

RICHIE L. ALLEN,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 92-20,212
	:	
SHARON A. ALLEN, Executrix of the	:	
Estate of GORDON M. ALLEN,	:	
	:	
Defendant	:	

**OPINION and ORDER**

The matter presently before the Court concerns Exceptions and Cross-Exceptions to the July 1, 1999, Master’s Report regarding equitable distribution and counsel fees.

Plaintiff Richie L. Allen (hereinafter “Plaintiff”) initiated this divorce action by a complaint filed against her then husband Gordon M. Allen on February 4, 1992. Plaintiff filed a Praecipe to Transmit the Record to the Court for entry of a divorce decree on October 29, 1992. As a result, a divorce decree was entered November 13, 1992. The decree terminating the marriage provided that the Court retained jurisdiction over all claims raised for which a final Order had not yet been entered. This Order effectively bifurcated the divorce proceedings.

No further action was taken by either party concerning equitable distribution of the marital property until February 27, 1998, when counsel for Gordon Allen filed a Motion for Appointment of Master with respect to the claims for alimony pendente lite and equitable distribution. However, Mr. Allen died April 24, 1998, before a hearing was held. Subsequently, on September 30, 1998, Plaintiff filed a Motion for Appointment of Master; a

Master was appointed by Order of Court filed October 6, 1998. The Master conducted the hearing January 13, 1999.

The Master's Report was filed July 1, 1999. Defendant Sharon A. Allen, Executrix of the estate of Gordon M. Allen (hereinafter "Defendant"), filed Exceptions July 12, 1999.<sup>1</sup> Cross-Exceptions were filed by Plaintiff Richie L. Allen (hereinafter "Plaintiff") on July 15, 1999. Defendant then filed "Amended Exceptions" September 20, 1999. At oral argument, Plaintiff's counsel objected to and moved to dismiss the additional Exceptions filed by Defendant, arguing there is no rule allowing for such a filing and that prejudice to Plaintiff was presumed by the late filing. Defendant's counsel replied that the Amended Exceptions were merely clarification of the original Exceptions and nothing new had been added. Initially, therefore, we must address whether the amended Exceptions are properly before us for disposition.

Pennsylvania Rule of Civil Procedure 1920.55-2(b) provides that within ten days of the mailing of the master's report and recommendation, any party may file exceptions. Matters not covered by the exceptions are deemed waived unless leave is granted to file exceptions raising those matters. Under Pa.R.C.P. 1920.55-2(c), if exceptions have been filed, any other party may file exceptions within ten days of the date of service of the original exceptions.

This Court has compared Defendant's original Exceptions with the Amended Exceptions filed. In both filings, paragraphs 1 through 4 are virtually identical. Paragraph 8 of the Amended Exceptions is arguably an amplification or clarification of paragraph 1 of the

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<sup>1</sup> Plaintiff moved to amend the caption of this action and the Motion was granted January 28, 1999.

original Exceptions and thus will be considered. However, paragraphs 5, 6 and 7 appear unrelated to the original Exceptions. As such, they are additional Exceptions filed not timely and therefore not properly before the Court and will not be addressed. An examination of the remaining Exceptions of each party does compel this Court to direct that the case be remanded to the Master for further testimony and discussion. The reasons for the remand will be discussed hereafter.

***Date of Marriage***

Plaintiff first objects to the Master finding the parties were married July 1, 1988. Master's Report pp. 1,4,7-8. The Master made this finding based upon the Divorce Complaint, wherein Plaintiff averred the date of the marriage to be July 1, 1988, and also upon an Order of Court dated April 16, 1992, which indicates the date of marriage as July 1, 1998. Plaintiff now claims this is error, as the actual date of marriage was July 1, 1981. Plaintiff has chosen not to provide the Court with any documentation as to the correct date. However, we note Defendant does not contest Plaintiff's allegation. Further, there is testimony in the record, by Plaintiff, that the date of marriage was in fact July 1, 1981. Transcript of Proceedings of January 13, 1999, p. 20. This date is further supported by additional testimony that the couple purchased a home "early on in the marriage," approximately 12 years prior to the date of the hearing. *Id.* at 22. Accordingly, Plaintiff's first Cross-Exception will be granted.

***Plaintiff's Share of the Marital Estate***

The Master determined that the assets of the marital estate be divided on a 50/50 basis. Master's Report p. 8. Plaintiff claims this was error. Cross-Exceptions paragraph 4. The Master indicated he was basing his decision, in large part, upon the length of the marriage,

which he perceived to have lasted only two years, four months from date of marriage to date of separation. Master's Report pp. 7-8. The Master found this to be "a very strong distinguishing point" from the case of *Dunn v. Dunn*, 544 A.2d 448 (Pa.Super. 1988), relied upon by Plaintiff. Master's Report at p. 8.

In *Dunn*, a husband and wife were divorced after approximately twenty-four years of marriage. Husband remarried while equitable distribution proceedings were pending, then died unexpectedly. The trial court awarded all marital assets to the first wife, and the Superior Court affirmed. The award to the first wife was based only in part upon the length of the marriage. *See Dunn* at 449. Other factors were also considered, including the age of the first wife, her vocational skills and needs, and the sources of income of the first and second wives.

Here, although the Master considered other factors in his report, it would appear he relied upon his finding regarding the length of the parties' marriage in determining the percentages to be awarded. As we have found this finding to be in error, Plaintiff's Cross-Exception, as set forth in paragraph 4 will be granted and we are constrained to remand this case for further proceedings before the Master. In *Dunn*, the Superior Court noted the trial court properly considered not only the sources of income and reasonable needs of the first wife and ex-husband, but also the reasonable needs of the second wife (and their child). The existing record is incomplete with regard to evidence upon which these factors can be considered. Upon remand, such evidence must be presented in order that the Master may properly consider the issue.

### ***The Northern Central Bank Account and Net Worth of Marital Residence***

In paragraph 2 of her Cross-Exceptions, Plaintiff claims the Master erred by finding that the Northern Central Bank account was not marital property. We agree. The transcript does contain testimony by Richie Allen that the account contained the proceeds from the sale of the marital home, totaling \$7,052.67 as of October 1998 (proceeds plus interest). N.T. 32. Further, Plaintiff's Exhibit 10, introduced at the hearing in conjunction with this testimony, is a statement from Northern Central Bank containing information on an account which is titled "Richie L. Allen; Richard Gahr & Dudley Anderson; Escrow Agents." Although more conclusive documentation would obviously be preferable and it is understandable why the Master reached the conclusion he did, the evidence is sufficient to find that the account is marital property. This Cross-Exception will be granted. Defendant's Exception with respect to the escrow account (paragraph 4) will be denied, however, as Defendant requests the account be split equally between the parties. A determination as to what percentage should be awarded to each party cannot be made until the distribution of all marital property is considered in light of the findings of this Court as set forth in this Opinion.

With respect to the value of the marital residence, as we have found the Northern Central Bank account contains proceeds from the sale of the home, the original amount of deposit should be added to the \$10,358.00<sup>2</sup> determined by the Master to be the value of the marital residence for equitable distribution purposes. *See* Master's Report, p. 4. This Cross-exception will also be granted.

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<sup>2</sup> The Master arrived at this figure because there was documentation from PNC bank concerning the amounts charged as a result of the foreclosure proceedings (which were brought about by Mr. Allen's failure to make mortgage payments).

### ***The Pension***

The Master found that the decedent's pension, in the amount of \$23,331.00, was marital property. This finding was based upon the case of *Palladino v. Palladino*, 713 A.2d 676 (Pa.Super. 1998). Defendant claims this is error, citing 20 Pa.C.S. §6407. The Court does not believe that statute to be applicable, as it deals with registered securities.<sup>3</sup> Nevertheless, we believe Defendant's position is correct. First, as Defendant rather succinctly states, in *Palladino* the husband was alive, thereby distinguishing the facts in that case from the instant case. Second, "after divorce, a party is no longer a 'surviving spouse'" under the Retirement Equity Act of 1984, P.L. 98-397, 98 Stat. 1426 (1984) for purposes of pension benefits under Section 205 of the Employee Retirement Income Security Act of 1974, P.L. 93-406, 88 Stat. 829, 29 U.S.C. §1001, *et seq.* *Savage v. Savage*, 736 A.2d 633, 647 fn. 37 (Pa.Super. 1999). According to the *Savage* Court, this means that "if the spouse with the pension dies after a bifurcated decree but prior to equitable distribution, there may be no means of the former spouse obtaining pension benefits, especially if the deceased spouse had remarried in the interim." *Ibid.* We are faced with exactly such a situation in the case before us. The *Savage* Court stated further:

Divorce, with or without a subsequent remarriage, will often cause the automatic termination of spousal health insurance and "surviving spouse" pension benefits *unless a pre-divorce provision has been made for some continuation of them*. Other disadvantages include...the risk that one party's death after the decree but prior to the resolution of economic issues might have a negative effect upon the surviving spouse's right to equitable distribution.

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<sup>3</sup> The relevant portion of the statute is set forth, *infra*.

*Id.* at 646 (emphasis added). No such provision was made in this case. The language in the November 13, 1992 Order of Court is silent as to any pre-divorce provision. When Plaintiff filed her Praecipe to Transmit the Record and the proceedings were bifurcated, she exposed herself to the risk bifurcation would have upon her economic claims. *See also Wolk v. Wolk*, 464 A.2d 1359, 1362 (Pa.Super. 1983) (where a case has been bifurcated and one party dies before resolution of ancillary issues, the surviving spouse is precluded from enjoying the benefits provided under the Probate, Estates and Fiduciaries Code, the death of one party has an adverse effect on the surviving party's equitable distribution claim; though the surviving spouse's claim survives under the Divorce Code's equitable distribution process, the claim is seriously hampered by the surviving spouse being rendered incompetent as a witness by the Dead Man's Rule<sup>4</sup>). Further, but for decedent's remarriage, the facts of this case would be considered in light of 20 Pa.C.S. §6111.2, which states in relevant part:

**§6111.2. Effect of divorce on designation of beneficiaries**

If a person domiciled in this Commonwealth at the time of his death is divorced from the bonds of matrimony after designating his spouse as beneficiary on a life insurance policy, annuity contract, pension or profit-sharing plan or other contractual arrangement providing for payments to his spouse, any designation in favor of his former spouse which was revocable by him after the divorce shall become ineffective for all purposes and shall be construed as if such former spouse had predeceased him unless it appears from the wording of the designation, a court order or a written contract between the person and such former spouse that the designation was intended to survive the divorce...

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<sup>4</sup> 42 Pa.C.S. §5930. Instantly, the statute was not raised by Defendant and any objection to Plaintiff's testimony is deemed waived. *Olson v. North American Indus. Supply, Inc.*, 658 A.2d 358 (Pa.Super. 1995).

Finally, based upon the Court's finding, Plaintiff's Cross-Exception that the Master erred by failing to factor into distribution the taxable effect of payments received by Plaintiff from Defendant's pension (Cross-Exception number 6) is moot and will be denied.

### ***The Stock Options***

The Master found \$21,377.72 in Pepsi-Co (Frito Lay) stock options issued during the marriage of the parties to be marital property, notwithstanding the death of Mr. Allen. In making this determination, the Master relied upon the case of *MacAleer v. MacAleer*, 725 A.2d 829 (Pa.Super. 1999), wherein the Superior Court considered the question whether stock options granted to a spouse during the marriage as part of the spouse's compensation constitute marital property. *Id.* at 831. The Court held that "regardless of when the right to exercise the options matures, stock options granted during the marriage constitute marital property if the options are granted as compensation for past services rather than as consideration for future services." *Ibid.* Instantly, no issue was raised by Defendant that the stock options Defendant earned during the parties' marriage were compensation for future services.

Defendant claims the Master erred, based upon 20 Pa.C.S. §6407. That statute reads as follows:

#### **§ 6407. Ownership on death of owner**

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners,



multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

We believe this statute to be inapplicable. Mr. Allen realized the value of the stock options in 1995, prior to his death. This is not a situation involving beneficiaries. The \$23,331.00 was correctly determined by the Master to be marital property. Defendant's Exception as set forth in paragraph 3 will be denied.

### ***Counsel Fees***

Plaintiff claims the Master erred in denying Plaintiff's request for counsel fees and costs. With regard to the latter, the Master found Defendant solely responsible for \$210.00 in costs. Master's Report pp. 9-10. On (unnumbered) page 9 of "Plaintiff's Brief in Support of Her Position on Equitable Distribution and Counsel Fees," filed February 2, 1999, Plaintiff refers to a bill submitted to the Master containing counsel fees and costs as of October 1, 1998. It would appear this reference relates to Exhibit 18 of Plaintiff's Final Pre-Trial Statement, filed December 22, 1998. The total of Administrative Costs listed is \$20.80. Given the minimal amount, which Plaintiff would have the resources to pay, we find no error regarding the Master's determination with respect to costs.

The Master denied Plaintiff counsel fees for "two primary reasons." Master's Report p. 9. First, the Master believed Plaintiff would have sufficient funds, based upon the equitable distribution, to pay her own counsel fees. Second, the Master stated "it appears that this matter should have been settled several years ago. At the time of the entrance of the Order of April 16, 1992, the parties were very close to entering into a settlement agreement." *Ibid.*

With regard to this last sentence, Defendant objected to this finding because the parties were not near agreement and Mr. Allen was “forced” to file for a Master’s hearing. Defendant’s Exception paragraph 1.

The Order of April 16, 1992, contains no reference to a pending settlement agreement. Because we cannot find a basis for this finding in the record before us, and because the findings of this Court alter the equitable distribution of marital property previously determined by the Master, Defendant’s Exception and Plaintiff’s Cross-Exception with respect to counsel fees must be granted. However, this determination in no way speaks to the question of whether counsel fees should or should not be awarded. Counsel fees are awarded under the facts of the case after review of all relevant factors, including payor’s ability to pay, requesting party’s financial resources and the property received in equitable distribution. *Litmans v. Litmans*, 673 A.2d 382 (Pa.Super. 1996); *Pearlberger v. Pearlberger*, 626 A.2d 1186 (Pa.Super. 1993). “Counsel fees are awarded only upon a showing of actual need.” *Harasym v. Harasym*, 614 A.2d 742, 747 (Pa.Super. 1992).

### ***Conclusion***

Based upon the foregoing Opinion, this case must be remanded to the Master for further proceedings consistent with the findings of this Court. Accordingly, the following Order is entered:

**ORDER**

*AND NOW*, this 19<sup>th</sup> day of January 2000, it is ORDERED and DIRECTED as follows:

1. Defendant's Exceptions 1 and 2 are GRANTED.
2. Defendant's Exceptions 3 and 4 are DENIED.
3. Plaintiff's Cross-Exceptions 1, 2, 3 and 4 are GRANTED.
4. Plaintiff's Cross-Exception 5 is GRANTED in part and DENIED in part as set forth in the foregoing Opinion.
5. Plaintiff's Cross-Exception 6 is DENIED.

This case is HEREBY REMANDED to the Master for further proceedings consistent with the foregoing Opinion.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator  
Ralph W. Thorne, Esquire  
Randi W. Dincher, Esquire  
Judges  
Nancy M. Snyder, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)