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IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF PENNSYLVANIA

1499 MDA 2020

ANN M. ROGERS,
Appellee

v.

ROBERT P. BAUCHWITZ,
Appellant

APPELLANT'S REPLY BRIEF

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

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INTRODUCTION

Wife-Appellee's brief raises some novel and erroneous claims concerning income, expenses, and earning capacity, often without any citation to evidence, or contrary to evidence that does exist. Of even greater import, issues of credibility are raised in a manner that Husband here asserts have continued to prejudice handling of the case, and demonstrate the need for appropriate de novo review.

ARGUMENT

I. Wife-Appellee has relied upon opinion rather than citation to evidence in arguing against Husband's economic justice claims

With respect to income, for example, Wife and her counsel have made repeated assertions in their brief that[1]:

> "Appellee will need to continue working and saving for her retirement over the next seven years ***just to be on equal footing with Appellant upon retirement***." (Appellee's Advance Brief, henceforth "EBr", p.17.)
>
> "Assuming Appellee remains employed full-time as a surgeon, continues earning her current salary until she reaches age 67 and is able to contribute almost $100,000 annually to her retirement

[1] With font emphasis added to quoted text throughout this brief.

savings, she may be on ***equal footing with Appellant when she reaches Social Security retirement age***." (*Ibid.*)

These claims are devoid of any basis in, or citation to, evidence. Wife's annual income, as established in the record, is nearly one half million dollars a year (R. 0420a), while Husband's earning capacity, in dispute, is at least 600% (6-fold), and more likely over an order of magnitude (10-fold), less (R. 0439a).

Wife's argument is flawed for several reasons. First, the asset supplement itself was intended to provide some parity and economic justice *to Husband,* because the master and trial court concluded the obvious, namely, that such a state did not exist at the time of the divorce and will not likely exist in the future. It is not a reasonable assertion by the opposing party to imply that there is a starting equality and Wife must catch up to achieve a "level playing field" economically.
The real question is the opposite: will the marital asset supplement to Husband allow him to achieve a more equal footing with Wife as he approaches retirement age, consistent with the marital standard of living (Edelstein v. Edelstein, 399 Pa. Super. 536, 582 A.2d 1074 (1990)?
The second, more specific flaw in Wife's argument is that she implies she is giving a $600,000 benefit to Husband: "That distribution results

in Appellant receiving almost $600,000 more of the marital assets than Appellee." (EBr p.5). However, Husband would only receive 10% more, and wife 10% less, than a 50:50 split. The difference is therefore approximately $300,000 of the total marital estate to or from each party, not $600,000 against Wife. (R. 0457a). In other words, the supplement would cost Wife 10% of the assets, not 20%.

Notably, this one-time supplement to Husband is equivalent to less than 65% of one year of Wife's gross taxable income. Using net incomes, as the relevant Spousal Support Guideline Calculations for the marital couple do (231 Pa. Code Sec. 1910.16-4(2)), it can be seen that the difference in Husband and Wife's net income ranges from **$21,000/month to $26,500/month**, depending on what earning capacity is used for Husband (R. 1911a).

Taking the average net difference in monthly income as $23,750/month, it can be estimated that it would take 12.6 months, or just over one year, for Wife to "recoup" the $300,000 extra asset benefit to Husband. After the next five years, Wife should have a net income/wealth benefit of about $1.425 million dollars.[2]

[2] Husband believes that more economically definitive methods exist, such as by calculating present value of future earnings, which can establish what actual difference in wealth will accrue in such circumstances. Such methods could be used

Wife also claims that the supplemental 10% marital asset benefit would cover Husband's "reasonable" expenses, were he to have to use such until retirement in lieu of achieving high-level, full time income. They claim without any citation to evidence that Husband could make an "an extremely conservative annual investment return of four (4%) percent" (EBr p.14). Furthermore, the 88% of assets that are retirement funds would all be taxable when taken early. Third, Husband's not getting the benefit of compound growth from reinvesting his returns on retirement funds would not produce equity in treatment with Wife. The master noted that Husband should not have to "raid" his retirement funds before the retirement age of 67 years. (R. 0445a).

Further with respect to expenses, Wife claimed in her brief that "In her determination of Appellant's reasonable monthly expenses, the divorce master included amounts for **discretionary expenses** such as ***vacation, entertainment and gifts***." (EBr p.9). However, the master further held frugality against Husband by choosing to accept Husband's *current* entertainment and vacation expenses, despite those being ***almost zero***. Husband has not had the time or discretionary funds to

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in support of claims that Husband should receive **much more than 60%** of marital assets. Thus, Husband does not claim in this case that swapping alimony for assets is an adequate solution.

travel since separation. Husband testified that he did not have anywhere near the standard of living on his current expenses as he had enjoyed during the marriage. (R. 1003a). Nevertheless, the master then reduced that amount from $7495/month to $4881 (R. 0445a), a decrease of 35%. Husband continues to assert that he could not possibly come close to any former standard of living based on the expenses as created the master. (Compare actual current expenses at R. 1906a-1910a).

The master also improperly reduced Husband's future ***home maintenance*** and related costs ***to zero***. She did this based on Husband's living with his 94-year-old mother, who is in a skilled nursing facility and near passing. (R. 0443a.) She also reduced the marital home mortgage/rental expense submitted by Husband to that of surgeon Wife, who has chosen to live "frugally" in an apartment after abandoning the marriage without notice. (*Ibid.*) These do not appear to be decisions based on credible "analyses", nor do they comport with the law that argues that frugal living by one spouse should not negatively impact the other (*Edelstein v. Edelstein*, 399 Pa.Super. 536, 542, 582 A.2d 1074, 1077 (1990)).

In addition to income and expenses, Wife and her counsel claim that Husband "had the opportunity to challenge the assigned earning

capacity as part of the divorce master's hearing, but *did not do so*." (EBr p.11). However, the record indicates otherwise. Husband's advance appeal brief had an entire section detailing his claim that "Earning capacity was not determined by adequate documentation or with full and realistic basis in evidence" (AdvBr p.21 *et. seq.*). Thus, the claim put forth by Wife's counsel is materially false.

Also with respect to earning capacity, Wife's counsel, apparently with her acquiescence, now claims that Husband:

> "testified about his ***alleged*** medical conditions and limitations imposed by those conditions. Of course, Appellant had a financial incentive to ***exaggerate*** his physical limitations since he was seeking alimony and a distribution of marital assets in his favor. Appellant provided no objective evidence of his medical conditions". (EBr p.11).

Husband did not merely testify about his medical limitations. Wife's counsel was given medical records (and a vocational expert's report) prior to a de novo support hearing scheduled for November 20, 2018 (R. 01552a-1580a.) Furthermore, before the October 17, 2019 master's hearing, Husband was informed of the results of a pretrial discussion between his counsel and Wife's in which Husband's counsel related that:

> "we do NOT need to put on an expert in support of our alimony claim. The other side is calling no experts, and you are competent to testify as to your current medical condition and how it physically impacts and limits your ability to do day- to-day functions that

would be required for work that may fall into your education and training." (R. 1999a).

Wife, a physician who knew Husband's medical history well, did not make any claims against his specific medical testimony in her own testimony, despite her counsel's opportunity to elicit such claims on direct examination of her (or by cross-examination of Husband).[3]

The improper handling of the record by Wife's counsel is again demonstrated on this issue with an earlier claim in the record that Husband was "exaggerating" his medical limitations with respect to an effect of his surgery for throat cancer on his ability to speak: "Husband had no difficulty testifying for hours during the afternoon of the divorce master's hearing" R. 0349a). However, a relevant exchange on this point in the testimony was:

"THE COURT: Would you like your water? Do you want to go get your water?
THE WITNESS [Husband]: Can I?
MASTER CONLEY: Sure.
THE WITNESS: This is that throat thing, by the way. So there are

[3] Furthermore, when left to his own devices, Husband provided expert medical and vocational reports to the opposing party (R. 1913a-1920a, 1970a-1998a). Interestingly, while in court in possession of Husband's expert reports, Wife's counsel only then objected to the testimony of Husband's experts, despite having been given appropriate disclosure, and having missed the deadline to object. (R. 1883a-1885a.) Husband's physician was prepared to testify by phone at the time of the hearing, and Husband's vocational expert was physically present in court. (R. 1885a.) Appellant was thereby compelled to make offers of proof and also enter his experts' reports into the record. (R. 1885a-1886a, 1913a-1920a).

minor sequelae like this. I have problems with speech." (R. 0947a). Thus, even a year later, there were sequelae from the major cancer surgery on Husband's throat.[4]

Despite failures to cite to the record, or ignoring contrary evidence in that record, Wife and her counsel then assert that "***Appellant's credibility*** is one of the factors the divorce master *properly* considered in determining his earning capacity." Next, Husband will attempt to extend an examination of credibility to all those involved in this case, particularly as it is the basis for one part of Husband's appeal.

II. Evidence in the record and professional standards were not properly employed in determining issues of credibility

Definitions of "credibility" in the law apply to evidence, including testimonial, and is based on its accuracy and truthfulness.

> "[C]redibility, n. The quality that makes something (as a witness or some evidence) worthy of belief." (Black's Law Dictionary, 9th Edition.)
>
> "Credibility ... relates to the accuracy of his or her testimony as well as to its logic, truthfulness, and sincerity." (West's Encyclopedia of American Law, edition 2. Copyright 2008).

[4] Indeed, radiographic evidence will support a conclusion that Husband has suffered permanent negative changes to his throat. The master also spoke to Husband about issues he had staying seated during the hearing (R. 0916a-0917a).

As presented above, Wife and her counsel have made several claims that are not cited to any evidence, or which are not consistent with the evidence available in the record. Further examples of credibility issues from the Appellee's Brief include such claims as:

> 1) "Appellant must provide evidence to support ***his claim*** that he is *not capable of working*." (EBr p.12).

However, Husband-Appellant never made such a claim. Even as recently as in his Appellant's Brief (henceforth, "ABr"), Husband wrote: "Indeed, it is also not true that either Husband or the recruiting firms failed to obtain *any* jobs." (ABr p.36).

> 2) "At the same time that Appellant is claiming limitations on his ability to work, he ***claims*** to be a business owner who independently operated Amerandus Research for approximately ten years, ***which limited his ability to pursue paid employment***." (EBr pp.12-13).

Nothing in the record supports a claim that Husband was limited from paid employment by operation of his business. The false insinuation that Husband was not really "working" has continued to be made in an obdurate and vexatious fashion. (R. 0957a-0958a, 1000a,

1648a.)[5]

> 3) "Appellant's assertion that he was required to use savings to pay his monthly expenses during the divorce process is ***incredible*** and not supported by the evidence." (EBr p.20).

Unsurprisingly, this claim is also false, but more importantly, it has been so repeatedly responded to in the record that it is clearly **knowingly false**. (R. 1647a-1648a; 1773a-1776a.)[6]

Husband has previously brought to opposing counsel Demmel's attention (R. 1155a) the requirements of the Pennsylvania Rules of Professional Conduct ("PRPC"):

> **Rule 3.4 - Fairness to Opposing Party and Counsel**
> "A lawyer **shall not**: ... when appearing before a tribunal, assert the lawyer's ***personal opinion*** as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, **on the lawyer's analysis of the evidence**, for any position or conclusion with respect to the matters stated herein". (204 Pa. Code § 3.4(c).

In the instances cited so far from Wife's reply brief, the assessment is simple since there was no citation to evidence. Consistent with a

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[5] On the contrary, Husband testified without objection that he had during such period received low-pay employment as an adjunct lecturer (R. 0311a). The real issue at bar is how Husband can obtain adequately lucrative income to maintain his standard of living. (ABr p. 36).

[6] The actual numbers Husband presented also go to claims made in the Appellee's brief that receipt of APL or alimony gave Husband "no financial incentive" to work, as opposed to Husband's noting from the data that large proportions of APL were in fact going to the attorneys in the case. (R. 1209a-1210a).

failure analyze evidence, evidence contradicting assertions by opposing counsel was found in the record, having often been introduced multiple times (R. 1316a.) If there is no evidence to support an "analysis", then there can not have been analysis sufficient to make any conclusion required under Rule 3.4.[7]

Rule 3.4 is consistent with the **Pennsylvania Code of Civility,** which in pertinent part states:

> "**5.** A lawyer *should* **abstain** from making **disparaging personal remarks** or engaging in acrimonious speech or conduct toward opposing counsel **or any participants** in the legal process and shall treat everyone involved with fair consideration."[8] (204 Pa. Code § 99.3).

Responses to requests by Husband have often been met not with counter-evidence, but rather with clear violations of PRPC Rule 3.4 and Rule 99.3(5) of the Code of Civility. For example, Wife's counsel asserts in Appellee's brief:

> "Appellant's argument that Appellee intentionally failed to report this income on her tax return is ***ludicrous***." (EBr pp. 30-31.)

Appellant-Husband has been unable to find any evidence in the record that he made a claim of intentionality. Counsel notes that it is

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[7] The proscriptions of Rule 3.4 are mandatory ("shall not").

[8] For the purposes of this reply brief, "disparaging" will be taken to mean **derogatory,** i.e. "showing a critical or disrespectful attitude." (Oxford Languages).

implied, and indeed intentional behavior is an obvious possibility, especially given the pattern of "mistakes" claimed in disclosure throughout the case. Regardless, it seems that Wife's attorney has responded through ad hominem attack by baseless use of the term "ludicrous"[9], which Husband asserts must be in violation of Rule 3.4 and 99.3(5) (*Ibid.*) Such an answer is certainly no legitimate defense against why discovery should not have been compelled of Wife.

Another example of the method of litigation by personal attack devoid of evidentiary support can be seen in the statement:

> "Appellant's request that Appellee be required to provide him copies of the toxicology and autopsy reports related to her father's death is ***outrageous***." (EBr. p.28).

Yet once again, opposing counsel provides no "analysis" of any evidence, or even citation to evidence of any sort, that would support use of such a term against a participant in the legal process. Instead, Wife's attorney tried to denigrate Husband's discovery request by making numerous further personal attacks against Husband, such as that his statement on the matter was "***disjointed***" (EBr. p.29) and, falsely, that Husband's counsel would not bring up the subject (*Ibid.*), when the record shows that Husband's counsel first raised the issue in

[9] Without any basis in evidence.

writing (R. 0221a).

These sorts of baseless ad hominem attacks against an opposing party create a high risk of prejudice in the litigation process, and the record in this case suggests that such has indeed occurred. (See below.)

Regardless, at no point has any adjudicator in this case corrected opposing counsel's behavior, and in the several instances in which Husband has tried to put him on notice (R. 1316a and R. 2026a), opposing counsel has remained obdurate in his practices.

Also relevant to the issue of credibility, Wife and her counsel make numerous references in Appellee's brief to a major discovery issue that arose in this case, namely, that Wife failed to report almost one million dollars in a retirement account to the trial court (master). (R. 0769a-0771a.) It is what opposing counsel testified to on his own behalf in Appellee's reply brief, versus the reality of what happened as supported by the record, that is most revealing. Wife's counsel wrote that:

> "Appellee ***mistakenly*** believed she had disclosed all of her retirement assets. **Counsel for the parties discussed this issue** in late 2018 **or** early 2019, after Appellant's counsel had reviewed Appellee's answers to Appellant's Request for Production of Documents." (EBr p.33).

The first problem with this statement is that it was not "or". It was both, i.e. 2018 "and" 2019. As the record reflects, Husband's counsel,

Weinstock, had a meeting with Wife's attorney, Demmel, on November 12, 2018. (R. 1713a-1714a). At that time, Husband's counsel raised questions about the identity and any non-overlap in two of Wife's large retirement statements. Husband's counsel specifically told Husband that he had asked if Wife's counsel had checked "thoroughly", and the latter assured Husband's counsel that he had done so. (*Ibid.*).

> Rule 1.1 of the PRPC states that:
> "A lawyer shall provide competent representation to a client. Competent representation **requires** the legal knowledge, **skill**, **thoroughness** and **preparation** reasonably necessary for the representation." (204 Pa. Code § 1.1)

It seems apparent from subsequent events that Attorney Demmel was providing false assurances as to his "thoroughness". Attorney Demmel then further testified in Appellee-Wife's brief:

> "After Appellant's counsel questioned the retirement account documents, ***Appellee's counsel realized and acknowledged*** that he was mistaken about Appellee having one retirement account through her current employer."

This is a fundamental deception. There were actually ***two*** meetings that Attorney Demmel held with Husband's counsel. The second occurred on March 13, 2019. (R. 0519a.) It was only after the second meeting with the Husband's new co-counsel, specifically hired to address on-going and highly material concerns about failures of fiscal

disclosures, that Attorney Demmel acknowledged that there were actually two completely separate and non-overlapping retirement accounts. Therefore, there was a four month delay and another meeting with another attorney before he conceded. Thus, contrary to counsel's testimony (as quoted above), and despite notice of concerns from Husband's representative, Wife's attorney did NOT readily or willingly correct this highly material "error".

Wife and her counsel's purported "mistakes" [10] were not limited to Wife's retirement accounts. They also involved failure to disclose a pension (R. 1777a-1779a), resistance to acknowledging a duplicate insurance payment (in the manner of a prepayment fraud; R. 1780a-1782a), claiming that a financed car had been leased (R. 1779a-1780a), and failing to report 1099-INTs to the IRS or providing them in discovery. (R. 0213a, 0226a). It should be noted that the double insurance payments were also represented by unexpected 1099s from Wife's insurance company. This supports the contention of Husband that failing to reveal 1099's could allow sequestration of significant funds. More generally, it seems difficult to understand how the party

[10] Wife's actual knowledge of her retirement accounts was brought up in her testimony concerning a document she had given to Husband in her handwriting showing two separate accounts. (R. 0901a-0902a, 0621a. 1782a).

that was continually found to be making "mistakes" was deemed the more credible one.

At this point, in the spring of 2019, Wife and her counsel were faced with a situation in which, at a minimum, they appear to have resisted timely compliance with discovery in numerous, sustained, and material ways. Perhaps by way of countering Husband's concerns about material failures of required disclosure, Wife and her counsel thereafter accused Husband, in a pretrial statement, of having threatened her life while they were at the marital home to divide property. (R. 0172a). This highly material false claim was made despite Husband's having hired a security agent to be present with himself and Wife at the home. (R. 0765a-0768a). Wife and her counsel used this false claim to assert that she could no longer work with Husband to sell the home (in which Husband was residing). (R. 0172a) Furthermore, Wife then began to insist on selling the house "as is"[11], much to the financial detriment of Husband, and against the recommendations of all professional real estate agents who had considered marketing the home. (R. 0190a-0193a, 0389a, 1011a-1012a). Husband strongly felt that he could not

[11] Without repairs and improvements, such as painting, to increase sale value.

leave Wife's false claims of threats against her life unchallenged in the record. Therefore, he and his counsel filed a response prior to the Settlement Conference. (R. 0182a-0188a).

III. The master's credibility determinations must considered in light of evidence and logic

Nevertheless, despite Husband's new expressions of concern about grave misconduct by Wife in making novel false allegations, and what Husband asserted were bad faith demands for an "as is" sale of the marital home, the master argued that Husband had raised the costs of litigation by his filing to bring such problems to her attention. (R. 0468a).[12] Had the master instead questioned Wife about Husband's purported threat, as Husband did on the record and in the presence of Wife's counsel, she might have found that Wife's testimony was not forthright or consistent with the behavior of an honestly aggrieved person (R. 1215a).[13]

[12] The master claimed that Husband's response had been "redundant", but actually Husband had not seen Wife's false allegation in her pretrial statement at the time he had filed his own, so his pretrial statement did not address the false allegation.

[13] Husband has argued that Wife was providing clear signs throughout the case of dissembling. (e.g. R. 01936a-01938a, points 16-25.)

Another possible consequence of such allegations was that the real estate agent, chosen mutually by the parties and with whom Husband had worked successfully in the past, ceased to communicate with him, thereby delaying preparation of the home for sale. (R. 1006a).

Most remarkably, immediately after the master's divorce hearing ("trial") of October 17, 2019, the master announced that she had decided that she wanted to have Husband issue a power of attorney (POA) to Wife to sell the home without his direct involvement. This outcome had been requested initially by Wife's counsel in their pretrial statement based on Husband's purported threat (R. 0172a). At the October 17 meeting, master Conley repeatedly asked if Husband would agree to provide a POA to Wife, and Husband repeatedly resisted, providing the same concerns about such a decision not being in his interests, especially with respect to an "as is" sale. (R. 0476a, 0261a.)

Despite Husband's obvious persistence in his resistance, a few days later a "POA" was issued by order of the master. (R. 0236a). Husband's continued resistance to signing the POA led to a filing of contempt by the opposing party (R. 0248a), which was seemingly resolved in a subsequent telephone conference among the attorneys and the master. (R. 0261a). Husband then signed the POA. However, it was notable that

Wife refused to work with Husband's new real estate agent, Sandra Pharmer, then of Coldwell Banker in Hershey, PA. (*Ibid.*) Ms. Pharmer had worked with Husband earlier to properly prepare the house for sale prior to Wife's taking control of the house. Pharmer's analysis showed that the efforts had raised the sale price of the house by at least $28,000 over the original purchase price of the home[14]. (*Ibid.* and R. 0271a-0273a).

Although Husband had spent thousands of dollars and considerable efforts of his own to accomplish preparation of the home for sale, it was ultimately through the efforts of his agent, Pharmer, that he was able to do so timely and at reasonable cost. Nevertheless, despite the seeming financial benefit of tens of thousands of dollars in the final sale price of the home over Wife's "as is" demanded price, (*Ibid.*), Wife continued to refuse to allow compensation of Pharmer. (R. 0390a.) As a consequence of this unrelenting and troublingly unethical behavior by Wife, Husband, under the belief that a POA in Pennsylvania could be revoked by the principal, did revoke the POA, (while not disturbing the sale of the home

[14] The house would subsequently sell for $33,000 over the original purchase price.

to an interested buyer).[15] Husband's revocation led to another filing of a petition of contempt by the opposing party. (R. 0371a). This was granted by the trial court judge within three days of filing, without any show cause rule or other due process. (R. 0382a.) Indeed, the master would go on to assert that by Husband's resistance in this situation, Husband had raised fees in the case, and she thereby awarded such to Wife, again without any hearing or other due process. (R. 0477a).[16]

IV. Can a "power of attorney" in Pennsylvania be compelled by order, and if so, does such circumstance preclude its revocation by the principal?

Derivative of Wife's raising credibility issues in her brief, Husband notes that as part of his appeal, he has requested that the Superior Court review whether the trial court committed legal error regarding issues surrounding sale of the marital home. Specifically, Husband asserts here

[15] Wife also failed to advance the costs to maintain the house as she had been ordered to do, and she also failed to hold an estate sale; instead, she removed an expensive item Husband had already sold to another buyer and has not returned it. (R. 0385a-0391a.) Husband subsequently filed a petition for special relief and contempt (R. 0384a.)

[16] Husband filed an exception to the master's award of fees in the POA contempt matter. The fees the master awarded were reversed by trial court order of October 9, 2020 (R. 0812a; as corrected by amended order of October 15, 2020, R. 0830a).

that he has found no basis in Pennsylvania law by which a power of attorney would not require agreement of the principal and, as a consequence, that the principal could not revoke a POA issued by himself were he to conclude that his interests were not being met by his agent thereunder.[17] It seems clear that the master and court have repeatedly emphasized that Husband was ***ordered*** and "required" to sign the POA (R. 0476a), and therefore, by implication, was in no position to make his own determinations of agreement or revocation.

Therefore, the Superior Court is specifically asked to review and issue a ruling, pursuant to part III of the Statement of Matters Complained of on Appeal, as to whether a litigant in a Pennsylvania divorce case can be ordered to sign a document presented as a "power of attorney", under state law as cited in the POA (20 Pa. C.S. CH. 56), and if so, whether the litigant could be acting in contempt of court by attempting to revoke such a "power of attorney".

V. Further credibility assessment issues

[17] The POA Husband signed October 31, 2019, states in relevant part that the document was signed "with full power of substitution and revocation". (Not entered into the court record .)

The assessment of Husband's credibility also involved several other topics, one of which goes to the core of how "whistleblowers" are treated. During the master's hearing, Wife had testified that she had provided funds to support a qui tam suit in which Husband had participated as a relator (R. 0429a-0433a). Husband had testified that the qui tam suit had been taken under contingency. Under the pretext of taking "judicial notice"[18] of this minor issue, master Conley then introduced 1200 words covering four and a half pages related to the federal record of the qui tam case into her master's report (*Ibid*.)

Although the master ultimately concluded Husband had been correct on the point that the qui tam suit was taken on a contingency basis,[19] she then went on to claim that another very minor statement by Husband, that he had "been brought in by the government" was, in her words, "***certainly meant to lead one to believ***e that but for the government's insistence, Husband would not have brought the suit

[18] "The court may judicially notice a fact that is **not subject to reasonable dispute"**. (225 Pa. Code § 201)**.**

[19] While sua sponte providing an "explanation" for Wife's erroneous statement that yet again suggests an unreasonable and non-neutral intervention in the case. (0431a.)

when ***in fact***, Husband instigated the initial investigation in the 1990's by his report to the ORI."[20] (*Ibid.*)

Contrary to the master's claims, Husband never made such a "but for" statement, and he sees no way that any such "certainty" could be deduced from the record she referenced. Conley's claim that "in fact, Husband instigated the initial investigation in the 1990's by his report to the ORI" cannot possibly be true, if for no other reason than that the "the Rec 1 protein activity" she cites from the early 1990's was not the same work claimed to involve false statements in the 2004 qui tam suit, which was based on research primarily published in 2002. She also apparently failed to find the court record by which ORI acknowledged in writing that it was *they* who had first approached Husband, and it had been Husband who resisted them for <u>*two years*</u> (from 2002 to 2004).[21]

Thus, despite the master's introducing a large amount of "evidence" into the record concerning Husband's qui tam case, she did

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[20] The federal Office of Research Integrity.

[21] It is also worth noting, regarding credibility, that ORI was completely incorrect in its claims, reproduced by master Conley, that no more relevant evidence would be found. Readers can judge for themselves the quality and credibility of Husband's findings in the qui tam matter at healthsci.org. At that same site, if an extended "judicial notice" is desired in order to obtain more information from Husband, see the section "From "D. Timeline and Handling of the Case by the Office of Research Integrity".

not do enough research to avoid making critical errors. What might have helped avoid such errors by the master would have been a realization that she was not taking "judicial notice" of facts "not subject to reasonable dispute", but rather, in effect, performing a sua sponte, impermissible judicial investigation.[22] Despite admitting the unimportance of this issue to the divorce matter, the master nevertheless then claimed that Husband had "embellished" his role in the case, and thereby concluded that such behavior as ascribed by her had diminished Husband's credibility. (*Ibid.*)

Master Conley made numerous other specious claims concerning Husband and his credibility. Relevant evidence from the record associated with several additional claims she made are identified in the Table of Evidentiary Cross-Reference, Volume I, pages xi-xv of the Reproduced Record.[23]

Also of note with respect to credibility determinations, the master seemed to engage in prejudicial behaviors such that, if Husband did not

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[22] For example: "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." Rule 2.9(C) ABA Model Code of Judicial Conduct: Canon 2, Feb. 2010.

[23] Please note that the word "tortious" was inadvertently spelled "tortuous" in the Table of Evidentiary Cross-Reference.

"admit" what she apparently had already decided was the case, then he was somehow being "evasive", "disingenuous", etc.[24] (R. 0429a, 0829a). Appellee-Wife, for instance, cites in her brief the divorce master as having made claims that Husband purportedly "*failed to provide [Appellee] with much credit in regard to her contributions* and was extremely ***hesitant to admit any faults*** on his part." (EBr p.35). This claim by master Conley demonstrates that she apparently had a preconceived notion that Husband must have had "faults" to admit, or that such faults were relevant to his testimony at the time.

Also contrary to the master's conclusions, the record shows that it was Wife who only grudgingly gave credit to Husband while under cross-examination, while Husband did in several instances credit Wife while under direct examination. (For example at R. 0977a: Husband: "really it was disincentivizing the other surgeon[s]. She was very good. She would go in and take care of them", vs. Wife on cross at R. 0892a: "Q: And you would agree, would you not, that he did more than what a normal husband would do? He utilized his training to assist you in the legal aspects of the malpractice action? Wife. *I guess*.") Therefore, it is a

[24] Husband had already complained to his counsel on June 26, 2019 about master Conley's having stated at a settlement conference on that date, before any hearing, that his was "not an alimony case". (R. 01696a).

bit hard to see how it was not Husband on direct who was spontaneously being generous to Wife, while Wife even on cross was being rather reticent to credit Husband.

Further in the vein of Husband's purported "failures" to "admit" things, e.g. such as the claim in Appellee's brief that Husband "never denied" "abuse" as purportedly shown in images/photographs, the reality is that Wife's counsel never made any effort to question Husband on such images when he had the chance on direct examination. Nevertheless, the master would made the same claim against Husband. (R. 0829a).

Husband asserts that it is improper to claim that his failure to speak on a topic not questioned is some sort of admission. Husband did in fact comment in writing to his counsel on the images submitted by Wife prior to the master's hearing (R. 1785a-1786a). Husband is also aware that a pretrial discussion of exhibits occurred between his counsel and Wife's. Given that it was very likely known to Wife's counsel that Husband was going to challenge the foundation of the images, their relevance, and other issues (*Ibid.*), Husband submits this foreknowledge is a possible, if not likely, reason why Wife's counsel did not directly question Husband about the images at the hearing. Also contrary to the

claims of Wife's counsel, Husband clearly filed an exception challenging the conclusions the master drew about such images (R. 0686a-0687a, point 7). Therefore, Husband's refutations of the images are manifestly in the record. It is also very troubling that the master, by seeming yet again to testify on Wife's behalf, (R. 1783a-1784a), dismissed police reports that Husband had filed concerning additional serious assaults by Wife against him at times very relevant to the marital separation. (R. 1790a-1800a).

One of the most central credibility claims concerning Husband was again repeated in Appellee's brief, namely, that Husband purportedly had all of Wife's financial documents (as referenced above). Husband has consistently claimed to the contrary, including in his testimony (R. 1696a, 1777a-1783a). Wife's actual testimony, however, never asserted that Husband had all her financial documents; on the contrary, she referenced only one drawer of goods she failed to take among the files she kept in the kitchen, (R. 0869a-0870a), and that "I have no idea how much [money] he had because we had separate bank accounts" (R. 0893a). Elsewhere in the record, she made demands for the contents of that drawer, among several non-financial items, but only

two check registers were specified among the financial ones.[25] Clearly, Wife had her financial records to provide in disclosure and discovery. Husband has never agreed, and Wife and her counsel have never provided any evidence, that Wife's relevant, current financial records were not taken by her from the marital home without notice on August 28, 2017.[26]

Wife's counsel now concedes Husband's point that, despite what the master wrote (see ABr pp.57-60), any knowledge Husband had of the Wife's financial documents would not have had any bearing on her possible intent in defrauding him by failures to disclose. (*Ibid.*) Nevertheless, if one assumes that in reality, some of Wife's "mistakes" in financial disclosure were not mere errors but instead might suggest other hidden assets, then there could remain additional motives in claiming Husband had "knowledge" of all Wife's financial matters.

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[25] Although Wife took all her primary financial documents except two check registers from her own files, she left a few documents in other places around the home. These Husband did eventually find upon search. They are shown at R. 1777a-1783a.

[26] A retired detective/security agent present in the marital home on August 28, 2017, also noted in his report the large number of documents and related devices Wife had taken with her without notice, including that Wife had reported to the Derry Township Police Department that she had taken sufficient items from the home that Husband might report a burglary. (R. 1801a-1802a.)

For example, it may be that the on-going and very numerous representations by Wife's counsel and the master that Husband had all the financial records of Wife, (despite no evidence to that effect), could be an attempt to forestall a claim of extrinsic fraud by turning it into an intrinsic fraud.[27] This would be consistent with Attorney Demmel's revealing the larger retirement account in the discovery papers while claiming it represented the same funds as in a different account revealed to the Court. Doing this might allow an argument that Husband had been on notice of an intrinsic fraud. Intrinsic frauds can only be brought for a short time after a final divorce decree, while an action for extrinsic fraud can be brought within five years.

Nevertheless, Wife and her counsel have persisted in such arguments, alleging in their brief that:

> "instead of openly providing information and seeking to identify and value the marital assets, Appellant chose to ***play a game*** of requesting information from Appellee, which information was already in his possession, and then accusing her of withholding information if she was mistaken in her responses." (EBr. p.29).

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[27] "Where the alleged perjury relates to a question upon which there was a conflict, and it was necessary for the court to determine the truth or falsity of the testimony, the fraud is **intrinsic** and is concluded by the judgment, unless there be a showing that the jurisdiction of the court has been imposed up, ***or that by some fraudulent act of the prevailing party the other has been deprived of an opportunity for a fair trial***." *Justice v. Justice*, 417 Pa. Super. 581 (Pa. Super. Ct. 1992)" quoting *Bleakley v. Barclay,* 75 Kansas 462 [89 P. 906 (1907).

Allegations of Husband's "playing a game", again without actual citation to the record or any other evidence in support of his allegations, is, Husband asserts, another clear violation of Rule 3.4 of the PRPC. Husband strongly agrees that we must stop playing whatever game it is in which Mr. Demmel believes he is engaged.

Therefore, as Wife's Attorney, James R. Demmel has manifested in Appellee's brief that he is himself testifying as to his involvement in matters at bar (the handling of financial matters), he has thereby transformed himself, at a minimum, into a material witness. His behaviors which continue to deride Husband without any basis in evidence should be sufficient to request that, to the extent this court can so recommend or order, that Attorney James R. Demmel not be allowed further involvement in this or any related proceeding within the jurisdiction of this court. If necessary, Husband intends to file to have him removed as counsel.

Finally, Husband notes that Judge Edward M. Marsico Jr. has recently revealed that he has a link to Wife through one of his cousins. (Motion of Inquiry of August 18, 2021, R. 2040a *et. seq*, and Order of 31, 2021, in Dauphin County Court or Common Pleas docket 2017-1699-

CV). Given the numerous questions raised about what Husband has asserted are violations of due process, abuse of discretion, or legal error affecting Husband but not Wife (R. 1310a-1314a, 1960a-1961a), and the questions already raised in the Appellant's Brief about whether appropriate de novo review was made of the matters appealed, request is made of this court to remand any further litigation to another judge.

CONCLUSION

For the reasons expressed in Husband's principal brief and his reply brief, above, as well as the established evidence of record as a whole, the matter should be remanded to the trial court to reassess the distribution of marital assets and support, as well as to allow Appellant to engage in further discovery.

SUPERIOR COURT OF PENNSYLVANIA

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief consists of __6763__ 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 reply briefs shall not exceed 7,000 words.

SUPERIOR COURT OF PENNSYLVANIA

CERTIFICATE OF SERVICE

I, Robert Bauchwitz, pro se for the Appellants, hereby certify that on ____September 7, ____, 2021 I filed an electronic copy of the Reply Brief via PACFile which electronically sends a copy of the same to the following counsel of record:

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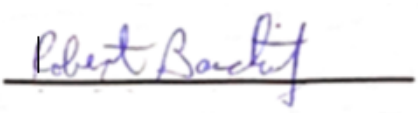

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IN THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA – MIDDLE DISTRICT

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.

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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:

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