

IN THE COURT OF COMMON PLEAS, LYCOMING COUNTY, PENNSYLVANIA

JOSEPH DEMBITSKY,	:	
Plaintiff	:	
	:	
v.	:	No.: 95-20,998
	:	
BARBARA DEMBITSKY,	:	
Defendant	:	

**ADDITIONAL OPINION IN SUPPORT OF ORDER
IN COMPLIANCE WITH RULE 1925(A)
OF THE RULES OF APPELLATE PROCEDURE**

On July 3, 2003 the Pennsylvania Superior Court issued a Memorandum Opinion remanding the case to this Court for preparation of a Pa.R.A.P. 1925(a) Opinion to address the merits of Appellant/Wife's allegations that this Court failed to one; order Husband to provide health insurance coverage for her; and, two, award Wife a portion of Husband's pension which was in payout status. The Court will address these issues seriatim.

In its original 1925(a) opinion, this Court dismissed the Appellant's claim for insurance coverage noting that it had been waived, as she had failed to raise the issues prior to the Equitable Distribution hearing. The Superior Court disagreed with the characterization and noted numerous instances where the issue was discussed (answer to the divorce complaint, pretrial statement) as well as during the Master's Hearing itself. Opinion of Superior Court July 3, 2003 at p.4. In support of its prior ruling, the Court notes that Wife did not raise the issue in her Motion for Appointment of a Master. Local Lycoming County practice dictates that where an issue is not raised by either party in a

request for appointment of a Hearing Master, then it is waived regardless of whether it has been raised earlier in a complaint or counterclaim. This local practice was created to avoid unfair surprise and unpreparedness of the opposing party at the Master's hearing. Therefore, where a party has not requested prior to a hearing that the Master consider a particular issue, the Master will not consider that issue at the time of the hearing. However, since additional analysis of the issue is requested, the Court will review all of the information available.

Under 23 Pa.C.S.A. Section 3502(d), entitled "Equitable Division of Marital Property", the Court "may direct the continued maintenance and beneficiary designations of existing policies insuring the life or health of either party which were originally purchased during the marriage and owned by or within the effective control of either party." The issue of health insurance coverage for Appellant was first raised by her counterclaim to Husband's divorce petition, which was filed on May 15, 2001. Although there is somewhat lengthy testimony presented throughout the hearing October 17, 2001 before the Master as to the parties' health conditions and their access to and ability to pay for health insurance, the Court notes the issue is not addressed specifically. However in the Master's Report, filed on November 17, 2001, it does state that "Ms. Dembitsky does not have any medical insurance through her present employer. She continues to be covered under Mr. Dembitsky's previous employer due to the fact that they are not divorced." Report of the Master, November 17, 2001, pp. 5 – 6. There is no indication in the Master's Report whether he recommends continued maintenance of the health care policy under section 3502(d). Indeed, in his evaluation of the needs of each of the parties, the Master found that Wife has poor health because of high blood pressure,

diabetes, deterioration due to arthritis, and diverticulitis. The Court further notes that Wife testified during the Master's hearing that she could not afford health insurance, N.T., October 17, 2001, p. 37, and that her employer does not provide health benefits to part-time or full-time employees. Id., at p. 43. Husband offered nothing during the course of the hearing to dispute this testimony. The Master made no recommendation as to whether Wife is entitled to health insurance benefits and the relative financial positions of the parties to determine if an award would be appropriate. However, if the Superior Court were to decide that her claim for health insurance was not waived and should be addressed on the merits, the issue of continued health care coverage should be addressed by the Master. Therefore, the matter would need to be remanded for a determination of whether an order of continued health insurance maintenance is appropriate.

This Court also dismissed wife's claim for a portion of the husband's pension. The Court found that it, too had not been raised in the request for Appointment of a Master, thereby failing to place all on notice that testimony would be presented and an award sought of a portion of the husband's pension which was in payout status since January, 1993. However, the Court will reexamine its position as though the issue were not waived.

At the Master's hearing on October 17, 2001, the parties stipulated that Husband is receiving his pension in the amount of \$490.00 per month. N.T. at p. 4. The parties further stipulated that the date of the marriage was June 30, 1962. Id. at p. 5. The transcript also reveals that Husband received his pension after working for thirty years for his employer, and that he retired from his employment on January 1, 1993 approximately

30 years and six months after his marriage to Wife, but prior to their final separation date of November of 1998. Id. at 7.

The Pennsylvania Divorce Code defines "marital property" as "all property acquired by either party during the marriage." 23 Pa.C.S.A § 3501(a). This definition includes the acquisition of pension benefits. See eg. Meyer v. Meyer, 561 Pa. 225, 749 A.2d 917 (2000). Despite this fact, the Master did not include the pension information in his report. A closer review of the issue reveals that appellate courts have previously held that "money included in an individual's income for the purpose of calculating support payments may not also be labeled as a marital asset subject to equitable distribution." Miller v. Miller, 783 A.2d 832 (Pa. Super. 2001) citing Rohrer v. Rohrer, 715 A.2d 463 (Pa. Super. 1998). However, the reverse is also true. "Money received from the sale of an asset awarded in equitable distribution may not be included in an individual's income for purposes of calculating support payments." Miller, supra at 835. Consequently, there are only two, mutually exclusive, positions that Wife can take with regard to the income. She can claim that the retirement money is either a marital asset to be distributed through equitable distribution or she can claim a portion as part of an alimony award by the court if alimony is requested. The Court finds that the Wife has failed to exercise either option. Had the Appellant requested the pension be considered a marital asset for the purposes of equitable distribution, she is required to present evidence to the Master as to the present value of the pension. No such evidence was presented at the Master's hearing and Appellant has therefore failed to show what portion of the pension, if any, she would be entitled to for purposes of equitable distribution. Conversely, if Wife wanted to claim a portion of the payments from the pension as part of an alimony payment ordered by the

court, she would have needed to specifically plead alimony in the answer and counterclaim to the original divorce petition. Since she failed to include a claim for alimony in her answer and counterclaim, Wife has given up any right that she might have to a portion of the pension payments to be included in an award of alimony. Accordingly, this Court therefore finds the Master did not err in failing to order distribution of the pension benefits.

Date: July 28,2003

By the Court,

Nancy L. Butts, Judge J.

xc: Joy McCoy, Esquire
John Felix, Esquire
Honorable Nancy L. Butts
Diane L. Turner, Esquire
Gary Weber, Esquire