

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

MICHAEL J. MANKE,

Appellant

v.

NICCOLLE MONIQUE MANKE,

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1056 WDA 2013

Appeal from the Decree Entered June 12, 2013  
In the Court of Common Pleas of Allegheny County  
Family Court at No(s): FD-11-08235-016

BEFORE: SHOGAN, OLSON and WECHT, JJ.

MEMORANDUM BY OLSON, J.: FILED: April 28, 2014

Michael J. Manke (hereinafter "Husband") appeals from the trial court's decree entered on June 12, 2013. We affirm.

Husband and Niccolle Monique Manke (hereinafter "Wife") married in 2008. On December 16, 2011, Husband filed a complaint in divorce against Wife, wherein Husband sought a decree in divorce, an order equitably dividing the marital property, alimony, and an order requiring Wife to pay his reasonable counsel fees, costs, and expenses. Complaint in Divorce, 12/16/11, at 1-7.

The trial court ordered that all monetary and property claims be heard before its permanent master (hereinafter "the Master") and, in October 2012, the Master held a four-day hearing on the claims. As the Master explained, the following evidence was presented at the hearing:

The parties [] were married on October 10, 2008. At the time of the marriage, Wife was 25 and Husband was 48. This was Wife's first marriage and Husband's second. Husband was a crane operator, supervisor[,] and master mechanic with 30 [years'] experience when he and Wife married. He is now a member of the International Union of Operating Engineers Local #66 and is dispatched for employment per union rules. Based on his employment status through the union, there are periods of time that Husband is unemployed and able to collect unemployment compensation. Wife was aware of those periods of unemployment before she and Husband married. Husband's current gross salary is in the [\$65,000.00 to \$70,000.00 per year] range. . . .

Wife is a mining engineer and[, at the time of the parties' marriage, Wife] was employed [full-time] by Drummond Corporation in Dora, Alabama. [At the time of their marriage,] Wife was on the brink of finishing her MBA in finance [and] Wife owned a house in Alabama in her own name. She paid all [] expenses relat[ing] to that house from her earnings. When [Husband] moved in to [Wife's] house prior to the marriage, [Wife] provided him with a credit card for his use, with the agreement that he would pay [the entire amount] for things that he [purchased for his own use] and [that he would pay] one-half [for the things that he and Wife purchased or did together]. . . .

Wife has been the principal support for the couple both before marriage and after the marriage. Wife has remained steadily employed since graduation from college in 2005. Wife is currently employed in Australia and her gross earnings annually are [\$152,000.00] in Australian dollars. Wife testified that the cost of living in Australia is approximately 40% higher than the cost of living in America. Wife is renting an apartment in Australia and has no present intention to return to the United States.

Husband had several long periods of unemployment during [his 36-month marriage to Wife.<sup>1</sup>] The parties had significantly different approaches to money, which caused friction throughout the marriage. Husband had financial obligations to his first wife for alimony and for college loans taken out for his two children from his first marriage. During [Husband's] periods of unemployment, Husband would use the parties' joint account to make these payments. According to Wife, this was not a problem when there were two incomes being deposited, but that it was a problem for her when Husband refused jobs he was offered during periods of unemployment because he did not "want" to work nights or travel to a job.

Eventually, Husband and Wife decided to move from Alabama to an area that would provide Husband with greater job opportunities. [The parties testified that] "a city with bridges" was what they desired. . . .

Wife had made application in 2009 for a job in Pittsburgh[, ] but [she] was not given an offer. [However, j]ust as [Wife and Husband's] desire to leave Alabama gelled, Wife was contacted by the Pittsburgh offices of [the National Institute of Occupational Safety and Health], and offered a job. Wife wanted Husband to stay behind until her Alabama house sold, but Husband insisted that they move together. . . .

The parties moved to Pittsburgh [on] Labor Day weekend of 2010. Wife had wanted to move to an apartment for the first year but Husband [convinced] her that they should buy a house. The parties purchased a house in Bethel Park[, Pennsylvania]. . . .

Wife immediately began working in Pittsburgh. Husband began working on the new residence in Bethel Park and started the process of transferring his union membership from Operator's Local #37 to [ ] Operator's Local #66. Between Labor Day 2010 and March 22, 2011, Husband was unemployed. [On March 22, 2011, Husband] was finally

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<sup>1</sup> The Master concluded that the parties separated on October 10, 2011.

sent out by the [union] on his first Pittsburgh job at C.J. Mahon Company. . . .

Husband testified that[, during the six-month period when he was unemployed in Pittsburgh,] he took several courses. [However, b]y his own testimony, Husband spent less than 11 days total [(out of the 180-plus-days that he was unemployed) participating in] these courses. [Further, during this time of unemployment, Husband] did not look for any part-time work to assist with the marital expenses. [Husband also] continued to pay his ex-wife [\$600.00 per month] in alimony, [and he continued to make] the student loan payments for his children [(from his first marriage)], from the parties' joint account.

The date of separation was contested. After considering all of the testimony and the exhibits presented, the Master [found that] the date of separation [was Monday,] October 10, 2011. . . .

[Over the Columbus Day weekend of October 8, 2011 to October 10, 2011, t]he parties went on a disastrous . . . trip to Niagara Falls, during which [time] they had a horrendous argument culminating in Husband leaving the motel late that evening, throwing his wedding ring over the Falls, and returning to the motel early the next morning. The parties drove home that day. The next day they went to the bank and separated all of their finances in a comprehensive[] and calculated manner, by closing and distributing their separate and joint accounts, and taking into consideration outstanding marital debts[] and obligations incurred by either Husband or Wife individually, or on behalf of his or her family members, and in assigning separate responsibility for the Freedom Chase credit card and the Bank of America credit card[]. The sum of [\$7,800.00] in debt was transferred from the Freedom Chase credit card to a Bank of America credit card in Wife's name only and became Wife's obligation to pay[.] The remaining \$6,914.56 owed on the Freedom Chase card was assigned to Husband to pay[.]

. . .

One of the major issues that has stymied the parties' efforts at settlement is the issue of the marital residence, located [in Bethel Park]. The parties purchased this house on or about September 7, 2010. While the deed to the property is in joint names, the mortgage on the property was placed in Wife's name alone, as Husband had poor credit and Wife, as an MBA graduate in [finance], with excellent credit, was offered a lower interest rate. The parties took advantage of this lower rate. Wife testified that she was surprised at the closing to find the deed jointly titled, but admitted that she did not do anything about it then or anytime thereafter. The stipulated value of the house is [\$122,000.00]. The most current mortgage payoff is \$94,078.80. . . .

Since the commencement of these proceedings, Husband has resided in the marital residence. He was awarded exclusive possession [of the residence] with the proviso that he keeps all mortgage, utility, tax, and homeowner's insurance payments current. Husband has transferred all of the utilities into his own name since the parties separated and has been keeping the designated payments current. However, Husband did nothing to apply for refinancing of the residence to remove Wife from the outstanding mortgage that is in her name alone. . . .

[Moreover,] Wife, through her counsel, has repeatedly appealed to the [trial c]ourt regarding the issue of the mortgage in Wife's name and the house in [Husband's] possession and control. The [trial c]ourt deferred this issue to the Master. For whatever reason, the matter was not addressed by Husband or his counsel prior to the first two days of trial. Knowing that this was THE significant stumbling block to settlement, it was amazing to the Master to find out that [Husband] was still "waiting" to be ordered to make application by the [trial c]ourt. Husband knew that both Wife and her counsel had serious concerns about Husband's ability to qualify for a refinancing mortgage given his income and his credit status. . . .

At the end of the second day of trial, the Master advised Husband that if he wanted to maintain ownership of the property[,], he would need to come to the next hearing date (13 days later) with a firm commitment letter. [Husband] arrived on th[at day] but made NO mention of the status of

his application for mortgage refinancing. It was not until the Master asked [Husband] at the end of day [three of the hearing,] that [Husband] provided opposing counsel with a purported commitment from a mortgage lender. The next morning, Wife's counsel filed a [motion *in limine* and motion for counsel fees], which the Master granted. . . .

[The Master granted Wife's motion because] Husband did not have a firm commitment letter, but only an [e-mailed] "provisional" document that discussed neither interest rates nor length of term. In the letter, it stated clearly that this provisional approval was [dependent] upon their investigation of [Husband's] current financial status. [Husband] did not bring a copy of anything he may have provided on an application to this on-line company, so neither the Master nor Wife's counsel know if [Husband] told [the company] about [Husband's] outstanding mortgage obligation on the [\$160,000.00] mortgage note he holds with his first [w]ife. The Master believes that Husband knows that he will not qualify for a mortgage refinancing, and that he has refused to seek refinancing in a timely matter until ordered to do so, so as to extend the period of time he can occupy the house before it needs to be returned to Wife and sold.

Master's Report and Recommendation, 11/13/12, at 1-5 and n.10 (internal footnotes omitted) (emphasis in original).

On November 13, 2012, the Master issued her report and recommendation and, on November 30, 2012, Husband filed exceptions to the Master's report. On May 20, 2013, the trial court granted Husband's exceptions in part, dismissed Husband's exceptions in part, and (but for the exceptions that the trial court granted) adopted the Master's report and recommendation as its final order in this case. Trial Court Order, 5/20/13, at 1.

On June 12, 2013, the trial court entered its divorce decree and, on June 26, 2013, Husband filed a timely notice of appeal from the final order entered in this case. **Campbell v. Campbell**, 516 A.2d 363, 366 (Pa. Super. 1986) (*en banc*) (“a pre-divorce decree distributing marital property is interlocutory. It cannot be reviewed until it has been rendered final by the entry of a decree in divorce”).

Husband raises the following claims on appeal:

[1.] Whether the trial court committed an error of law and/or abused its discretion in upholding the [M]aster’s grant of [Wife’s] motion *in limine* and request for counsel fees?

[2.] Whether the trial court committed an error of law and/or abused its discretion in failing to include the cost of sale in the determination of the net equity of the marital residence?

[3.] Whether the trial court committed an error of law and/or abused its discretion in failing to award any value for [Wife’s] Suzuki [vehicle]?

[4.] Whether the trial court committed an error of law and/or abused its discretion in failing to award counsel fees to [Husband] relative to the following four matters set forth in his exceptions to the report and recommendation of the [M]aster?

[A.] [Husband’s counsel’s] preparation for the exclusive possession hearing when [Wife] withdrew her counter-claim for the same after pre-trial statements were due.

[B.] [Wife’s counsel’s] failure to respond timely to [Husband’s counsel’s] deadline for the release of [Husband’s] cell phone number, causing [Husband] to incur counsel fees.

[C.] [Wife's] failure to provide a proposal to resolve all economic claims at the parties' equitable distribution conciliation.

[D.] The denial of [Wife's] August 24, 2012 pre-trial motion which preserved [Husband's] counsel fees for equitable distribution.

[5.] Whether the trial court committed an error of law and/or abused its discretion in failing to include the value of funds transferred from joint funds to [Wife's] pre-marital bank accounts as part of the marital estate in [Wife's] possession?

[6.] Whether the trial court committed an error of law and/or abused its discretion in awarding [Wife] one half of the parties' 2008 tax refund where [Wife] failed to raise this as an issue for consideration in any pleadings and where she failed to provide any evidence or testimony regarding the refund that she would have received based upon her income and filing status?

[7.] Whether the trial court committed an error of law and/or abused its discretion in failing to award [Husband] reimbursement for his expenditures in repairing/replacing the locks in and on the marital residence, subsequent to [Wife's] unauthorized entry in contravention of the December 22, 2011 order of court awarding [Husband] exclusive possession of the marital residence?

[8.] Whether the trial court committed an error of law and/or abused its discretion in failing to award [Husband] either the personal property that he requested in [Wife's] possession or its value?

Husband's Brief at 2-3.

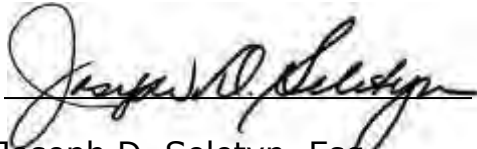
We have reviewed the briefs of the parties, the relevant law, the certified record, and the well-written opinion of the able trial judge, the Honorable Donald R. Walko, Jr. We conclude that there has been no error in this case and that the trial court's opinion, filed August 23, 2013,



meticulously and accurately disposes of Husband's claims on appeal. Therefore, we affirm on the basis of the trial court's opinion and adopt it as our own. In any future filings with this or any other court addressing this ruling, the filing party shall attach a copy of the trial court's opinion.

Decree affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/28/2014

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

MICHAEL J. MANKE,

Plaintiff,

v.

NICCOLLE MONIQUE MANKE,

Defendant.

Docket No. FD 11-08235-016

Superior Court No.: 1056 WDA 2013

**OPINION**

BY:

**DONALD R. WALKO, JR., JUDGE**  
Court of Common Pleas

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DEPT. OF COURT RECORDS  
CIVIL FAMILY DIVISION  
ALLEGHENY COUNTY, PA

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MICHAEL J. MANKE,	)	FAMILY DIVISION
	)	
Plaintiff	)	Docket No. FD 11-08235-016
	)	
vs.	)	Superior Court No.: 1056 WDA 2013
	)	
NICOLLE MONIQUE MANKE,	)	
	)	
Defendant.	)	

**OPINION**

WALKO, J.

August 23, 2013

Plaintiff/Husband Michael J. Manke (“Husband”) appeals this Court’s May 17, 2013 Order of Court dismissing his remaining Exceptions and from this Court’s June 5, 2013 Order denying his Motion for Reconsideration. For the reasons set forth in this Opinion, the May 17, 2013 and June 5, 2013 Orders of Court should be affirmed.

**PROCEDURAL HISTORY**

Husband and Wife were married on October 10, 2008 and separated in October 2011.<sup>1</sup> Husband filed his first Complaint in Divorce on November 11, 2011 but then settled and discontinued the Complaint on November 15, 2011. Husband filed his second Complaint in Divorce on December 16, 2011 and a Divorce Decree was entered on June 12, 2013. Following a trial to address the parties’ economic claims, Master Peggy Lynn Ferber entered a Report and Recommendation dated November 13, 2012. On February 22, 2013 Wife presented a Motion to

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<sup>1</sup> Date of separation was contested and argued in front of Master Peggy Lynn Ferber at the hearing. After considering all testimony and exhibits presented, the Master found the date of separation to be 10/10/11.

Schedule Remand Hearing Before Master or, in the Alternative, Motion to Supplement the Trial Record, which was denied with prejudice. Exceptions to the Master's Report and Recommendation and Answers were filed by Husband and Wife, respectively. Briefs were submitted and oral argument was held May 17, 2013. This Court then entered an Order granting Husband's Exceptions in part. As per the Brief in Support, the Court found and granted that the Master erred in her math calculation of assets in the possession of both parties, in incorrectly listing the stipulated value of Husband's Wells Fargo Roth IRA, in failing to list Husband's Local Annuity 77 in the amount of \$230, in failing to include Wife's Drummond Pension as part of Wife's list of assets in her possession, and in her calculation of funds owed between the parties to equalize equitable distribution. All other remaining Exceptions were dismissed and the Court deferred to the Master's Recommendation.

Husband promptly presented a Motion for Reconsideration on June 5, 2013 and asked the Court to grant his dismissed Exceptions. Specifically, he asked the Court to reconsider whether or not the Master erred in granting Wife's Motion in Limine and Request for Counsel Fees, in failing to include the cost of sale in determining the net equity of the marital residence, in failing to award any value for Wife's Suzuki, in failing to award counsel fees to Husband, in failing to include the value of funds transferred from joint funds to Wife's pre-marital bank accounts as part of the marital estate in Wife's possession, in awarding Wife one-half of the parties' 2008 tax refund, in failing to award Husband reimbursement for his expenditures in repairing/replacing the locks in the marital residence, and in failing to award Husband either the personal property that he requested that is in Wife's possession, or its accompanying value. The Court denied his Motion for Reconsideration and again deferred to the Master's Recommendation regarding the contested matters.

The May 17, 2013 and June 5, 2013 Orders were made final Orders by virtue of the Divorce Decree dated June 11, 2013. Husband filed a timely Notice of Appeal on June 26, 2013 and his Concise Statement of Matters Complained of on Appeal on July 3, 2013.

## DISCUSSION

Husband Michael J. Manke asserts in his Concise Statement of Matters Complained of on Appeal that the Trial Court committed an error of law and/or abused its discretion in making its determinations. In *Wang v. Feng*, 888 A.2d 882 (Pa. Super. 2005), the Superior Court stated that it will not find an abuse of discretion unless the law has been overridden or misapplied, or the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias, or ill will, as shown by the evidence in the certified record. *Wang*, 888 A.2d at 887. Absent a finding of an error of law or an abuse of discretion, the Orders of May 17, 2013 and June 5, 2013 must be upheld.

Before an analysis of Husband's Matters Complained of can be undertaken, it is first necessary to review the credibility determinations made by the Master. A reviewing court must give substantial deference to the fact finder's credibility determinations because he or she has heard and seen the witnesses, observed the witnesses' demeanor and attitude, and consequently, "can make a more reasonable assessment of where the truth lies than can the reviewing court." *Thomson v. Thomson*, 519 A.2d 483 (Pa. Super. 1986); *Rothcock v. Rothcock*, 765 A.2d 400 (Pa. Super. 2000). In *Coda v. Coda*, the Superior Court articulated, "It is for the lower court to assess credibility of witnesses, and if its findings are supported by competent evidence, a reviewing court is bound thereby." *Coda v. Coda*, 666 A.2d 741 (Pa. Super. 1995).

In the present case the Master heard lengthy testimony about a refinancing transaction effectuated by Husband and his *first* wife, Victoria Manke. In June 2009, more than six months

after their divorce and Husband's marriage to Defendant, Husband and his first wife represented to the mortgage company that they were still married and that Husband was residing in that home but travelled a lot for his job. (Master's Report and Recommendation, p. 5). Despite the fact that these representations were completely false, Husband and first wife qualified for a \$160,000 mortgage for which they are both jointly liable. *Id.* Using a check from the mortgage company, Husband transferred \$31,800 to an account in Defendant's name to be used for the closing costs and down payment on the marital residence. *Id.* Husband never represented to Wife that the money was a debt, but rather, led her to believe it was a buyout of his interest in the Virginia house he held with his first wife.

It is likely that by admitting his willing participation in a fraudulent refinancing scheme the Master questioned Husband's truthfulness and honesty on other issues as well. In fact, the Master in her Report and Recommendation often represents that Wife offered credible testimony or seemed credible in her representation of events, but makes no similar comments regarding Husband's credibility. Husband claims that the Master was biased against him in her Recommendation. It is more likely, however, that the Master gave no weight to certain testimony by Husband because she perceived him to be dishonest.

While a Master's report is advisory only, it is to be given great deference. *Morschhauser v. Morschhauser*, 516 A.2d 10 (1986). Although a reviewing court has a duty to make a complete and independent review of the evidence to determine if the Master's recommendations were appropriate, the reviewing court must also review the weight and credibility to be given to the testimony of witnesses. *Rollman v. Rollman*, 421 A.2d 755 (1980); *Goodman v. Goodman*, 544 A.2d 1033 (Pa. 1988). Consequently, because Husband's lack of credibility was a substantial

issue for the Master, great deference must be accorded to her recommendations concerning Husband's claims.

**1) Defendant's Motion in Limine and Request for Counsel Fees**

Husband contends that, "the Trial Court committed an error of law and/or abused its discretion in upholding the Master's grant of Defendant's Motion in Limine and Request for Counsel fees." (Concise Statement of Matters Complained of on Appeal, ¶ 1). Husband believes the Master overstepped her authority in granting the Motion and counsel fees because he claims she had no authority to direct Husband to provide a commitment letter regarding the refinancing of the marital residence, which contradicted the Court's August 24, 2012 Order. (Plaintiff's Brief in Support of Matters Complained of on Appeal, p. 3). On August 24, 2012, this Court denied Wife's Pre-Trial Motion Regarding Disposition of Marital Residence in which the Court was asked to direct that Husband "shall provide Wife's counsel with a loan commitment letter ... from a commercial lender that ... substantiates Husband's immediate ability to obtain sufficient funds to refinance the existing mortgage ..." on the marital residence. Husband maintains that as a result of the Master "directing that Husband provide that which the Court had expressly denied", she substituted her own judgment and indicated her bias against him. *Id.* at p. 5.

Husband's characterization of the Orders previously denying that he should be required to obtain a loan commitment letter is misplaced. It was not this Court's position that Husband should never have to provide the letter. The largest dollar value issue confronting the Court in this case is Wife's unilateral, indefinite obligation to pay off an approximately \$94,500 mortgage loan which only bears her name and is against a residence that Husband desires to retain as his property. (Wife's Brief in Opposition to Husband's Exceptions, p. 6). The Master correctly acknowledges in her Report and Recommendation that the Court deferred this issue to her so that she could deal with all equitable distribution issues at once, and not hear them in a piecemeal

manner. Knowing that the mortgage was the most significant issue and stumbling block to settlement, “it was amazing to the Master to find out that he [Husband] was still “waiting” to be ordered to make application by the Court.” (Master’s Report and Recommendation, footnote 10, p. 4). Instead of coming prepared to the hearing to discuss his supposed ability to refinance despite still owing money against his residence with this first wife, Husband waited until the end of the second day of trial to deal with the issue. Id. It was not until the end of the third day of trial, when the Master asked Husband about the letter, that he presented a provisional document that clearly stated that approval was dependent on a pending investigation of his financial status. Id. at p. 5). Because he brought no supporting documents for the provisional letter so the Master or Wife could know if he had accurately represented his outstanding mortgage obligation, it was impossible to ascertain whether he would qualify for refinancing.

Husband had a fifteen-month long opportunity to refinance the marital residence. (Wife’s Brief in Opposition, p. 10). If Husband truly believed he was eligible for refinancing, then it is reasonable to assume it would have been secured by now. However, since it still had not happened up to the point of the hearing, the Master was within her authority to think Husband knew he would not qualify for a mortgage refinancing and that the reason he has refused to seek refinancing in a timely manner is so he can extend the period of time he can occupy the marital residence before it needed to be returned to Wife and sold. (Master’s Report and Recommendation, footnote 10, p. 5).

The Master did not commit an error of law or abuse her discretion in granting the Motion in Limine and Request for Counsel Fees. There was no proof to support Husband’s “pre-approval letter” or in any way show that he would be able to refinance the marital residence.



## 2) Cost of Sale for marital residence and its corresponding net equity

Husband's next contention that "The Trial Court committed an error of law and/or abused its discretion in failing to include the cost of sale in the determination of the net equity of the marital residence" (Husband's Concise Statement of Matters Complained of on Appeal, ¶ 2) is incorrect. Husband argues that in determining the equitable distribution of marital property it is necessary to consider "the expense of sale, transfer, or liquidation associated with a particular asset, which expense need not be immediate and certain." 23 Pa. C.S.A. 3502(a)(10.2). The particular facts or circumstances of any given case, however, are determinative as to the equitable relevance or weight. Additionally, Husband admits there is no universal rule applied by the courts for determining cost of sale relative to the net equity of a marital residence, which would further support the notion that such a determination is fact and circumstance dependent.

Husband cites *Thrush v. Thrush*, No. 1314 S. 1981, slip opinion at 3 (Dauphin County, September 21, 1984), *aff'd per curiam* 491 A.2d 927 (1985), petition for allowance of appeal denied (Pa. 1985) to claim that "even if neither party contemplated selling the home, the costs of sale must still be deducted" and that "valuation is nothing more than a function of what the home is worth if it were to be presently sold." However, the Pennsylvania Supreme Court case *Zeigler v. Zeigler*, 530 A.2d 455 (1987) declined to accept the *Thrush* rule for all cases, including cases in which an immediate sale is intended, as the intention to sell is not easily susceptible of proof and the proper amount to deduct for costs of sale would be speculative. *Zeigler*, 530 A.2d at 550. In *Zeigler*, Wife disputed the value that the trial court placed on the marital residence, as she intended to sell the property immediately. *Id.* at 549. Wife argued that the value of the residence should have been reduced by the expenses of the sale to reflect its true value. *Id.* at 549. The Court disagreed with Wife, and stated that the trial court's refusal to deduct the costs of sale was

a proper exercise of its discretion because the record did not establish the expenses incident to the contemplated sale with enough specificity to deduct such expenses. *Id.* at 550-551.

In the present case, Husband has exclusive possession of the marital residence and has indicated that he plans to stay in Pittsburgh for a minimum of three years until he is vested in his pension with Local 66. Even if Husband does not intend to stay in Pittsburgh permanently, he will be in the marital residence for the foreseeable future. The Master determined that it was appropriate not to consider the cost of sale, which is proper in light of the *Zeigler* holding. In comparison to the contemplated sale of the marital residence in *Zeigler*, which Wife intended to undertake immediately, in this case Husband contemplates a sale of the marital residence at an undefined future date. Husband states that the cost of sale of the marital residence is \$9,150, calculated through his testimony at the hearing of the 6% real estate commission that the parties paid when they purchased the residence and the 1.5% realty transfer tax for Bethel Park. (10/15/12 H.T., p. 64). This value is purely speculative, as there is no evidence on the record that a 6% real estate commission or a 1.5% realty transfer tax will be incurred upon the future sale of the property (if such a sale were to even take place). The calculated value of \$9,150 is thus not sufficiently specific to require a deduction of the cost of sale from the net equity. For these reasons, it was not an error of law or an abuse of discretion for the Master not to include the cost of sale in the determination of the net equity of the marital residence.

### **3) Value of Defendant's Suzuki**

Husband further contends that, "the Trial Court committed an error of law and/or abused its discretion in failing to award any value for Defendant's Suzuki." (Husband's Concise Statement of Matters Complained of on Appeal, ¶ 3). Husband argues that all property must be assigned a marital or non-marital title and all values must be properly assigned by either

stipulation between the parties or the Master's determination. *Anzalone v. Anzalone*, 835 A.2d 773 (2003). It is undisputed that Wife's 2008 Suzuki XL7 (hereinafter "Suzuki") was purchased during the marriage, and that monthly payments for the Suzuki came from the parties' joint Wachovia 2276 account. (Tr. 10/15/12, p. 122). Father contends that Wife presented no evidence showing the vehicle had no value, while he presented documentation from Kelly Blue Book and numerous photographs showing the exterior condition of the car. (Plaintiff's Brief in Support of Exceptions, ¶5, p. 7). Because the Master "completely ignored" his evidence and provided a value of \$0.00 for the Suzuki, it constituted an abuse of discretion and the Suzuki should have been valued at \$7,756.20. (Plaintiff's Brief in Support of Exceptions, ¶5, p. 8).

The Master did not commit an error of law or abuse her discretion by not awarding a value for the Defendant's Suzuki. It is clear from the trial transcripts that the Master had an ample evidentiary basis to reject Husband's asserted values and accept Wife's value instead. In an exchange between the Master and Husband, Husband's photographs of the exterior of the vehicle were discussed:

THE COURT: Let's just ask the question very simply. When I look at these pictures, if there were any problems with the engine or the mechanics inside the car, I would not be able to tell that by looking at the photos?

MR. MANKE: You looking at these photos, no.

(10/30/12 H.T., pp. 149-150)

Husband subsequently admitted that at the time he took the photos of the Suzuki, he was never inside the vehicle and thus never "looked under its hood" as he acknowledged he did when he purchased his Jeep in order to use his "Master Mechanic" skills and expertise to determine the price he would pay. (10/30/12 H.T. pp. 147-148). Additionally, Wife testified as to her understanding of the Suzuki's value:

MS. BERNSTEIN: To what extent have you investigated this online?

MS. MANKE: I have looked up the Kelly Blue Book values given the information about the vehicle as it is. I have also looked at AutoTrader.com to sell it, which I'm in the process of trying to do so since I moved. I had actually listed it on AutoTrader before I left and didn't even get an offer from anybody ...

THE COURT: Right. Tell us what you think its value is.

MS. BERNSTEIN: What do you think the value is as owner?

MS. MANKE: The \$6,681 is what I offered.

THE COURT: \$6,681?

MS. MANKE: Yes.

THE COURT: What do you still owe on it, if anything?

MS. MANKE: It is around that high, \$6,207.

THE COURT: So you are selling it for--

MS. MANKE: For what I owe, yes.

(10/16/12 H.T. pp. 185-186)

Husband stated that at the time of separation he was not aware of any mechanical defects in the Suzuki. (Plaintiff's Brief in Support of Exceptions, ¶ 5, p. 8). Since a full calendar year had passed between the date of separation, when Husband last had intimate knowledge of the Suzuki, and the date of the trial, it would be reasonable to assume that Wife has the better understanding of the condition of the vehicle and its value. Referring again to the credibility assessments made by the Master, if there was a discrepancy in estimated values of the Suzuki, it is logical that the Master would accept Wife's credible testimony over Husband's testimony. Similarly, Wife does not seem to be aiming to make a profit from the sale of the Suzuki, as she listed it for almost the exact price that she still owes on it. Because there would be little profit

made from the sale and for the reasons above, the Court did not commit an error of law or abuse its discretion by not awarding any value for the Defendant/Wife's Suzuki.

#### **4) Counsel Fees for Plaintiff/Husband**

Husband's fourth contention is that "the Trial Court committed an error of law/and or abused its discretion in failing to award counsel fees to Plaintiff relative to four matters" set forth in his Exceptions. (Husband's Concise Statement of Matters Complained of on Appeal, ¶ 4). Specifically, Husband is seeking counsel fees related to: the exclusive possession hearing and Wife's withdrawal of her petition; the attempts by Husband to get his cell phone number released from Wife's family plan; Wife's lack of preparation for an equitable distribution conciliation and her apparent lack of a proposal; and the time spent defending against Wife's pretrial motion seeking a loan commitment letter. Id.

In order to award counsel fees, there must be a showing of dilatory, obdurate, and vexatious conduct by an opposing party. As an objective standard, the party requesting the counsel fee award must establish that the participant had no arguable basis for the asserted position. *Scott v. Mershon (II)*, 657 A.2d 1304 (Pa. Super. 1995). In order for any of Husband's individual claims to stand, he must prove Wife acted in a way that was dilatory, obdurate, or vexatious.

##### **(A) Exclusive possession hearing.**

An exclusive possession hearing was scheduled for February 17, 2012 and pre-trial statements were to be filed by February 7, 2012. (10/15/12 H.T. pp. 204-205). After a first proposed order sent to Husband by Wife's counsel trying to resolve the exclusive possession issue was rejected, Wife's counsel sent a second proposal which Husband found acceptable. Id. at pp. 208-209. Referencing the second proposal, Wife's counsel sent a facsimile withdrawing

her cross-petition. Id. Because Husband had already submitted his pre-trial statement and Wife had not, Husband believes Wife fully intended on withdrawing her petition well in advance of February 8, only after she was sure Husband had already incurred fees. (Plaintiff's Brief in Support of Exceptions, p. 9). Because the Master failed to include this in her Report Husband claims it is an abuse of discretion and that he is entitled to \$4, 053. Id. at p. 10.

At trial, however, Husband's counsel only posed two questions regarding this claim:

MS. PETRUZZI: You did not file a pre-trial statement when they were due on February 7th, correct?

MS. MANKE: No.

MS. PETRUZZI: Okay. And the actual consent Order that you and Mr. Manke entered into actually didn't occur until about a day later; correct?

MS. BERNSTEIN: It was not a consent order. We withdrew our claim, to be specific.

MS. MANKE: Because the motion in limine the week before was denied. I had a long, hard think about whether I wanted to go to that hearing and decided against it.

(10/30/12 H.T. pp. 41-42)

This testimony falls short of proving obdurate and vexatious conduct. The Master appropriately disregarded Husband's claim because there was no evidentiary basis for it other than a feeling by Husband. Because of this, it was not an error of law or an abuse of discretion for the Court not to award counsel fees in this instance.

(B) Husband's cell phone number.

Husband claims he used the same cell phone number for ten years and that it was known exclusively to all of his employers, his Union and the organizations to which he belonged.

Moreover, it was his emergency contact number for his family. (Plaintiff's Brief in Support of Exceptions, p. 10). Husband also claims that his number was transferred to Wife's family plan,

and that after she left the marital residence she interfered with service to the number and prevented Husband from using it. Id. On February 15, 2012, Husband's counsel sent Wife a letter indicating if there was no reply by the 20<sup>th</sup>, counsel was going to present a motion for withholding the cell number and for counsel fees. Id. Wife responded on the 23<sup>rd</sup> after a copy of the Motion was submitted on the 21<sup>st</sup>. Id. Husband believes he is entitled to counsel fees for the preparation of this motion because Wife was given a deadline to comply and return the number and did not. Id.

The Master addressed this claim in her Report and reasoned that the only motive for Husband's actions in preparation of the motion was to create a "tempest in a teapot". (Master's Report and Recommendation, p. 9). Investigation into the reasons why Wife suspended Husband's number from her family plan revealed that in the month they separated, Husband used 971 of the total 1400 minutes available to all five members of the plan. In November, the month after they separated, he used 864. (Master's Report and Recommendation, p. 8). Because her parents were charged for the overusage, Wife changed the plan to 2000 minutes a month and suspended Husband's number from the plan. Id. Husband claims that being suspended from the plan caused him great aggravation and inconvenience, yet the record shows Husband had already purchased a new phone and number with unlimited texting and calling in November. Id. Husband had notified over sixty people of the number change via an email and at no time was there any interruption to his phone usage. Id. He never complained about the loss of his premarital phone number until two and a half months after the service was cut off.

The Master found no basis for the actions Husband took, and neither does the Court. The motion to have the phone number released was seemingly pointless as Husband already had a new phone and number. His actions were intended to cause Wife aggravation, inconvenience,

and legal costs, especially because at the time the motion was prepared, Husband knew Wife was out of town at a conference in Seattle. Wife's actions in no way reach the standard needed to impose counsel fees, so the Master did not commit an error of law or abuse her discretion in not awarding counsel fees on this issue.

(C) Equitable Distribution conciliation.

Husband asserts that at the judicial conciliation the parties had in early June 2012, Wife's counsel was unprepared with information and had no proposal regarding the economic issues in dispute. Because of this Husband asserts the conciliation was a waste of time and because the Master did not mention it in her Report, it was an abuse of discretion. Husband, however, provides no testimony or evidence to show that Wife and her counsel purposefully showed up unprepared, intended to cause Husband to incur counsel fees, or otherwise behaved in a dilatory, obdurate or vexatious manner.

(D) Wife's pre-trial motion.

Wife presented a pre-trial motion attempting to get Husband to secure a loan commitment letter for the refinancing of the marital residence. The Court denied the motion with prejudice with the intent that the Master hear all claims at once instead of the Court hearing the issues in a piecemeal manner. Husband maintains that he is owed counsel fees because the Court preserved the issue for the hearing. He is not entitled to counsel fees, however, simply because the issue was preserved. The Master determined that there was no proof that Wife acted in a way that was dilatory, obdurate or vexatious in the presentation of the motion. Because she made no such finding or argument, it was not an error of law or an abuse of discretion for the Court to deny him counsel fees on this issue.

All of Husband's claims for counsel fees are largely unsubstantiated in the record.



### **5) Funds transferred from joint funds to Defendant's pre-marital bank accounts**

Husband's fifth contention is that, "the Trial Court committed an error of law and/or abused its discretion in failing to include the value of funds transferred from joint funds to Defendant's pre-marital bank accounts as part of the marital estate in Defendant's possession." (Husband's Concise Statement of Matters Complained of on Appeal, ¶ 5). In preparation for trial, Husband claims to have discovered a total of \$18,197.43 in marital funds transferred from the joint account into three unknown bank accounts. (Plaintiff's Brief in Support of Exceptions, ¶ 7). Having confirmed with Wife's counsel that the bank accounts were Wife's pre-marital bank accounts and through citing case law, Husband contends that the transfers were an advance on equitable distribution which the Master did not reference in her recommendation, thus amounting to an abuse of discretion. *Downey v. Downey*, 582 A.2d 674 (1990); *Bold v. Bold*, 516 A.2d 741 (1986).

The Master did not commit an error of law or abuse her discretion by failing to find that Wife received an \$18,197 advance on equitable distribution because testimony at trial revealed glaring holes in the analysis proffered by Husband. Wife provided the Master with information which unequivocally substantiated that while the approximate total amount of \$18,000 had been transferred from the parties' joint checking account into various savings accounts, *more than* \$18,000 was subsequently transferred back into the joint checking account from those same savings accounts. (10/16/12 H.T. pp. 200-204 and 10/29/12 H.T. pp. 39-44). Upon marriage and at Husband's behest, his name was added to Wife's premarital checking account as well as to her premarital savings accounts. (Wife's Brief in Opposition to Husband's Exceptions, ¶ 6, p. 16). Additionally, at the parties' October 10, 2011 separation, the joint checking account was ultimately brought down to a zero balance through payment of household bills and mutually

agreed upon allocations between them. Id. Wife credibly testified that she did not receive any cash advance of marital funds. Thus, since Husband failed to prove that Wife retained any of the funds for herself, and in consideration Master's credibility determinations, which cannot be revisited, the Court did not commit an error of law or abuse its discretion by not including the value of funds transferred from joint funds to Defendant's premarital bank accounts as part of the marital estate in Defendant's possession.

#### **6) 2008 Tax Refund**

Husband's sixth contention is that, "the Trial Court committed an error of law and/or abused its discretion in awarding Defendant one-half of the parties' 2008 tax refund." (Husband's Concise Statement of Matters Complained of on Appeal, ¶ 6). He argues that because Wife failed to raise the issue of the tax refund during equitable distribution and did not list the tax refund amount as an asset to be distributed in her Inventory or Marital Asset and Liability Summary, that she waived the right to the same. (Plaintiff's Brief in Support of Exceptions, ¶ 8, p. 14). Due to Wife's failure to raise the issue, Husband argued that it was an abuse of discretion by the Master to "substitute her own judgment" in determination of the issue and her recommendation should be vacated. Id. at p. 15.

The characterization of the parties' 2008 tax refund as an asset is misplaced. Wife never contended that it was an asset owed to her, but rather it was a credit due to her against Husband's awarded share of the marital estate. (Wife's Brief in Opposition to Husband's Exceptions to Master's Report and Recommendation, ¶ 8). When the Internal Revenue Service confiscated the parties' joint tax refund, it was to satisfy a debt that Husband and his *first* wife had on a return they jointly filed in 2006. (Master's Report and Recommendation, p. 9). It is clear that Wife had no obligation on Husband's premarital debt for which the refund was confiscated. Further,

Husband additionally remitted a \$1,628.47 check drawn on a marital bank account to pay off the remainder of his non-marital 2006 outstanding tax liability. (10/16/12 H.T. pp. 53-55). When considering any credits due to either party after the equitable distribution of the marital estate, it was reasonable for the Master to find that Husband owed Wife for her interest in the confiscated tax refund. Therefore, the Court did not commit an error of law or abuse its discretion by awarding Defendant one-half of the parties' 2008 tax refund.

**7) Reimbursement for expenditures in repairing/replacing the locks of marital residence**

Husband's seventh contention is, "the Trial Court committed an error of law and/or abused its discretion in failing to award Plaintiff reimbursement for his expenditures in repairing/replacing the locks in and on the marital residence" subsequent to an entry into the residence by Defendant in December 2011. (Concise Statement of Matters Complained of on Appeal, ¶ 7). By an Order dated December 22, 2011, Husband was awarded exclusive possession of the marital residence. Soon after the Order was entered, Husband left for Christmas vacation to visit his children in Denver. Before leaving he posted the Order outside the marital residence and put a chain across the driveway to secure the premises. (Plaintiff's Brief in Support of Exceptions, pp. 17-18). Husband claims that upon his return from Denver on December 30, 2011 he returned to find that property had been taken from the exterior of the house, the door handle was hammered off the door, the doors were damaged and the deadbolt locks were not functional. Because of all of this Husband was scared and a "mental wreck." *Id.* Husband provided the following testimony about replacing the locks:

MS. PETRUZZI: What was the total amount that you were charged to repair – to replace the locks?

MR. MANKE: The total amount to repair the damaged locks and rekey the locks is \$1,385.65.

MS. PETRUZZI: Now, have you ever previously replaced any locks?

MR. MANKE: Yes, I have.

MS. PETRUZZI: Why didn't you replace the locks yourself?

MR. MANKE: In order to do that, I would have had to leave the residence unsecured to go buy locks, and it's a lot of work. There's two locks on every exterior door of the house, and they're keyed on both sides of the dead bolts. There was a lock on my bedroom door. It was just an overwhelming task for me to take on myself. I'm not a locksmith. I mean, yes, I do repairs, and I am fairly handy, but this was just too much for one person to address, and I was emotionally shook up. I was scared.

(10/15/12 H.T. pp. 181-182).

Husband also claims that Wife was in violation of the Order granting exclusive possession, and points to the testimony of Constable Verghies as evidence to show that she broke into the home by using force. (Plaintiff's Brief in Support of Exceptions, pp. 19-20).

The contention that the Court committed an error of law or abused its discretion in declining to award Husband locksmith fees is unfounded for a number of reasons. First, the Order of December 22, 2011 states in paragraph 2(a) that Wife was allowed to remove items from the residence as long as she was accompanied by a constable. Wife complied with this requirement by bringing Constable Verghies with her to the house. It was reasonable for Wife to want to enter the residence while Husband was away given the events that occurred when she previously removed property. On December 10, 2011 Wife went to the marital residence, Husband confronted her in the driveway, refused to allow her to leave, and called the police. (Master's Report and Recommendation, footnote 16, pp. 7-8). The incident resulted in cross-PFA filings and Husband also brought a Civil Complaint against Wife. Id. Both PFAs and the Civil Complaint were later dismissed. Id.

Second, Husband's use of Constable Verghies' testimony to show Wife intended to use force to enter the residence is misplaced. As a disinterested, third party witness, Pennsylvania State Constable Matthew Verghies testified at length about the events of December 27, 2011. He made the specific observations that Wife made every possible effort to remove her personal items in the cleanest, most orderly manner possible, avoid any kind of disruption or physical damage to the residence itself, and avoid any kind of disruption or damage to the contents of the house. (10/29/12 H.T. pp. 10-13). Additionally, Constable Verghies testified that Wife had purchased new locks, left behind all the new keys for the locks she installed, and did not copy the keys for the new locks. He also testified that all of the doors were locked and the residence secured when he and Wife left the residence. (10/29/12 H.T. pp. 20-21).

Third, Husband admitted to a series of Facebook postings following his return to the residence that would seem to refute the claim that he was scared and in a state of "mental wreck":

"The police just left my house. Someone broke in and stole all of Nikky's stuff. LOL. They were stupid enough not to wear gloves so someone will be coming to visit them soon ☺"

(10/15/12 H.T. p. 249)

"Judge Walko is not going to be happy when Court opens back up on Tuesday ☺"

(10/15/12 H.T. pp. 251-252).

"Someone broke into my house while I was in Denver and stole all kinds of stuff. Thankfully they left the Dennis' 47-inch wide screen TV and the hot tub! Party rocking movie night in the hot tub is still on"

(10/29/12 H.T. p. 117)

The Master clearly could find that Husband's seemingly mocking and sarcastic comments are not typical of someone scared after a break-in.

Finally, the reason why Wife should not be compelled to reimburse Husband for locksmith fees is because the Master found that Husband's hiring of a locksmith was, "unnecessary and designed to cause Wife additional expense (time and a half for holiday) and trouble." (Master's Report and Recommendation, p. 8). Due to his impressive skill-set as a Master Mechanic and related technical expertise, it is likely Husband did not need the service of a locksmith. When describing his technical skills, Husband testified to the following:

MS. BERNSTEIN: What do the duties or job functions of a master mechanic encompass?

MR. MANKE: Repairing cranes, putting cranes together, repairing trucks, bull dozers, backhoes, supervising the people that grease and maintain them ... Welding, using a cutting torch, operating the cranes and other equipment naturally to assess their functionality

(10/16/12 H.T. p. 56)

Husband also testified to the structural improvements he made to the parties' Alabama home and Pennsylvania residence including building a deck and sauna, extensive landscaping, drainage work, yard improvements, building custommade shelves, excavating and pouring a concrete slab for the hot tub, and replacing exterior doors. Husband also testified about his experience with replacing locks:

MS. BERNSTEIN: Did you then have to put new locks on all these exterior doors for the house?

MR. MANKE: I did install new locks on them, yes.

...

MS. BERNSTEIN: ...Right. Quick question on that, Mr. Manke. The number of interior doors were three you said?

MR. MANKE: Exterior doors were three.

MS. BERNSTEIN: And there were six locks?

MR. MANKE: There are ... if you are talking locks, there is a key to key dead bolt on all three exterior of the doors, so that is six locks, plus there is a door handle which is a lock, so that's nine. On the door to the garage, which is semi-exterior, it has a dead bolt.

...

MS. BERNSTEIN: ... Before we get to that, when you did the replacing exterior doors and putting the new locks in as referenced in your pretrial statement, timeframe-wise when was that please?

MR. MANKE: That was in the winter of --we moved up there in September 2010. It was in the winter because it was cold, and we were cutting them out and all the stink bugs were in the door frame.

MS. BERNSTEIN: You didn't need the assistance of a locksmith in order to do that?

MR. MANKE: No, we did not hire a locksmith.

...

MS. BERNSTEIN: Right. So having put on new doors and having put on new locks in the dead of winter dealing with the stink bugs, you were able to put on new locks then. Conceivably you could have been able to put on new locks on or about December 30, 2011; isn't that right?

MR. MANKE: Hypothetically that is correct.

...

MS. BERNSTEIN: Can you look at the Facebook posting on Exhibit P and tell me if you recognize it? Postings, I should say. There are two.

MR. MANKE: This is on a NIOSH letterhead. There appears to be an excerpt part of a Facebook page copied on here also.

MS. BERNSTEIN: Do you see that: "Whew-wee, someone is going to choke—in all capital letters—when the judge makes them pay for the 24-hour locksmith and rekey all the damaged locks on my house, LOL, so says my lawyer." Did you make a posting like that on your Facebook page?

MR. MANKE: Yes, I did.

MS. BERNSTEIN: Okay, let's look below it. It then says: "Gees, they charged not only a weekend off-hour emergency rate, but two times the holiday rate on top of that!" Did you post that as well?

MR. MANKE: Yes, I did.

(10/16/12 H.T. pp. 58-62)

Given the extensive testimony by Husband regarding his previous experience in changing locks, the testimony by Constable Verghies regarding Wife's actions and the events on the day of entry, and Husband's online behavior versus his supposed feelings of being scared, it was not an error of law or abuse of discretion for the Court not to award Husband reimbursement for his expenditures in replacing the locks.

#### **8) Personal property in Defendant's possession**

Husband's final contention is, "the Trial Court committed an error of law and/or abused its discretion in failing to award Plaintiff either the personal property he requested which is in Defendant's possession, or its value." (Concise Statement of Matters Complained of on Appeal, ¶ 8). Simply stated, Husband presented an extensive list of items removed from the marital residence without his consent by Wife. He contends these items are a combination of marital property, premarital property, gifts that were given to the couple, gifts given to him, and all of which he would either like returned to him or for the value of said items to be awarded to him. (Plaintiff's Brief in Support of Exceptions to Special Master's Report and Recommendation, ¶ 17, pp. 20-21).

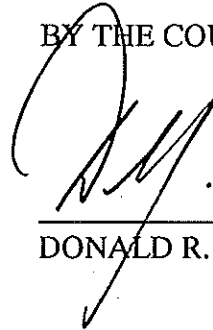
The Court did not commit an error of law or abuse its discretion in addressing the division of the parties' tangible personal property. After an abundance of evidence was presented and Wife's credible testimony heard, the Master determined Wife removed only her personal property from the residence and that Husband retained the lion's share of the tangible marital property in the residence, as well as numerous non-marital items belonging to Wife. (10/29/12 H.T. pp. 19-20 and pp. 90-103). Instead of trifling with disputes over pots and pans, the Master



decided fairly for both parties that each “should retain the property in their respective possession” and attributed “no value to either for what he or she has.” (Master’s Report and Recommendation, p. 11, footnote 22). Due to the facts and credibility determinations made by the Master, she did not commit an error of law or abuse her discretion in not awarding Husband either the personal property or its value as he requested.

For the foregoing reasons, this Court’s Orders dated May 17, 2013 and June 5, 2013 should be affirmed.

BY THE COURT:



\_\_\_\_\_, J.  
DONALD R. WALKO, JR., JUDGE