

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

EDS,		:	No. 15-20,932
	Plaintiff	:	
		:	
vs.		:	CIVIL ACTION - LAW
		:	
SS,		:	
	Defendant	:	

OPINION AND ORDER

AND NOW, this 2nd day of **January, 2018**, presently before the Court are Exceptions filed by SS, Wife, through her counsel, Janice Yaw, Esquire, on October 12, 2016, and Cross-Exceptions filed by EDS, Husband through his counsel, Bradley Hillman, Esquire, on October 26, 2016.

On October 4, 2016, a Master's Report and Recommendation in regard to Equitable Distribution was filed. Thereafter, Wife filed her Exceptions on October 12, 2016, and Husband filed Cross-Exceptions on October 26, 2016. Wife's counsel requested a transcript at the time of filing the Exceptions. Argument was first held on the Exceptions and Cross-Exceptions on January 5, 2017. At that time, only one hour was scheduled for the argument and there was not sufficient time to complete the argument. The matter was rescheduled for continued argument on March 15, 2017. Counsel concluded argument on the Exceptions before the Court on March 15, 2017. Shortly thereafter, in preparing to enter an opinion, the Court discovered that the full transcript had not been transcribed in this matter, despite the fact it had been represented to the Court that the entire transcript had been prepared. The Court, therefore, held an on-the-record argument on March 27, 2017, to address the partial transcript issue.

At the time of the argument on March 27, 2017, it was directed by the Court that the remaining portions of the transcript of the Master's Hearing that were not previously transcribed be transcribed so that the Court could issue a ruling on the Exceptions and Cross-Exceptions. The Court, at that time, indicated that there would be no further argument scheduled, but that the Court will render a ruling on the Exceptions and Cross-Exceptions based upon the previous arguments made and the entire transcript once received. The Court received the remaining portion of the transcript on May 1, 2017.

Wife filed the following Exceptions:

1. The Master erred in taking closing costs of 7% on the real estate.

The parties stipulated that the increase in value of the marital residence is \$47,335. The parties further stipulated if the increase in value was reduced by 7% reduction for real estate transfer tax and realtor fees, the increase in value is \$44,665. The Hearing Officer chose to apply the 7% reduction in the value of the residence for real estate transfer tax and realtor fees. The Court finds that the Hearing Officer made a well-reasoned determination in regard to this reduction. Though there was no testimony that the residence would, at any time soon, be liquidated, the Hearing Officer believed the liquidation value was the most equitable value to use. The Court cannot find that the Hearing Officer erred in making this determination. Wife Exception 1 is DENIED.

2. The Master erred in not taking a 20% commission fee on the Nascar collection.

During the parties' marriage, Wife obtained a NASCAR collection with a value of \$12,500. The Hearing Officer assessed this value to Wife, but did not choose to reduce the value to account for a 20% commission. The Court finds that, in this particular case,

the Hearing Officer erred in failing to do so. In the present case, there are primarily two tangible assets which are subject to liquidation: the residence and Wife's NASCAR collection. As the Hearing Officer chose to reduce the value of the marital residence by the liquidation value, it is only equitable that the value of Wife's NASCAR collection be reduced to the liquidation value. The NASCAR collection is valued at \$12,500. A 20% commission on the sale totals \$2,500.00. Therefore, the liquidation value of the NASCAR collection is \$10,000.00. Wife Exception 2 is GRANTED. The value of the NASCAR collection attributable to Wife for equitable distribution purposes totals \$10,000.

3. The Master erred in not considering a value of \$5,741 for Wife's vehicle as the vehicle had damage.

The parties stipulated that the regular NADA value of the Monte Carlo was \$6,538.00. Wife requested that the asset be valued at \$5,741.00 alleging that there had been damage done to the vehicle which was attributed to Husband. Wife testified that there were scratches and key marks on the vehicle which occurred in April, 2015, post-separation. As the Hearing Officer found, there was no evidence presented, other than Wife's speculation, that Husband had done the damage. The Hearing Officer further found there was no credible evidence presented to the Hearing Officer for the cost to repair the damage. Based upon the evidence and testimony presented, the Court cannot find that the Hearing Officer abused her discretion in utilizing the stipulated regular NADA value of \$6,538.00. Wife's Exception 3 is, therefore, DENIED.

4. The Master erred in not adding \$16,414 into the amount of monies that Husband could not account for other than golf clubs that were never disclosed on

his inventory and appraisal. Husband failed to disclose this asset and failed to provide documentation of expenditures.

In February, 2013, just five months before the parties' separation, Husband withdrew approximately \$21,000 in cash out of a joint account. Husband opened a new account which had \$4,586 in it at the time of separation, which was accounted for by the Hearing Officer under Husband's checking account. Husband testified that the remainder of the cash was kept locked in his car. He testified that he spent money on golf clubs, bought food and gas and spent the balance here and there over the next two and one-half years. Husband was unable to testify as to how much of the cash he had left at the time of separation. The Hearing Officer chose to assess Husband with a value of \$13,000 from the money he removed from the joint checking account and stashed in his truck. The Hearing Officer also included the \$4,586 which was in Husband's checking account at the time of separation for a total of \$17,586 being assessed to Husband out of the original \$21,000 that was withdrawn from the account. During this same time, Husband continued to be employed full-time. It is, therefore, difficult for this Court to accept that Husband spend \$3,414.00 for food, gas, as well as "here and there". It is noted that he did indicate that \$700-800 was spent on golf clubs. The Court finds that the Hearing Officer erred in not including the entire \$21,000 as an asset attributable to Husband. The fact that the monies were withdrawn in such close proximity to the time of separation and that Husband could not specifically account for how the money was spent, despite the fact that he was working and had an income during the same time, leads the Court to conclude that the entire balance that was withdrawn from the joint checking account was marital and is subject to distribution. Husband is therefore assessed his checking account balance at the

time of separation of \$4,856 and a value of \$16,414 in stashed cash. As the Court is assessing Husband the entire value of the \$21,000 between his checking account and the stashed cash, this also includes any value attributed to the golf clubs that were allegedly purchased by Husband with these funds. Wife's Exception 4 is GRANTED. Husband shall be assessed the value of his checking account of \$4,586 and the value of his stashed cash of \$16,414.

5. The Master erred in not adding the golf clubs in as an asset.

See Exception 4 above. Wife's Exception 5 is DENIED.

6. The Master erred in not doing an immediate offset on the Law Data pension as there were sufficient monies in the Husband's defined contribution plan for a rollover. Husband presented no credible evidence that a QDRO would be accepted.

At the time of the hearing, Tara Comerford from Law Data testified regarding the division of Husband's pension through a qualified domestic relations order. Ms. Comerford testified that though there already exists a qualified domestic relations order for Husband's pension from a prior wife, a second qualified domestic relations order can be entered against Husband's pension. Ms. Comerford further testified that the valuation that was provided by Law Data for Husband's pension which was presented as Exhibit W9 did not take into account the existing Qualified Domestic Relations Order; therefore, the valuation is inaccurate. In light of the fact that the Law Data valuation presented to the Court is inaccurate, the Hearing Officer determined that it would make no sense to award Wife a percentage of that incorrect value in an immediate offset. The Hearing Officer determined that what was most equitable in this case was to award Wife a percentage of the marital

portion of Husband's pension. The Hearing Officer pointed out that though 23 Pa.C.S.A. §3501(c)(2) states that the preferred method is the immediate offset, in this particular case, it would be inequitable in light of the fact that there is not an accurate valuation of the value of the marital portion of Husband's pension. The Court finds that the Hearing Officer made a well-reasoned decision to provide Wife with a percentage of the marital portion of Husband's pension rather than an immediate offset. Wife's Exception 6 is therefore DENIED.

7. The Master erred in not ordering Husband to pay to Wife a cash payment for the equitable distribution as Husband retained all the cash assets, including the \$21,000 he pulled out in cash, increase in value of the residence (\$44,665), the Christmas Club account (\$1,000), and the checking account \$4,586). Total of \$71,251 as the Master stated it would be unfair to Husband.

See the discussion to Exception 13. Wife's Exception 7 is DENIED.

8. The Master erred in not considering Wife's cash contributions to the increase in the value of the property in the amount of \$52,000.

Wife presented Exhibit 24 which contained an accounting of monies Wife argues she contributed towards the marital residence. The Court notes that the marital residence was pre-marital property of Husband. The parties stipulated that the increase in value of the marital residence during the marriage, taking into consideration a 7% reduction in the value of the residence for real estate transfer tax and realtor fees, totaled \$44,665.00. Wife ultimately received 58% of the increase in value in the marital residence after factoring in the liquidation costs. Wife testified that, throughout the marriage, she provided Husband with cash and also made purchases on things such as fencing, furniture, painting,

appliances and flooring for the marital residence. The Court does not find that the Hearing Officer erred in failing to consider the direct contributions that Wife made to the marital residence during the marriage. Clearly, the increase in value of the marital residence has been factored into distribution and Wife has received a disproportionate share of that asset. Wife's Exception 8 is DENIED.

9. The Master erred in stating that Wife could make more as a cosmetologist as there was no testimony presented as to what a cosmetologist would make.

In discussion of the equitable distribution factors, at Factor 5, the Hearing Officer indicated that "both parties will likely continue at their present vocations, with only minor changes in their income. Wife could earn more if she chose to work full-time and/or work as a cosmetologist." The Court notes that throughout the Hearing Officer's Report, she emphasized the fact that Wife chooses to only work part-time, rather than full-time, and that the Hearing Officer strongly believed that Wife's income far exceeded that which she reported. The Hearing Officer, on numerous occasions, found Wife's testimony to not be credible. Though there was no testimony presented as to what a cosmetologist would make, the Court does not find that the Hearing Officer's statement that Wife could earn more if she chose to work full-time and/or work as a cosmetologist, is an error by the Hearing Officer. Clearly, Wife could earn more by choosing to work full-time rather than the part-time job that she has chosen to work for many, many years. The Court does not find that the Hearing Officer's statement that Wife could earn more if she chose to work as a cosmetologist, despite the fact that there was not testimony presented regarding this

issue, in any way would affect the ultimate determination made by the Hearing Officer in this case. Wife's Exception 9 is DENIED.

10. The Master erred in stating that Wife could receive medical insurance through employment if she chose to work. There was no evidence that employment suited to Wife's job skills would provide medical insurance.

It is assumed that Wife, in this Exception, is arguing that the Hearing Officer erred in failing to order Husband provide health insurance for her. As the Hearing Officer found, Wife testified that she was not requesting Husband to provide her health insurance once the divorce was finalized. She testified "I'll pay for my health insurance". Additionally, as the Hearing Officer found, Wife has chosen to be under-employed throughout her adult life working as an independent contractor. Wife is fully capable of obtaining full-time employment which would most likely carry with it the ability to obtain health insurance benefits if she wished. The Hearing Officer did not err in ordering that Husband was not required to provide health insurance for Wife. Wife's Exception 10 is DENIED.

11. The Master erred in stating that Wife received 58% of the benefit of the increase in value as the increase in value was not calculated correctly.

Wife argues that the Hearing Officer erred in stating that she receive 58% of the benefit of the increase in value as the increase in value is not calculated correctly. It is the Court's belief that Wife is referring to the fact that the Hearing Officer reduced the increase in value of the residence by the 7% real estate commission and taxes. The Court has addressed this issue in Exception 1. Wife's Exception 11 is DENIED.

12. The Master erred in not awarding alimony as the Master indicated Wife was fully capable of meeting her needs, but would not permit Wife to testify as to needs that were speculative.

See the discussion in Exception 15. The Court does not find that the Hearing Officer erred in failing to hear testimony in regard to Wife's needs which were speculative. The Hearing Officer conducted a thorough analysis of the alimony factors and also conducted a thorough discussion on the evidence in this case and how that evidence applies to the request for alimony. Wife's Exception 12 is DENIED.

13. The Master erred in not awarding a full cash payment to Wife and erred in allowing the additional \$25,457 with a cash equivalent applying 10% penalty plus 10% estimated federal tax. There is no tax bracket of 10% and the federal withholdings are 20%, not 10%. The Master should have ordered Husband to withdraw the sums and pay Wife directly in cash since Wife lost cash of significantly more than what she was recovering.

The Court does find that the Hearing Officer erred in how she chose to award the equitable distribution payment owed to Wife. Though the Court agrees with the concept the Hearing Officer was trying to achieve, there is simpler way to effectuate economic justice between the parties. The two largest assets in the case are the increase in value of the marital residence and the increase in value of Husband's 401(k). The liquidation costs have been accounted for in regard to the marital residence. In regard to the 401(k), the most equitable way to divide this asset is for it to be divided, in kind, 58% of the increase in value to Wife, and 42% of the increase in value to Husband. This can be accomplished through a rollover to Wife. Wife shall then have the discretion, at that point, to liquidate the

account if she wishes to do so; however, she would suffer any penalties and tax consequence as a result of doing so. The remaining payment owed to Wife in equitable distribution shall be paid by Husband in cash. Wife's Exception 13 is GRANTED. See the calculation below.

14. The Master erred in not considering that Husband has a property with no mortgage and he could easily borrow the cash payment to pay Wife.

Wife's Exception 14 is DENIED as moot based upon the Court's ruling on Exception 13 above.

15. The Master erred in not awarding alimony as the Master made no findings as to Wife's income nor expenses and did not consider all factors.

On pages 16-20 of the Hearing Officer's Report, the Hearing Officer conducted a detailed analysis of the discussion on the 17 alimony factors. The Hearing Officer took into account each factor and also conducted a thorough discussion on her ultimate denial of alimony. The Court does not find that the Hearing Officer erred in failing to award Wife alimony. Wife's Exception 15 is DENIED.

16. The Master erred in not ordering Husband to assume all costs of the QDRO, as well as the fees which will be incurred by Wife's attorney to complete the QDRO.

The Hearing Officer ordered Husband to prepare the Qualified Domestic Relations Order, but ordered Wife to contribute \$200.00 towards the cost of preparing it. The Court does not find that the Hearing Officer abused her discretion in requiring Husband to be responsible for the cost and for Wife to pay a small portion of the cost. Wife should not incur any fees for her attorney to complete the QDRO as she has not been directed to

prepare it, rather Husband's counsel has been directed to do so. The Court notes that there was testimony from Tara Comerford from Law Data in regard to the preparation of a QDRO in regard to Husband's pension. The Court would anticipate that Husband's counsel would utilize Law Data to complete the preparation of the QDRO. The \$200.00 contribution Wife has been ordered to make is only a small portion of the overall cost that may be incurred with the preparation of a QDRO by Husband. The majority of this expense has been placed on Husband by the Hearing Officer. In light of this, the Court cannot find that the Hearing Officer erred. Wife's Exception 16 is therefore DENIED.

17. The Master erred in not providing Wife with a 65% split of assets as she failed to include relevant factors including the disparity in social security, health insurance and retirement.

The Hearing Officer divided the marital assets 58% to Wife and 42% to Husband. In pages 8-11 of her Report, the Hearing Officer makes very detailed general findings in regard to the history of the case. Additionally, on pages 12-15, the Hearing Officer carefully considered each of the equitable distribution factors. The Hearing Officer included in her consideration the disparity in Social Security, health insurance and retirement. The Court finds that the Hearing Officer's determination was well-reasoned and, as stated by the Hearing Officer, due to Wife's own choice to work part-time as a dog groomer for her adult life, Wife is underemployed. The Hearing Officer further did not find Wife to be truthful about her income, or much else at the time of the hearing, and the Hearing Officer believed Wife was earning a lot more than she reported. In light of the detailed analysis conducted by the Hearing Officer based upon the evidence presented at the time of the hearing, the Court cannot find that the Hearing Officer abused her discretion in ordering the

58% division of the marital assets to Wife. Therefore, Wife's Exception 17 is hereby DISMISSED.

18. The Master erred in not awarding a survivorship benefit to Wife.

There was no evidence presented at the time of the Equitable Distribution Hearing as to the value of a survivorship benefit to Wife through Husband's pension. In light of the fact that there was no evidence presented in regard to such a benefit, the Court cannot find that the Hearing Officer erred in failing to award such benefit to Wife. The award of a survivorship benefit would reduce the value of Husband's pension. It would be inequitable for the Court to award a survivorship benefit without factoring in the cost of said benefit in the overall distribution. Wife's Exception 18 is DENIED.

Husband filed the following Cross-Exceptions:

1. The Master erred in not considering a value of \$9,262 for Wife's vehicle as the vehicle had low mileage. This information evidencing such was provided to the Court during cross examination.

The parties stipulated that the regular NADA value of the Monte Carlo was \$6,538.00. Husband argued that a higher value should be utilized due to the fact that the vehicle had low mileage. Husband testified, however, that he would be guessing at the mileage at the time of separation. Further, there was no evidence presented to establish what the higher value would be due to the low mileage. Though Husband attempted to introduce an exhibit explaining the Blue Book procedures on low mileage vehicles, the exhibit was not admitted into evidence due to not having previously been provided to opposing counsel. Based upon the evidence and testimony presented, the Court cannot

find that the Hearing Officer erred in utilizing the regular NADA value of the vehicle of \$6,538.00. Husband's Cross-Exception 1 is DENIED.

2. The Master erred in not adding Wife's "stashed cash" in the amount of \$8,800 to wife's assets. Sufficient proof, specifically photographs, Exhibits 54 and 55 were provided to the Court.

Husband testified that after separation, he found a safe containing a large amount of cash with a tally of \$7,300.00. Approximately two months later, he looked in the safe again and found that the tally stated \$8,800.00. Husband introduced exhibits to show photographs of the cash. Husband testified that he had never seen the safe before and did not know if some or any of the cash existed at the time of separation. As the Hearing Officer stated, she believed Husband's testimony in regard to finding the cash and the amount, but there was no evidence that the cash existed at separation. As a result, the Hearing Officer refused to add the value of this cash as an asset to Wife. The Court finds that the Hearing Officer did not abuse her discretion in failing to include the value of the cash as an asset to Wife. The Court does note, however, that the Hearing Officer, in her overall determination in this case, found that Wife's earnings from her grooming business were more than she admitted and, clearly, this evidence supports that finding by the Hearing Officer. Husband's Cross-Exception 2 is DENIED.

3. The Master erred in distributing the marital assets at a ratio of 58%/42%.

See the reasons set forth under Wife's Exception 17. The Court finds that the Hearing Officer performed a detailed analysis of all of the factors and finds no error in the

58% distribution to Wife and 42% distribution to Husband. Husband's Cross-Exception 3 is DENIED.

4. The Master erred in failing to consider the age of the parties and the effect that has on Equitable Distribution. Husband is 54 and Wife is 48 years old. Husband has less earning years.

The Hearing Officer thoroughly discussed both Husband's and Wife's age and their opportunity for future acquisition of income. The Hearing Officer conducted a thorough analysis of all of the equitable distribution factors including the parties' ages. The Court does not find that the Hearing Officer erred in failing to consider the parties' ages. Husband's Cross-Exception 4 is therefore DENIED.

5. The Master erred in failing to include and/or consider the fair rental value of the marital residence. Plaintiff's exhibit 39(A), the appraisal of the marital residence included a value in the amount of \$800 per month as a fair rental value.

The Hearing Officer denied Husband's request for fair rental value stating that no evidence was introduced as to fair rental value. Review of the transcript indicates that there was no testimony presented concerning fair rental value of the marital residence. Further, review of the transcript evidences that Exhibit 39A as referenced in Husband's Cross-Exception was never offered into evidence or made part of the record. The Court does not find that the Hearing Officer erred in failing to award fair rental value when there was no evidence presented regarding fair rental value. Husband's Cross-Exception 5 is DENIED.

Summary of Division of Assets

A. Marital Assets to be split 58% / 42%

To Husband:

Increase in value of residence	\$44,665.00
Tacoma	8,950.00
Life Insurance	2,099.00
Christmas Club	1,000.00
Checking Account	4,586.00
Stashed Cash	16,414.00
 Total	 \$77,714.00

To Wife:

Monte Carlo	\$ 6,538.00
Checking Account	1,651.00
Increase Savings	20,828.00
NASCAR Collection	10,000.00
 Total	 \$39,017.00

Total Marital Assets to be Distributed between the parties \$116,731.00

B. Pension: Marital portion to be split 58% to Wife, 42% to Husband

C. 401(k): Increase in value (\$47,028) to be split 58% to Wife by a rollover from Husband's 401(k) to Wife in the amount of \$27,276.24. Wife shall receive the sum of \$27,276.24 in a rollover as of July 13, 2013, plus gains and/or losses on said amount up to the date of distribution.

Final Reconciliation: The total marital assets (aside from the pension and 401(k)) to be split 58% to Wife and 42% to Husband equal \$116,731.00. Fifty-eight percent of these assets total \$67,703.98. Wife is receiving assets totaling \$39,017.00. Therefore, Husband owes to Wife the sum of \$28,686.98. Wife owes \$200.00 for the cost of preparing the QDRO. This brings the payment to \$28,486.98 payable by Husband to Wife in cash.

Wife shall receive 58% of the marital portion of Husband's pension through a qualified domestic relations order. Wife shall receive a rollover from Husband's 401(k) in the amount of \$27,276 plus gains and/or losses on said amount at the time of distribution.

ORDER

Based upon the Master's Report and Recommendation as modified herein, it is hereby ORDERED and DIRECTED as follows:

1. Each party shall be responsible for his or her attorney's fees and costs incurred in this matter, except for Wife's \$200.00 contribution to the cost of the QDRO, as explained herein.
2. Wife's request for alimony is denied.
3. Wife's request for Husband to provide medical insurance is denied.
4. Husband shall receive the assets set forth for him under Summary of Division of Assets and Wife shall receive the assets set forth for her under Summary of Division of Assets. Each party shall be responsible for all debt associated with the items awarded to him or her, as well as any tax consequences resulting from disposition of those items.
5. Each party shall be responsible for any debts in his or her sole name.
6. Wife is awarded both dogs.
7. Wife is ordered to return to Husband the ring once belonging to Husband's great grandmother. The ring shall be returned within seven (7) days of a final Order in this matter.

8. Husband's pension shall be split with 58% of the marital portion awarded to Wife and 42% of the marital portion awarded to Husband. Husband's attorney shall, within thirty (30) days, prepare the QDRO once a final Order in this matter has been issued.

9. Wife shall receive a rollover from Husband's 401(k) in the amount of \$27,276.24 as of July 13, 2013 plus all gains and/or losses on said amount as of the date of distribution. Husband's attorney shall be responsible for preparing any documentation necessary in regard to the rollover of the 401(k).

10. Husband shall pay to Wife the sum of \$28,486.98 within sixty (60) days of a final Order being issued in this matter.

11. Wife shall vacate the marital residence within sixty (60) days of a final Order being issued in this matter.

By The Court,

Joy Reynolds McCoy, Judge