, Husband had sought through communications by his attorney to Wife's attorney (including as shown in his October 11, 2019 motion to extend discovery) disclosure of 1099 forms from Wife.

The Master's Preliminary Conference Memorandum of March 21, 2019 from which the first discovery directives were issued, included 1099's:

> "b. Complete tax returns, plus for 2018. Each party shall provide to the other a copy of their respective returns, Schedules, Attachments, Statements, work papers, W-2s, K-1s, 1098s, **1099s** etc." (R. 0129a)

Of note, despite Husband's spending considerable funds for his attorney to write to Wife to demand the 1099's, among other documents (e.g. see the Letter of May 31, 2019 as attached to the Motion to Extend Discovery of October 11, 2019; R. 0220a-0222a), Wife did not comply with discovery directives in the 1099 matter, until three days *after* Husband filed his discovery motion.

Specifically, on October 14, 2019, that Wife's counsel filed a Plaintiff's Answer to Defendant's Motion to Extend Discovery in which he wrote:

> "Simultaneously with the filing of this answer, **Wife's counsel is providing copies of Wife's Capital One 1099s for the 2017 and 2018 tax year to Husband's counsel**. (Plaintiff's Answer to Def Motion to Extend Discovery 8 page original p.3; R. 0226a).

The preceding is clear evidence that **Wife did not comply with discovery directives**. Nevertheless, the Master apparently accepted Wife's claims that Wife had yet again made "mistakes" (despite the tax records indicating that Wife had the assistance of professional accountants). The master apparently also accepted Wife's claims about the IRS's having brought such "oversights" to Wife's attention, as claimed in Wife's response of October 14, 2019 (R. 0226a at point 15). Yet, by denying Husband's discovery in the face of such admission that

the opposing party had indeed violated discovery orders, Husband was not provided reasonable opportunity to directly examine documents and perform considered discovery. (The order to deny discovery was issued on the same day, October 14, 2019, that Wife filed her response to Husband Motion to Extend Discovery.)

It should be noted with respect to timing that the 1099's were not the only issue. (See Husband's complete Motion to Extend Discovery of October 11, 2019; R. 0210a-0222a.) Indeed, the overriding concern is that Wife had made so many false statements and errors about financial matters already in the case that the need for investigation had been elevated. It was to this increased need for heightened examination that Husband's forensic accountant addressed his efforts, thereby taking time and, notably, money. Husband asserts it was not reasonable for the master to repeatedly take Wife's claims of error at face value, despite the associated delays caused by Wife. But when Husband, in response conducted a broad, time-consuming financial investigation, the master quickly ruled against him.

Husband, having had some classroom training as a paralegal, could imagine having submitted a motion to compel discovery rather than to "extend" it. However, whether or not there is any legal

requirement to do so, as may be implied by the trial court's judgment, remains for the appeals court to decide.

The law, however seems to be quite favorable to discovery matters. (231 Pa. Code § 4003.1 *et. seq*.) Furthermore, Husband notes that:

> "The rules [of civil procedure] shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding **may disregard any error or defect of procedure** which does not affect the substantial rights of the parties. Pa. R.C.P. 126. Thus, our Supreme Court explained as follows.
>
> > [W]hile we look for full compliance with the terms of our rules, we provide a limited exception under Rule 126 to those who commit a misstep when attempting to do what any particular rule requires. Moreover, we made **Rule 126 a rule of universal application,** such that the **trial court may disregard any such procedural defect or error at every stage of any action or proceeding to which the civil procedural rules apply**. *Womer*, *supra* at 276 (citations omitted) (emphasis added)."
>
> *Anthony Biddle Contractors v. Preet Allied American St.*, 28 A.3d 916 (Pa. Super. Ct. 2011)

Furthermore:

> "Thus, due to Biddle's substantial compliance with the case management order, we determine that strictly enforcing the April 5, 2010 deadline against Biddle serves neither the interest of fairness nor the interest of justice. *See Womer*, *supra* at 276. As such, the trial court abused its discretion to the extent that it denied Biddle's motion as untimely." *Anthony Biddle Contractors v. Preet Allied American St.*, 28 A.3d 916 (Pa. Super. Ct. 2011)

There seems to have been no consideration that throughout the case that it was the opposing party, repeatedly, that was noncompliant. In effect, the denial of discovery rewarded the delaying tactics of Wife's counsel, and also increased costs to the opposing party, Husband, by his being compelled yet again to engage additional experts to investigate, and to repeatedly communicate with Wife's counsel, was forced to expend funds and become distracted from other preparations for hearing.

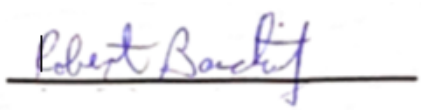
Husband again repeats his assertions and objections that it was the master who has not been credible in her determinations about this matter. Regardless, as the legal issue is not only discovery but fees, Husband notes the following standard cited by the trial court: "Moreover, 42 Pa.C.S.A. §2503(7) also authorizes an award of counsel fees for **dilatory, obdurate, or vexatious conduct** during the pendency of litigation**.**" (R. 0824a-0825a.) [Abridged]

CONCLUSION

This matter should be remanded to the trial court to award alimony to the Husband as well as to properly reassess the distribution

of marital assets. If necessary, the trial court should permit additional discovery as to the nature/extent of the parties' marital assets and conduct *de novo* review of any of the master's evidentiary rulings and credibility determinations that are relevant to the issues of alimony and equitable distribution.

Respectfully submitted,



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SUPERIOR COURT OF PENNSYLVANIA

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief consists of __13,829__ words, excluding the title page, table of contents, and table of citations, and this complies with the requirements of Pennsylvania Rule of Appellate Procedure 2135 that principal briefs shall not exceed 14,000 words.

SUPERIOR COURT OF PENNSYLVANIA

CERTIFICATE OF SERVICE

I, Robert Bauchwitz, pro se for the Appellants, hereby certify that on ____September 6, ____, 2021 I filed an electronic copy of the Brief via PACFile which electronically sends a copy of the same to the following counsel of record:

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APPENDIX A

ANN M. ROGERS, : **IN THE COURT OF COMMON PLEAS OF**
Plaintiff/ Wife : **DAUPHIN COUNTY, PENNSYLVANIA**

V.

: **NO. 2017-CV-6699-DV**

ROBERT P. BAUCHWITZ,
Defendant/Husband : **CIVIL ACTION — LAW**
: **DIVORCE**

ORDER

AND NOW, this 9th day of October, 2020, upon consideration of both Defendants and Plaintiffs Exceptions to the Divorce Master's Report and Recommendations, the briefs filed of record, and following oral argument, it is hereby **ORDERED** that the Exceptions filed by Plaintiff are **DISMISSED.** It is further **ORDERED** that Defendant's Exception Number 15, relating to the Divorce Master's award of counsel fees to Plaintiff on her Petition for Contempt and Special Relief without an evidentiary hearing, is **GRANTED.** The Defendant's remaining Exceptions are **DISMISSED.**

A hearing on the Petition for Contempt and Special Relief filed by Plaintiff, and any attorney's fees related thereto, is scheduled for **Tuesday, November 10, 2020 at 2:30 p.m. in Courtroom No. 4 on the 3rd Floor of the Dauphin County Courthouse.**

BY THE COURT:

SEP 09 2020

EDWARD M. MARSICO, JR., J.

I hereby certify that the forgoing is a true and correct copy of the original filed.

Cir

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ANN M. ROGERS, : **IN THE COURT OF COMMON PLEAS OF**
Plaintiff/ Wife : **DAUPHIN COUNTY, PENNSYLVANIA**

V.

: **NO. 2017-CV-6699-DV**

ROBERT P. BAUCHWITZ,
Defendant/Husband : **CIVIL ACTION — LAW**
: **DIVORCE**

OPINION

PROCEDURAL HISTORY

Before this Court are the Exceptions to the Master's Report filed by Ann M. Rogers (hereinafter "Wife") and Robert P. Bauchwitz (hereinafter "Husband"). The instant matter was commenced on September 20, 2017, when Wife filed a Complaint in Divorce raising claims for either a Section 3301 (c) or Section 3301 (d) no-fault divorce and Equitable Distribution.' On September 26, 2017, Husband filed an Answer to Wife's Divorce Complaint denying that the marriage was irretrievably broken and raised claims for alimony, alimony pendente lite, counsel fees, costs and expenses. Wife filed an Amended Complaint on October 3, 2017. On October 5, 2017, Husband's attorney accepted service of the Amended Complaint and proof of service was filed on October 12, 2017.

[1] An Order was issued non-entertaining Wife's Divorce Complaint for failure to adhere to Dauphin County Local Rules 1920.1 and 1920.1(3). Wife was directed to file an Amended Complaint within 20 days.

Wife filed a Motion for Appointment of Divorce Master on November 6, 2018. Cindy Conley, Esquire was appointed as Master on November 20, 2018. A Preliminary Conference was scheduled for January 30, 2019; at the request of both parties, it was rescheduled for February 6, 2019. At Husband's request and over Wife's objection, the February 6, 2019 Preliminary Conference was re-scheduled to March 19, 2019.

On March 21, 2019, Wife filed an Affidavit pursuant to § 3301(d) of the Divorce Code in which she averred that the parties had separated in August, 2017, had been separated in excess of one year and that the marriage was irretrievably broken. On April 17, 2019, Husband filed a counter-affidavit pursuant to § 3301 (d) of the Divorce Code in which he averred that the parties had not been separated in excess of two years, that the marriage was not irretrievably broken and that he wished to claim economic relief.

A Settlement Conference was held on June 28, 2019. A hearing was scheduled for October 17 and 18, 2019 to address all remaining issues. On October 11, 2019, Husband filed a request for a continuance of the hearing and that discovery be extended. This request was denied. Both parties were present with counsel at the October 17, 2019 hearing and offered testimony. The record was closed on October 17, 2019 at the conclusion of the hearing and after the parties waived the preparation and filing of the transcript. Both parties timely filed post hearing memoranda.

On March 13, 2020, Master Conley issued her Report and Recommendation of the Master. She recommended that Husband's request for alimony be denied. She also denied Husband's request for attorney's fees; however, she did determine that Wife should reimburse Husband $600.00 that he paid for the valuation of the parties' defined benefit pensions. Master Conley awarded Wife attorney's fees in the amount of $900.00;

when offset with the $600.00 awarded to Husband, Wife was entitled to $300.00 in attorney's fees.

Both Husband and Wife filed exceptions to the Master's Report. An Order was issued on May 20, 2020, setting forth briefing deadlines, as well as scheduling oral argument for July 16, 2020. Thereafter, the case was assigned to this Court and oral argument was re-scheduled for August 6, 2020; briefs were due no later than July 27, 2020, Oral argument was held before this Court on August 6, 2020.

DISCUSSION

Wife first argues that the Divorce Master erred in recommending that Husband receive 60% of the total value of the marital assets and that Wife receive 40%. It is Wife's position that the statutory equitable distribution factors support a distribution of 55% to Husband and 45% to Wife.

When reviewing divorce exceptions, the evidence must be considered *de novo* at every stage of review. Coxe v. Coxe, 369 A.2d 1297, 1297 (Pa. Super. 1976). The reviewing court must consider the evidence, its weight, and the credibility of the witnesses, *de novo.* Arcure v. Arcure, 281 A.2d 694, 695 (Pa. Super. 1971).

The report of the master is entitled to great consideration in that the master has heard and seen the witnesses, and it should not be lightly disregarded. Id. at 694. However, the master's report is advisory only, and the 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. Id.

Section 3502(a) of the Pennsylvania Divorce Code sets forth eleven (11) factors to be considered by a court when determining the equitable distribution of marital assets pursuant to a divorce decree. 23 Pa. C.S.A. § 3502(a).

In the present matter, the Divorce Master analyzed the eleven equitable distribution factors enumerated in 23 Pa. C.S.A. § 3502(a). In so doing, the Divorce Master concluded that the majority of the factors favored Husband and that equity demanded Husband receive a greater portion of the marital estate. The Divorce Master ultimately recommended that Husband receive 60% of the marital assets while Wife received 40%.

The application of the criteria found in 23 Pa. C.S.A. § 3502(a) is meant to effectuate economic justice between parties and insure a fair and just determination and settlement of their property rights. Smith v. Smith, 653 A.2d 1259, 1264, 439 Pa. Super. 283, 294 (1995). There is no simple formula by which to divide marital property. Id. The method of distribution derives from the facts of the individual case. Id. The list of factors serves as a guideline for consideration, although the list is neither exhaustive nor specific as to the weight to be given the various factors. Id.

The Divorce Master found several statutory factors weighing in favor of Husband receiving 60% of the marital assets. Specifically, the age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties; the opportunity of each party for future acquisitions of capital assets and income; the standard of living of the parties established during the marriage; and the economic circumstances of each party at the time the division of property is to become effective. Wife argues that the Divorce Master erred by considering the disparity between

the parties' incomes in these four separate factors. While Wife acknowledges her income is greater than Husband's, she contends that it does not justify a 60% distribution to Husband.

As noted by the court in Smith, there is no formula to determine the division of marital property. Here, based on the facts and application of the factors, the Divorce Master determined that Husband was entitled to receive 60% of the marital assets. Wife argues that the Divorce Master failed to consider that, in some of the factors, Husband benefitted from Wife's contributions and that, therefore, Husband's percentage should be less. The Divorce Master reasoned that given his impressive education, Husband should be able to obtain employment that at least meets, if not exceeds, his earning capacity of $72,000.00 annually. Nevertheless, Wife's income will most likely always exceed Husband's income many times over. For this reason, the Divorce Master noted that equity demanded that Husband receive a greater portion of the marital estate. Because the Divorce Master thoroughly considered the relevant factors in fashioning the equitable distribution award, and provided her analysis in reaching her determination, we reject Wife's argument. The Master's conclusions are supported by the evidence and will not be disturbed.

In the same vein, Wife argues that the Divorce Master erred in determining that Husband should receive 60% of the marital home sale proceeds and Wife receive 40%. Wife posits that a more equitable distribution under the factors would be 55% to Husband and 45% to Wife. In support of her argument, Wife contends that the four factors the Divorce Master decided supported a larger distribution to Husband were based on the difference in

analyze the extent to which the difference in the parties' income balanced against the factors that weighed in favor of Wife, such as her contributions to Husband's education throughout the marriage. While the Divorce Master found that Husband had an earning capacity, the disparity between Husband and Wife's earning capacity justified a greater award of the marital assets to Husband. The Divorce Master's analysis of the factors supports Husband receiving a larger share from the sale of the marital home, as such, we reject Wife's argument.

Finally, Wife argues that the Divorce Master erred in finding that the standard of living established by the parties during their marriage favors a larger distribution of marital assets to Husband. Wife maintains that it is not equitable to use the difference in the parties' incomes to justify Husband receiving a greater percentage of the marital assets. Specifically, Wife posits that just because she can enjoy a higher standard of living than the parties enjoyed during their marriage, that does not mean she intends to do so. Wife maintains that because she will continue to live modestly, and it was found that Husband can maintain a modest lifestyle based on his earning potential, it was inequitable to award Husband a greater percentage of the marital estate.

The Divorce Master noted that the parties had established an upper middle class standard of living throughout their marriage. While in the later years of the marriage Wife's income was substantial, the parties lived well within their means while contributing the maximum to their retirement accounts. The parties lived in a nice home, took regular vacations and owned nice, but not luxury, cars. The Divorce Master noted that with an earning capacity of $72,000.00 annually, Husband could maintain a middle-class standard of living. The Divorce Master further noted that Wife's earning capacity would

allow her to easily surpass the standard of living the parties became accustomed to during their marriage. For this reason, the Divorce Master indicated a larger distribution to Husband was appropriate. In assessing this factor, it is necessary to look at the parties' earning capacity. Spousal incomes are what establishes a standard of living throughout a marriage; therefore, it is certainly reasonable that the Divorce Master considered and analyzed the incomes of both Husband and Wife. Because Wife's earning potential will continue to far surpass Husband's, it was equitable to award Husband a greater share of the marital estate.

Husband filed exceptions to several of the Divorce Master's recommendations. First, Husband maintains that the Divorce Master erred in not awarding him alimony. Husband asserts that he does not have sufficient funds to meet his needs and the majority of the marital assets awarded to him are retirement funds. Husband argues that because of Wife's earning capacity and her ability to continue to amass substantial assets, she will be able to rebuild her retirement assets, whereas Husband will have to deplete the retirement assets awarded to him in order to meet his daily needs.

Section 3701 of the Divorce Code provides that "[w]here a divorce decree has been entered, the court may allow alimony, as it deems reasonable, to either party *only if it finds that alimony is necessary."* 23 Pa.C.S.A. §3701(a). The Superior Court has provided the following explanation with regard to the purpose and intent of alimony:

> ...[t]he purpose of alimony is not to reward one party and to punish the other, but rather to ensure that the reasonable needs of the person who is unable to support himself or herself through appropriate employment, are met. Alimony is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor's ability to pay. Moreover, [a]limony following a divorce is a *secondary remedy* and is available only where economic justice and the reasonable needs of the parties cannot be

> achieved by way of an equitable distribution award and development of an appropriate employable skill.

Teodorski v. Teodorski, 857 A.2d 194, 200 (Pa. Super. 2004) (citing Moran v. Moran, 839 A.2d 1091, 1096-97 (Pa. Super. 2003)) (emphasis and alterations in original) (quotation marks omitted). The Divorce Code lists seventeen factors that a Court must consider in making a recommendation for alimony.

The Divorce Master noted that only three of the seventeen alimony factors favored an award of alimony to Husband. The three factors that favored an award of alimony were also contained within the equitable distribution factors that favored Husband receiving a larger marital property distribution. The Divorce Master explained that if a recommendation of alimony were to be made, a recommendation of a 50% distribution of marital assets, as opposed to the 60%-40% split, would be more appropriate. In so reasoning, the Divorce Master noted that, based on the circumstances, Husband would not be guaranteed receipt of the entire alimony award. By recommending that Husband not be awarded alimony and, instead, receive 60% of the marital assets in equitable distribution, the Divorce Master noted that Husband will be motivated to find employment close to his earning capacity and will not be discouraged from entering into another relationship, which could potentially jeopardize his income.

Husband maintains that because he and Wife mutually decided during the course of their marriage that he would sacrifice his earning potential and subordinate his career for Wife's, he is entitled to alimony. While Husband pursued career choices during the marriage where he would earn less than Wife, that choice does not prevent Husband from now pursuing work which earnings would maintain his basic daily needs. Husband highlights the fact that during the last eight years of the marriage, he had no earnings;

however, he earned $90,046 in 2005. Therefore, Husband's argument implying that he requires alimony because he is incapable of earning wages sufficient to support his daily needs is disingenuous.

Further, if Husband decides not to work again, the extra funds received through the equitable distribution should permit him to provide for his reasonable needs. Here, while Husband's income has been significantly less than Wife's, with appropriate employment, in addition to the money he will receive through equitable distribution of the marital assets, he should be able to meet his daily needs. An award of alimony shall be made to either party only if it is necessary to provide the receiving spouse with sufficient income to obtain the necessities of life. Stamerro v. Stamerro, 889 A.2d 1251, 1259 (Pa. Super. 2005). Taking this into consideration, it was equitable to deny Husband's request for alimony.

In support of his argument that he is entitled to an award of alimony, Husband also cites to a whistleblower lawsuit he was involved in which he believes precluded him from obtaining a job in the medical research field. He also cites to the fact that when the family decided to move from New York to Pennsylvania, he did not have a job lined up. Finally, Husband posits that as a result of certain medical conditions, he is physically unable to work, specifically, in the medical research field. As was addressed previously, while certain circumstances might have prevented Husband from obtaining lucrative employment during the marriage, he is not precluded from earning any wages. While his physical condition may have diminished, Husband provided no medical evidence which suggested that he was unable to earn any wages. To the contrary, Husband testified that

he was considering restarting a research business he had initially started during the marriage and running it as a not-for-profit entity.

Finally, Husband maintains that he is entitled to an award of alimony based on marital fault. In this regard he cites to instances throughout the marriage where Wife acted abusively towards Husband. Based on the testimony, the Divorce Master found that Husband and Wife engaged in infrequent physical altercations during the marriage. Because it was determined that both parties participated in this behavior, we reject Husband's argument.

Nevertheless, Husband argues that here, there is no economic justice since he will be required to use proceeds that were saved for retirement in order to meet his daily needs. Based on Husband's earning capacity of $72,000.00, the Divorce Master found that he had a potential net monthly income of $4,423.00. The Divorce Master further found that Husband had reasonable monthly expenses totaling $4,881.00. The Divorce Master's recommendation would also give Husband approximately $200,000.00 in cash assets, proceeds from the sale of the marital home totaling approximately $140,000.00, and retirement assets totaling over $1.4 million. Husband will also be eligible to collect Social Security retirement benefits when he reaches the age of 67. It seems disingenuous for Husband to argue that he will need to deplete the entire amount of funds he will receive through equitable distribution to meet his daily needs. By his own admission during these divorce proceedings, Husband was largely in charge of the parties' finances, allowing them to amass such a large retirement portfolio. Because Husband can meet his reasonable needs through his earning capacity, and the funds he will receive through the

equitable distribution of the marital assets the Divorce Master recommended, there was no error.

Husband alternatively argues that the Divorce Master erred in determining that he had a $72,000.00 earning capacity. In analyzing Husband's earning capacity, the Divorce Master noted that in December, 2017, the Dauphin County Domestic Relations Office calculated Husband's gross earning capacity as a Certified Fraud Examiner as $72,000.00. In addition to this earning capacity, the Divorce Master considered that Husband had a bachelor of science degree in biochemistry from Harvard College and medical and doctorate degrees from Cornell University. Husband also obtained a paralegal certificate from Delaware Law School in 2016 in addition to his certified fraud examiner certification. During the parties' marriage, the highest income Husband earned was $90,000.00. While the Divorce Master noted that Husband's health has deteriorated since 2017, aside from lifting restrictions, there was no medical evidence offered to suggest Husband was prohibited from obtaining employment as a Certified Fraud Examiner, a paralegal, or employment that utilizes his medical education. While Husband challenges the determination of earning capacity that the Dauphin County Domestic Relations Office calculated in 2017, it is noteworthy that he withdrew his request for a de novo hearing. To now challenge the Divorce Master's reliance on that figure is misplaced. Furthermore, the Divorce Master not only relied on the determination made by Domestic Relations, she also cited Husband's impressive education and training in arriving at her determination. Accordingly, there was no error.

Husband next argues that the Divorce Master erred and abused her discretion in failing to direct that Husband should be reimbursed for the costs that he paid to get the

home ready for sale and to maintain the home pending sale. He contends that these costs should be given to him from the proceeds of the marital home sale. Husband seeks reimbursement for monies paid to a second real estate agent he employed in an effort to prepare the marital residence for sale. The Divorce Master noted that Husband should be reimbursed for the cost of replacing the basement door of the marital residence upon submitting the appropriate documentation evidencing the cost. Wife acknowledges that Husband should be reimbursed for mutually- agreed upon expenses he incurred to prepare the property for sale. Here, it was agreed that Husband should be reimbursed for expenses he and Wife agreed to for purposes of maintaining the home and preparing it for sale. However, Husband chose to enlist the services of a second realtor without assent from Wife. Therefore, it was not error to determine that Wife was not responsible for reimbursing Husband for costs associated with the hiring of a second realtor.

Next, Husband contends that by finding Wife did not intentionally withhold assets, the Divorce Master erred in her overall credibility determinations. Husband contends there were other additional areas in which the Divorce Master erred in her credibility determinations regarding Husband's testimony. The Divorce Master specifically noted that throughout the proceedings, Husband argued that Wife intentionally failed to disclose marital assets in an attempt to deprive him of his equitable share of the marital assets. The Divorce Master outright rejected Husband's argument in this regard as disingenuous. In so finding, the Divorce Master noted that Husband testified that he oversaw the parties' investments to a very detailed and exhaustive knowledge of the parties' finances; specifically, Wife's accounts. Wife also credibly testified that she was confused regarding the number of retirement accounts she possessed. While a master's report and

recommendation is only advisory, it 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. 2003). While the Divorce Master specifically noted that the discrepancies between the testimony of parties were due to a difference in the parties' perspectives and not due to an intent to deceive the fact finder, she did find Wife, overall, to be slightly more credible than Husband. However, the Divorce Master specifically found that Husband's testimony regarding Wife's intentional failure to disclose marital assets to be not credible, The Divorce Master also found Husband to be evasive and referenced his embellishments. Because the Divorce Master is in the best position to address matters of credibility, we reject Husband's argument regarding the Divorce Master's credibility determinations.

Husband also argues that the Divorce Master erred in denying Husband's claims for counsel fees, costs and expenses.

The Superior Court has held that in a divorce action, "[c]ounsel fees are awarded only upon a showing of need." Teodorski, 857 A.2d at 201 (quoting Harasym v. Harasym, 614 A.2d 742, 747 (Pa. Super. 1992)). Therefore, "[i]n most cases, each party's financial considerations will ultimately dictate whether an award of counsel fees is appropriate." Plitka v. Plitka, 714 A.2d 1067, 1070 (Pa. Super. 1998). The factors to be considered in determining whether to award counsel fees in a divorce action include "the payor's ability to pay, the requesting party's financial resources, the value of the services rendered, and the property received in equitable distribution." Busse v. Busse, 921 A.2d 1248, 1258 (Pa. Super. 2007) (citing Teodorski, 857 A.2d at 201). Moreover, 42 Pa.C.S.A. §2503(7) also

authorizes an award of counsel fees for dilatory, obdurate, or vexatious conduct during the pendency of litigation.

Husband specifically requested an attorney's fee award of $20,000.00. The Divorce Master found that Husband failed to demonstrate an actual need for counsel fees and further noted that an award for counsel fees was not appropriate. In so finding, the Divorce Master indicated that Husband's own actions caused a rise in his attorney's fees. Specifically, the Divorce Master noted that Husband employed the services of five different law firms during the pendency of the divorce proceedings, sometimes simultaneously. The Divorce Master also found that Husband, through his various attorneys, filed redundant and unnecessary pleadings during the proceedings.

In the same vein, Husband argues he is entitled to an award of counsel fees because Wife attempted to conceal more than one million dollars in marital assets, forcing him to incur additional legal fees. The Divorce Master rejected Husband's argument in this regard, finding that there was no evidence to support Husband's claim that the mistake caused him to incur additional counsel fees. Specifically, the Divorce Master noted that Wife's counsel credibly represented that the error regarding the retirement account was his. Additionally, from the date the parties separated, Husband was receiving statements for all retirement accounts. Based on his testimony, the Divorce Master noted that Husband had exhaustive knowledge of and documentation in regard to Wife's accounts. Most notably, however, the Divorce Master noted that during the parties' marriage, Husband directed Wife in matters relating to the retirement accounts. Wife was also credible in her testimony that she was confused by the number of retirement accounts she held. Because Husband had the information regarding the retirement

accounts in his possession at the time of separation and the mistakes were eventually corrected, Wife did not intentionally fail to disclose marital assets. Consequently,

because the Divorce Master found that, based on the record, Husband failed to establish the need for an award of counsel fees, it was appropriate to reject Husband's request for counsel fees.

Husband also contends **that** the Divorce Master erred in denying Husband's motion to continue the trial and extend discovery where Wife failed to provide full and complete information in discovery. Husband posits this was an abuse of the Divorce Master's discretion and materially prejudiced him. At the conclusion of a June 28, 2019 settlement conference, a hearing was scheduled for October 17 and 18, 2019. On October 11, 2019, counsel for Husband filed a motion requesting that the hearing be continued, and that discovery be extended. Counsel for Wife filed an Answer and the Divorce Master directed that the motion be denied. The Divorce Master noted that Husband had ample time to request a continuance prior to the October 17, 2019 hearing and much of what was requested regarding financial information he sought, could have been handled by him prior to the hearing. Alternatively, Husband complained that he did not receive other financial documents that Wife was not required to give him. Because Husband had adequate time to collect the discovery he claims to have been prohibited from obtaining prior to the October 17th hearing, it was not error for the Divorce Master to deny his request for a continuance.

Further, in his pursuit of discovery, Husband sought an autopsy and toxicology report for Wife's father, who died in August, 2017. The Divorce Master found that such reports were irrelevant to the divorce matter. Husband argues that such reports might

show fault for the divorce as his father-in-law's death occurred shortly before the date of separation. The Divorce Master found that the date of separation of the parties was August 28, 2017, based on the credible evidence of record. Whether Wife's father's death contributed to the parties' separation is irrelevant and immaterial and, accordingly, the Divorce Master acted appropriately in denying a continuance request to obtain such irrelevant material.

Husband also argues that the Divorce Master erred in finding that during the marriage, the parties engaged in infrequent physical altercations. Husband posits that the Divorce Master abused her discretion by basing this determination on photographs introduced by Wife, that Husband did not recognize. In this regard, Husband's argument is disingenuous. Both he and Wife offered testimony regarding incidents of violence during the marriage. While Husband maintains that Wife was always the instigator of these infrequent incidents, he did not deny that the incidents occurred, Further, at this juncture, it is irrelevant for purposes of the Divorce Master's general finding that during the marriage the parties engaged in infrequent physical altercations.

Husband lastly argues that the Divorce Master erred and deprived him of due process by awarding Wife counsel fees on her Petition for Contempt and Special Relief where no evidentiary hearing was conducted. We grant Husband's exception in this regard. Accordingly, to the extent the Divorce Master offset the award of attorney's fees to Wife from the amount awarded to Husband for costs, Wife shall reimburse Husband the $600.00 he paid to Conrad Seigel Actuaries, specifically Jonathan Cramer, for the valuation of the parties' defined benefit pensions.

APPENDIX B

ANN M. ROGERS,	:	**IN THE COURT OF COMMON PLEAS OF**
Plaintiff/ Wife	:	**DAUPHIN COUNTY, PENNSYLVANIA**
	:	
v.	:	
	:	**NO. 2017-CV-6699-DV**
ROBERT P. BAUCHWITZ,	:	
Defendant/Husband	:	**CIVIL ACTION – LAW**
	:	**DIVORCE**

AMENDED ORDER

AND NOW, this 15th day of October, 2020, the Order issued by this court on October 9, 2020, is hereby **AMENDED** to reflect that the Petition for Contempt and Special Relief was filed by **DEFENDANT**. The hearing remains scheduled for **Tuesday, November 10, 2020 at 2:30 p.m. in Courtroom No. 4 on the 3rd Floor of the Dauphin County Courthouse**.

BY THE COURT:

EDWARD M. MARSICO, JR., J.

APPENDIX C

ANN M. ROGERS,		: IN THE COURT OF COMMON PLEAS
	PLAINTIFF	: DAUPHIN COUNTY, PENNSYLVANIA
		:
	v.	: NO. 2017-CV-6699-DV
		:
ROBERT P. BAUCHWITZ,		:
	DEFENDANT	: CIVIL ACTION – DIVORCE

DIVORCE DECREE

AND NOW, October 28, 2020, it is ordered and decreed that ANN M. ROGERS, plaintiff, and ROBERT P. BAUCHWITZ, defendant, are divorced from the bonds of matrimony.

The court retains jurisdiction of any claims raised by the parties to this action for which a final order has not yet been entered. Those claims are as follow: None

Any existing spousal support order shall hereafter be deemed an order for alimony pendente lite if any economic claims remain pending.

BY THE COURT:

/s/ Edward M. Marsico Jr.
Attest:

October 28, 2020
Prothonotary
Matthew R. Krupp

IN THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA – MIDDLE DISTRICT

ANN M. ROGERS, Appellee	)))	
v.	)	1499 MDA 2020
ROBERT P. BAUCHWITZ, Appellant	)))	

CERTIFICATION OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: 9/7/21

/s/ Robert Bauchwitz

Robert P. Bauchwitz
Appellant
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pro se

Received 9/7/2021 9:16:47 PM Superior Court Middle District

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1499 MDA 2020

IN THE SUPERIOR COURT OF PENNSYLVANIA

Ann M. Rogers	:	1499 MDA 2020
v.	:	
Robert P. Bauchwitz	:	
Appellant		

PROOF OF SERVICE

I hereby certify that this 7th day of September, 2021, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served:	James R. Demmel
Service Method:	eService
Email:	jdemmel@demmellawoffice.com
Service Date:	9/7/2021
Address:	1544 Bridge Street New Cumberland, PA 17070
Phone:	(71-7) -695-0705
Representing:	Appellee Ann M. Rogers

/s/ Robert P. Bauchwitz

(Signature of Person Serving)

Person Serving:	Bauchwitz, Robert P.
Attorney Registration No:	
Law Firm:	
Address:	23 Harlech Drive Wilmington, DE 19807
Pro Se:	Appellant Bauchwitz, Robert P.