IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

EDWARD T. EARLEY, Plaintiff	:	FC-20-20473
vs.	:	CIVIL ACTION – LAW IN DIVORCE
MARY JEAN GOULD-EARLEY, Defendant	:	*Exceptions*

OPINION AND ORDER

AND NOW, this 29th day of June 2022, following argument held on February 14, 2022 on Defendant's Exceptions to the Master's Report filed September 29, 2021, and supplemental briefing, the Court hereby issues the following Opinion and Order.

BACKGROUND

A. Filings

Plaintiff commenced this action by filing a Complaint in Divorce on July 8, 2020. Count I – Divorce alleged that the parties' marriage was "irretrievably broken and the parties are estranged due to marital difficulties with no reasonable expectation of reconciliation as provided by the Divorce Code of 1980, Section 3301(c)" and that "the parties intend to live separate and apart as provided by the Divorce Code of 1980, Section 3301(d)." Count II sought an equitable distribution of property. Count III sought the payment of reasonable attorney's fees and costs. Count IV sought alimony.

The issue of the date of separation arose early in the proceedings. On October 7, 2020, Defendant filed a Petition for Special Relief, which indicated that Defendant "believed the separation date was in 2014, when a Post-Nuptial

Agreement was prepared and Respondent purchased a home in his own name and took out a[n] equity loan," rather than January 1, 2018 as Plaintiff indicated in his discovery requests. A Master's Hearing to determine the date of separation was initially scheduled for a half-day on February 23, 2021 before Hearing Officer Diane L. Turner, Esq. The hearing was not completed during that time, and further testimony was taken on April 20, 2021 and August 3, 2021, with the hearing concluding on that final date.

B. Master's Report

On September 29, 2021, Hearing Officer Turner issued her Master's Report, ultimately concluding that the separation date was "late May, 2019" as Plaintiff ultimately contended, rather than August 16, 2014 as Defendant contended.[1] The Report first discussed the divorce code's definition of "separate and apart" as well as the applicable presumptions and burdens when a party proposes a date of separation that predates the filing of the divorce complaint. The Report characterized the parties' arguments as primarily concerning four areas:

- An August 2014 incident during which "[Defendant] claims that [Plaintiff] nearly hit her with a tractor during an argument";
- Defendant's broken leg, suffered in October 2018, and Plaintiff's subsequent lack of care for her;
- The February 2015 signing of a "post-nuptial agreement" by the parties; and
- Plaintiff's 2015 purchase of a home in his own name.

[1] Although Defendant interpreted Plaintiff's proposed date of separation based on his discovery requests as "January 1, 2018" in her October 7, 2020 Petition for Special Relief, Plaintiff clarified on the first day of the hearing that his proposed separation date was when he moved out of the house he and Defendant shared around "the end of May of 2019." *N.T. 2/23/21* 6:11.

1. August 2014 Incident

As recounted in the Master's Report, Defendant characterized the August 2014 incident as an argument over the use of the "front area" of their property; Defendant stated she told Plaintiff she planned to use it as a pasture for her ponies, but returned from an errand to discover Plaintiff mowing the pasture with a tractor so he could use it for his cows. Defendant testified that during the ensuing argument, she had to jump to avoid Plaintiff hitting her with the tractor. Defendant reported Plaintiff "told her that if she wanted a divorce, she should file for one" and, after this, Defendant moved into a separate bedroom on the first floor of the house.

Plaintiff disagreed that he nearly hit Defendant with the tractor during this incident, and that he made the statement regarding her filing for divorce during this argument. He did state that he and Defendant would make such statements "from time to time" in the heat of arguments, though, as the Master's Report described it, "within a few days the argument would blow over and the parties would resume living their lives with their marriage essentially unchanged." Plaintiff agreed with Defendant that after the August 2014 incident she did begin sleeping in the bedroom on the first floor of the home. The Hearing Master found credible Plaintiff's testimony that "he did not believe" Defendant's use of a separate bedroom after the August 2014 incident "meant that they were separated in their marriage and that [Defendant] never told him that they were separated when she moved into the other bedroom."

The Master cited testimony that the parties continued to use the storage space and the bathroom attached to the master bedroom, and that "although the parties began to sleep in different rooms, they did not change the other aspects of their

marriage." She additionally noted testimony that – both before and after the August 2014 incident – the parties did not share joint bank accounts, did not have sexual intercourse, did not change how they handled household chores, continued to purchase gifts for each other, and conducted family functions without change, including "hold[ing] themselves out to others as Husband and Wife."

The Master noted that, "[a]fter the tractor incident, [Defendant] told a limited number of friends and family members that she and [Plaintiff] were separated," but "[Plaintiff] did not tell anyone that [they] were separated and testified that he did not believe that they were separated until he left in May, 2019." Both parties called witnesses to support these contentions; the Master found them "credible in what they said, [though] none of them shed any light on whether [Defendant] had communicated to [Plaintiff] her intention to be separated."

The Report recounted Defendant's testimony concerning things that changed after 2014 that supported her assertion that Plaintiff was aware of her intent to separate. Defendant testified that after the August 2014 incident, she stopped inviting her family to visit the marital home, whereas they had visited often prior to the incident.

The Master found important the testimony that during marriage counseling between January and April 2015, Defendant told Plaintiff "if you're not going to try to make this better, that's it! We're done!" The Master specifically found that this statement "implies that the parties were not in fact 'done' at the time that the statement was made in April, 2015," because it was a conditional statement indicating they would be "done" in the future *if* Plaintiff did not change his behavior.

The Master also noted Defendant's testimony that she had first spoken to an attorney about the possibility of divorce in 2012, but chose not to file at that time due to the cost and her health issues. The Master found that when viewed in the context of the parties' lives prior to 2014, the "testimony from both parties establishe[d] that little or nothing changed in their relationship except that they began to sleep in different bedrooms. Nothing changed in their interaction with one another."

2. Defendant's Broken Leg

The Report detailed the testimony concerning the Defendant breaking her leg in October 2018, resulting in surgery, a week-long hospital stay, incapacitation upon her return home, and significant pain and restrictions for a year following the injury. The Master recounted how Plaintiff left a work-related task he was performing in Ithaca, NY to go to the hospital while Defendant was in surgery, and how he transported Defendant to their home along with her sister. The Master noted the efforts of Defendant's sister to arrange for Defendant's care, discussing specifics of those arrangements, but found that these arrangements did not shed light on whether Defendant had ever communicated to Plaintiff that they were separated. Defendant testified to two separate incidents during her convalescence that she claimed showed Plaintiff's lack of care: his failure to arrange for the care of his animals, which required Defendant to do so while on medication, and his trip to Arizona that Defendant characterized as a vacation. Plaintiff did not dispute the first contention, but indicated the trip to Arizona was a convention related to his employment rather than a vacation. The Master found that these circumstances did

not shed any light on whether Defendant had communicated her intent to separate to Plaintiff.

3. February 2015 Post-Nuptial Agreement

The Report next detailed the circumstances surrounding a document, titled "Post-Nuptial Agreement," signed by both parties in February 2015. Defendant contended this document demonstrated the parties were separated at that time, though Plaintiff characterized it as a document required by a gas company the parties were negotiating new leases with. The Master noted that prior to the marriage, Defendant owned a property referred to as "the farm" and Plaintiff owned a property referred to as "the clinic," and that in 2008 the parties jointly entered into natural gas leases for these properties. Although the leases were entered jointly, the checks received for the farm went to Defendant, and those received for the clinic went to Plaintiff. The Master described how, when the leases were up for renewal in 2015, the gas companies would not allow payment of clinic profits to Plaintiff and farm profits to Defendant unless they signed a document setting forth the parties' rights "in the event of (i) the dissolution of their marriage by divorce; (ii) the separation of the parties; or (iii) the death of each party...."

The Master, noting that this document was prepared by an attorney at the same law firm as Defendant's present counsel, found that the agreement "could easily have... state[d] that the parties are in fact separated" but did not do so, and that the language "in the event of... the separation of the parties" in fact supported Plaintiff's contention that the parties were not separated at that time. She found

credible Plaintiff's testimony that he "did not think the post nuptial agreement was about the parties' marriage but was instead about [Defendant] protecting her money."

4. Plaintiff's Purchase of Second Home

Finally, the Report discussed Plaintiff's purchase of a second home in 2015. Plaintiff testified that he purchased the home so he could move his mother, who was living in Michigan and suffering from Alzheimer's disease, closer. Defendant did not participate in the purchase or financing of the home. Plaintiff's mother lived in the home for about two years, and it was then vacant for approximately two years until Plaintiff moved into the home in May 2019.

Defendant testified that in early 2015, Plaintiff told their marriage counselor he had purchased the home so he would have a place to go if the parties separated.[2] The Master found noteworthy that the home had been vacant for approximately two years before Plaintiff moved in, reasoning that "if [Plaintiff] believed the parties were separated during that time, he would have been using his empty property as his own residence and left wife to use the property that belonged to her as her residence." The Master concluded that the home was "intended for the use of [Plaintiff's] mother," and that there was "no evidence from either party that either of them suggested that [Plaintiff] leave the marital residence and live in the second home during the two years that the property sat vacant."

[2] The Master found that this testimony supported *Plaintiff's* contention that the parties were not separated in early 2015.

5. Conclusion of Master's Report

In conclusion, the Master stated:

"A two-prong test has been established in McCoy[3]... for determination of the date of separation between two married persons. First, one of the married individuals must have an independent intent to dissolve the marital union. Second, this independent intent must be communicated to the other spouse. Based upon the facts and conclusions set forth above, a finding is made that no intent to dissolve the marital union was communicated from Mary Jean Gould Earley to Edward Earley prior to late May, 2019, when Mr. Earley left the marital residence and established a new residence for himself in the home he had purchased for his mother four years prior. No finding is necessary and therefore none is made whether Ms. Gould Earley developed an independent intent to dissolve the marital union between the parties. Although each of the parties made angry, nasty comments to one another for years prior to the time that Mr. Earley moved out, and in spite of the fact that the parties began to use separate bedrooms in 2014, the evidence supports a finding that the parties had an extremely unhappy marriage. The evidence does not support that the parties were separated but living in the same residence. Based upon the foregoing, a finding is made that the separation date in this case is late May, 2019."

C. Exceptions

On October 19, 2021, Defendant filed the following six Exceptions to the Master's Report:

"1. The master erred in determining the separation date was May 2019 and not August 16, 2014, the date [Defendant] conveyed her desire to be separate and divorced and moved to the separate bedroom and did not return.

2. The Master erred in the separation date as she stated [Defendant] had no legal interest in property purchased by [Plaintiff] in January 2015. In doing so she confirmed the separation date as [Defendant] would have 'no legal interest' only if the parties were separated. This property was intentionally not included in the post-nuptial agreement.

[3] *McCoy v. McCoy*, 888 A.2d 906 (Pa. Super. 2005).

3. The evidence did not support the Master's conclusion that [Defendant] did not communicate her desire to live separate and apart and be divorced as [Defendant] produced emails sent to [Plaintiff] stating the parties were separated and stated this directly to [Plaintiff].

4. The Master erred in her conclusion that the parties did not cease living as Husband and Wife as she focused on 'nothing changed' rather than focusing on the date there was a complete cessation of marital rights and responsibilities. The parties had gradually ceased most marital rights and responsibilities prior to 2014. On or after August 14, 2014 the parties completely ceased living together as Husband and Wife.

    1. Stopped joint gas leases.

    2. Made separate purchases of real estate.

    3. Did not vacation together as Husband and Wife and took separate family vacations with the children.

    4. Did not return to sleeping together in the bedroom.

    5. Did not socialize in public as a couple. They regularly attend[ed] school events separately and did not sit together.

    6. Did nothing as Husband and Wife except attend counseling to reconcile their marriage.

5. The Master usurped her role as fact finder and injected her own opinion not supported by evidence.

6. The Master erred in determining husband was credible."[4]

ARGUMENT AND BRIEFING

Argument on Defendant's Exceptions was initially scheduled for December 3, 2021; it was continued twice and ultimately held on February 14, 2022. After argument, a briefing schedule was issued, with Defendant's supplemental

[4] The Court addresses these exceptions in detail *infra*.

memorandum of law due by February 28, 2022 and Plaintiff's reply memorandum due March 14, 2022. Defendant filed a rebuttal to Plaintiff's reply memorandum on March 16, 2022.

A. Oral Argument

At argument, Defendant stressed that although a master's report is to be given great consideration, it is advisory only,[5] and provided cases she believed would assist the Court's analysis.[6] Defendant took issue with the Master's Report's lack of citation to the record, and implored the Court to skeptically examine a number of factual conclusions in the Report that, Defendant argues, are not supported by the record. Defendant noted that the Master's Report did not mention the emails she sent, which she contends are strong evidence of her intent to separate and communication of that intent. In general, Defendant listed a number of characterizations of the Master's Report she believed were improper or without support in the record, and maintained that the Master simply made an unsupportable credibility determination.

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[5] Defendant cited *Herwig v. Herwig*, 420 A.2d 746 (Pa. Super. 1980), which states "[a] Master's Report in a divorce action, although advisory only is to be given fullest consideration, particularly on the issue of credibility of witnesses. This is so because it is the master who had the opportunity to observe the demeanor of the witnesses and the parties. However, in a divorce action we are to make an independent review of the record and to consider the evidence de novo, pass on its weight and on the credibility of witnesses, and reach an independent conclusion on the merit. In reviewing the record we must sedulously examine and weigh the testimony to discover inherent improbabilities in stories of witnesses, inconsistencies and contradictions, bias and interest, opposition to incontrovertible physical facts, potent falsehood and other factors by which credibility may be ascertained."

[6] *Schmidt v. Krug*, 624 A.2d 183 (Pa. Super. 1993); *Sinha v. Sinha*, 526 A.2d 765 (Pa. 1987); *Mackey v. Mackey*, 545 A.2d 362 (Pa. Super. 1988).

Plaintiff responded that the Master's decision was appropriately supported by the three-day record. Plaintiff stressed his contention that although Defendant may have taken a number of actions with the goal of causing separation, she did so without communicating that goal, in a manner designed to hide her true intent from Plaintiff. Plaintiff argued that although the marriage was certainly changed in some way prior to May 2019, it had not ended and was not unhappy; for instance, Plaintiff noted that family Christmas cards did not cease in 2014 or 2015 but only after Plaintiff moved out in 2019.

B. Defendant's Supplemental Memorandum

Defendant filed her supplemental memorandum on February 28, 2022. Defendant cited multiple places in the record where she testified she told Plaintiff to "get out" following the August 2014 incident, and that Plaintiff responded by refusing and threatening to attempt to take her assets in a divorce. At that point, Defendant argued, she "could not move out of the residence to establish a two-year separation, as the children were still in high school. [Defendant] also owned the residence prior to marriage. [Plaintiff] told [Defendant] that he would not move out until she filed for a divorce. Consequently, [Defendant] began utilizing the downstairs guest room."

Defendant argued that the evidence concerning the gas leases and post-nuptial agreement supported her contentions, claiming she "was concerned that entering into joint gas leases could be interpreted/argued in the future that she was not living separate and apart." This prompted her to seek legal counsel to draft the post-nuptial agreement, and was designed to "satisfy the gas company and allow the gas company to place payor clauses into the agreement while protecting her legal

status as separated." Defendant noted that page 3 of the post-nuptial agreement specifically stated "the parties agree the signing of this agreement is not a reflection of the parties' marital status, and specifically does not in and of itself demonstrate that the parties are acting as a married couple."

C. Plaintiff's Reply Memorandum

In reply, Plaintiff first acknowledged that "[t]he evidence submitted established that the parties did not have a traditional marriage," in that they did not combine their finances, often vacationed separately, and often slept in separate rooms throughout their marriage. Plaintiff contends, however, that the evidence shows "that there was no change with the manner in which the parties lived until [Plaintiff] moved out in May 2019," and that a year passed before Defendant "came to his residence and asked him if it meant the parties were getting a divorce." Plaintiff ultimately contends that from Defendant's asserted date of separation in 2014 through Plaintiff's asserted date in 2019, Plaintiff and Defendant continued to "socialize together… attend family events together… [and] went out as a family for… birthdays [and] anniversaries" – that is, they continued to behave as a married couple in the same way they had before.

ANALYSIS

A. Legal Standard

23 Pa. C.S. § 3301(d) provides that "[t]he court may grant a divorce where a complaint has been filed alleging that the marriage is irretrievably broken… and the defendant… [d]oes not deny the allegations set forth in the affidavit [or] [d]enies one or more of the allegations set forth in the affidavit but, after notice and hearing, the

court determines that the parties have lived separate and apart for a period of at least one year and that the marriage is irretrievably broken."

The Divorce code allows the court to "appoint a master to hear testimony on all or some issues... and return the record and a transcript of the testimony together with a report and recommendation as prescribed by general rules...."[7] A master's report and recommendation is "advisory only" but is nonetheless "to be given fullest consideration, particularly on the issue of credibility of witnesses."[8] Still, the court must "make an independent review of the record and... consider the evidence de novo, pass on its weight and the credibility of witnesses, and reach an independent conclusion on the merit."[9]

The Divorce Code defines the phrase "separate and apart" as "[c]essation of cohabitation, whether living in the same residence or not."[10] The "date of separation" is "the date on which the parties begin living separate and apart...."[11] In this context, "'cohabitation' means the mutual assumption of those rights and duties attendant to the relationship of husband and wife."[12]

The parties cite numerous cases discussing the appropriate analysis of when spouses are deemed to live "separate and apart." In *Sinha v. Sinha*, husband and wife were married in India; two years later, husband came to the United States to

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[7] 23 Pa. C.S. § 3321.
[8] *Herwig v. Herwig*, 420 A.2d 746, 748 (Pa. Super. 1980) (citing *Margolis v. Margolis*, 192 A.2d 228 (Pa. 1963)).
[9] *Id.*
[10] 23 Pa. C.S. § 3103.
[11] *McCoy v. McCoy*, 888 A.2d 906, 912 (Pa. Super. 2005).
[12] *Thomas v. Thomas*, 483 A.2d 945, 948 (Pa. Super. 1984).

earn a master's degree but due to visa issues wife remained in India.[13] For the next two years, although husband and wife did not live together, they regularly corresponded and "as late as [two-and-a-half years after husband came to America], the husband professed his love for his wife."[14] Approximately one year after that expression of love, husband filed for divorce, claiming that the date of separation was when he moved to America.[15] The Supreme Court of Pennsylvania disagreed, holding that in order for parties to be living "separate and apart," "[t]here must be an independent intent on the part of one of the parties to dissolve the marital union [that is] clearly manifested and communicated to the other spouse."[16] Thus, the Court concluded that husband and wife began to live "separate and apart" not when husband moved to America but when he filed for divorce, which was the first indication that he independently intended to dissolve the marriage, and communicated that fact to his wife.[17]

In *Mackey v. Mackey*, husband "informed [wife] that he wanted a divorce" in spring of 1983, filed a divorce complaint in July 1983, and filed an amended divorce complaint in June 1986.[18] He contended that, as of June 1986, he and wife had lived "separate and apart" for over three years, despite the fact that they "had actually resided together in the marital residence for the past three years...."[19] The evidence demonstrated that, in spring of 1983, husband asked his wife to leave the residence

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[13] *Sinha v. Sinha*, 526 A.2d 765, 766 (Pa. 1987).
[14] *Id.*
[15] *Id.*
[16] *Id.* at 767.
[17] *Id.*
[18] *Mackey v. Mackey*, 545 A.2d 362, 363 (Pa. Super. 1988).
[19] *Id.* at 363-64.

(which had been in husband's family since 1921) but she refused, after which "[husband] slept in the farmhouse's first floor bedroom which has an adjoining bathroom, and [wife] resided on the second floor of the farmhouse… [with] neither spouse regularly ventur[ing] into the other's private living quarters."[20] In the intervening three years, husband and wife "shared the common areas of the [residence and] occasionally ate meals together" and "attended family picnics together, dined together in the presence of [husband's family], played doubles tennis together, and occasionally entertained guests at the farm together."[21] Conversely, they "generally prepared their own meals and did their own grocery shopping... generally [did] not socialize[] together in public… and [kept] their finances… separate," though they did file joint tax returns and share utility expenses.[22] Beginning in 1983, there was a complete cessation of affection and "the parties… stipulated they [had] not had sexual relations" in that time, though they had "a remarkably civil, if not amiable, relationship."[23] On these facts, the Superior Court concluded that the parties had lived separate and apart since 1983, because they had "private living quarters… no longer [had] a public social life together… [had] not engaged in sexual relations" since 1983, and thus ultimately husband had "lived a life separate from that of his wife" in that time.[24] The Court held that the party seeking an

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[20] *Id.* at 364.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 365.

earlier date of separation should not be punished "merely because [the parties] demonstrated a level of civility rarely seen in a divorce action."[25]

In *Schmidt v. Krug*, the Court noted that "the gravamen of the phrase 'separate and apart' [is] the existence of separate lives, not separate roofs... [A] common residence is not a bar to showing that the parties live separate and apart...."[26] In *Schmidt*, wife contended that "husband believed the parties were separated in November 1988," "no affection existed after November of 1988," and "the parties... severed financial ties in January 1988," and therefore the trial court's determination of April 1989, when husband served divorce papers, as the date of separation was erroneous.[27] The Superior Court noted that although wife purchased property in November or December of 1988 solely in her name, husband participated in the selection and negotiation of that property and undertook renovation of it.[28] Additionally, wife "purchased a U.S. Savings Bond in February of 1989 and listed husband as beneficiary," and continued using the parties' joint checking account until March of 1989.[29] The Superior Court affirmed the trial court's determination that "the parties had engaged in activities that they had engaged in during the marriage up until" April of 1989, and thus the conclusion that the date of separation occurred in April 1989 was not erroneous.[30]

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[25] *Id.*
[26] *Schmidt v. Krug*, 624 A.2d 183, 185 (Pa. Super. 1993) (citing *Flynn v. Flynn*, 491 A.2d 156, 159 (Pa. Super. 1985)).
[27] *Id.* at 184.
[28] *Id.* at 185.
[29] *Id.*
[30] *Id.*

In *Frey v. Frey*, the parties were married in 1993, and husband filed for divorce in August 1999, alleging a separation date of March 1, 1999; wife contended that the date of separation was October 2001.[31] The testimony showed that husband and wife had not shared a bed since March 1998, though they occasionally had sexual relations afterwards; husband testified that they shared the marital house because he had nowhere else to go, his business was next to the house, and he did not want to leave his daughter who lived there.[32] The parties generally did not eat together, and husband did not spend his free time at the marital house.[33] After filing for divorce, the parties did go on multiple vacations together, though husband testified that he and wife did not sleep together on the vacations and before each vacation he "specifically informed wife that he was going solely for the benefit of their daughter."[34] After the divorce filing, the parties occasionally hosted guests or attended events with their daughter, though husband insisted he did so solely for the benefit of his daughter.[35] The Superior Court affirmed the trial court's finding that the date of separation was August 6, 1999, as it was "supported by sufficient, credible evidence"; specifically, the Court noted that "isolated attempts at reconciliation do not begin running anew the marital relationship," and the parties "led separate lives, even though the parties generally slept under the same roof, and their activities together were knowingly performed solely for the benefit of their daughter."[36]

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[31] *Frey v. Frey*, 821 A.2d 623, 625-26 (Pa. Super. 2003).
[32] *Id.* at 625.
[33] *Id.*
[34] *Id.* at 625-26.
[35] *Id.* at 626.
[36] *Id.* at 628-29.

Finally, in *McCoy v. McCoy*, wife contended that the date of separation was November 20, 2002, when she filed for divorce; husband contended it was December 31, 1996.[37] The trial court noted that in the intervening six years the parties "appeared… to outsiders… to be a happily married couple, frequently taking their children on vacations" and to public events.[38] The parties filed taxes jointly, there was no evidence of unfaithfulness prior to October 2002, and husband did not wish to dissolve the marriage.[39] Ultimately, the trial court, and Superior Court, determined that "although the marriage had not been a particularly good one," there was no "evidence that would support a finding that an intent to dissolve the marriage had been communicated by one spouse to the other prior to the filing of the divorce complaint by wife."[40]

B. Discussion of Exceptions

The Court's review of the record is largely, though not entirely, consistent with the Master's report. Defendant, of course, takes issue with the Master's central analysis, which is:

> "The central issue in this case is whether [Defendant] is credible in her assertion that the parties separated and that both were aware of the separation in August, 2014 or whether [Plaintiff] is credible in his assertion that the marriage was strained but the actual separation did not occur until he moved out of the marital residence in late May, 2019… [A] finding is made that [Plaintiff] is the credible party and therefore the date of the parties' separation is late May, 2019."

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[37] *McCoy v. McCoy*, 888 A2d 906, 910 (Pa. Super. 2005).
[38] *Id.* at 910-11.
[39] *Id.* at 911.
[40] *Id.* at 912.

To this end, Defendant has raised six exceptions. The Court addresses the allegations of each of Defendant's exceptions in turn before discussing them.

1. Communication of Desire to Live Separately and Divorce

Defendant contests the master's determination that "no intent to dissolve the marital union was communicated from [Defendant] to [Plaintiff] prior to late May, 2019, when [Plaintiff] left the marital residence and established a new residence for himself in the home he had purchased for this mother four years prior."

Defendant notes that Plaintiff testified "that he was never made aware of any separation and in fact didn't believe he was separated until he moved out," but contends that the text messages admitted as Defendant's Exhibit 5 demonstrate that "she had texted him on several occasions stating that the parties had been separated." These text messages contained the following statements on this topic:

- November 27, 2016: Defendant texted Plaintiff "I planned to go to my parents with the girls back when u told me u were going to Michigan over Thanksgiving to handle your mother's home sale. The fact that u changed your plans later and then the night before asked to go to VA is not my fault. Where would u stay if u went? With me? We have lived separately for over 3 years now as u r well aware...."

- May 23, 2017: Defendant texted Plaintiff "After 3 ½ years I am taking my bedroom back. Enough already. I am not living in a guest room in my own house any longer. And this home is not a hotel where u can come and go as you please with no responsibility and even less communication."

- May 25, 2017: Defendant texted Plaintiff "I feel like you are exploiting me. Why?? And to what end? So you can continue to live almost as a single person while taking on little responsibility for the care of home, and of the farm that this home is part of? As you said this has gone on for 15 years probably... Meanwhile I'm left struggling to hold everything together – effectively as a single mom – taking care of house and farm, paying mortgage

and all housing expenses for yourself and your children with no financial help from you whatsoever... Worse yet there is no emotional support from you whatsoever. I'm just supposed to be a doormat (that pays the bills and does all the chores) I guess. All the while you come and go as you please, without even the courtesy of telling me when you are leaving town or anything else. This is not a marriage. And you apparently want to continue this indefinitely... and with me staying in the guest room on top of everything else.... For God's sake, think about [the children] and please let's try to resolve this as amicably as possible so we don't subject them to further harm. We both cannot keep living like this (or at least I can't – the chronic stress is literally killing me). We both know it has been over for far too long. It is time to move on and find some peace again in what is left of life, and hopefully make lives better for our children."

- July 25, 2018: Defendant texted Plaintiff "I am taking back upstairs bedroom. You have had it for 4 years and my turn is long overdue... You can have Janelle's old room and sink etc. We have guests staying in guest room (incl Lydia for a week) and I am not living like a guest in my own house any longer."

Defendant also highlights the post-nuptial agreement. Regarding this agreement, the Master concluded:

"First, the post nuptial agreement does not state that the parties are in fact separated. It could easily have done so given that both parties acknowledge that it was purposely created because they were imminently signing a new gas lease with a new company. The parties signed both the post nuptial agreement and the new gas leases on the same day. Husband did not have the benefit of separate counsel prior to signing the post nuptial agreement. Neither party has suggested that Wife state to Husband that the document was in recognition of the fact that they were already separated.

Based upon this, a finding is made that the post-nuptial agreement does not prove that the parties were separated. To the contrary, the language used in that agreement is 'in the event of... the separation of the parties.' This language supports Husband's argument that the parties were not separated at the time that the post nuptial agreement was executed approximately six months after Wife's suggested separation date."

Defendant faults the Master for noting that the post nuptial agreement contains the line "[i]t is desired by the parties hereto that in the event of (i) the dissolution of their marriage by divorce; (ii) the separation of the parties; or (iii) the death of each party, the rights of the parties shall be set forth as herein" but does not acknowledge that the agreement also states "[t]he parties agree the signing of this agreement is not a reflection of the parties' marital status, and specifically does not in and of itself demonstrate that the parties are acting as a married couple." Defendant contends that this second provision, apparently not considered by the Master in her analysis of the post nuptial agreement, cuts against her finding that the first provision in the agreement supports the contention that the parties were not separated.

2. Legal Interest in Property

Next, Defendant takes issue with the Master's conclusions concerning Plaintiff's purchase of property in January 2015. Defendant notes that the testimony establishes that she was not involved with any aspect of the purchase of the home, which the Master acknowledged; thus, she claims, this situation is akin to *Mackey*, in which the parties mostly kept their finances separate, and distinguishable from *Schmidt*, in which the wife purchased a home solely in her name but the evidence showed both husband and wife substantially participated in the purchase, financing, and care of the home.

Defendant notes that the Master reasoned, essentially, that because Defendant "did not participate in the purchase, financing, or decorating of the home," and "had no interest, legal or otherwise, in the property," the fact that she never used the property is not evidence of separation because it was never *intended* for her use.

That is, Defendant's lack of use of the property was not attributable to a choice by Plaintiff and Defendant to separate themselves from each other's assets, but was attributable to the fact that Plaintiff purchased the home solely for his mother, rendering Defendant's use or lack of use of the home less irrelevant to the status of the parties' marriage. Defendant contends, however, that the mere fact that she did not participate at all in the purchase of the house is *itself* evidence that the parties were separated, and the Master's conclusion that Defendant has "no legal interest" in the house would only be true if the parties were, in fact, separated when Plaintiff purchased it.

3. Wife Communicated Desire to Live Separately and Apart

Defendant first contends that "[t]here was no evidence presented that [Defendant] did not have the independent intent to dissolve the marital unit," and notes that Defendant's sister testified that Defendant told her she and Plaintiff were living separately in the same house as of 2014. Defendant reiterated the text messages discussed above.

Defendant highlights a number of other portions of testimony, during which she stated she "repeatedly discussed divorce with" Plaintiff, "asking him [multiple times] for the sake of the kids" for an amicable divorce.

4. Whether and When Plaintiff and Defendant Ceased Living as Husband and Wife

Defendant contends that the Master's focus on the fact that "nothing changed" in August of 2014 with respect to the character of the parties' marriage, but should have focused on the "cessation of cohabitation" as required by the definition of

"separate and apart." Defendant recounted the testimony of multiple of her witnesses, who all testified to Plaintiff's "cessation of cohabitation and the lack of responsibilities and assumptions of duties" by Plaintiff. Defendant contends that "[t]he Master did not consider [this] witness testimony even though it was crucial to Wife's position that the parties ceased cohabitation, nor did she consider the texts."

5. Master Usurped Role as Fact Finder and Injected her Own Opinion

Next, Defendant contends that "[t]he Master did not cite to the transcript and thus many of her statements were not factually correct and instead were based on her opinion...." Defendant highlighted a number of alleged examples:

- The Master characterized Defendant as claiming the post nuptial agreement proved that both parties considered themselves separate at the time of its filing in 2015, when in reality Defendant testified that the agreement was prepared by her attorney to show Defendant's opinion that she considered herself separate and apart;

- The Master stated that "[b]oth parties testified that the ultimate result of the post-nuptial agreement was that the new gas leases continued to be paid the same way that the old gas leases had been paid," but in reality Defendant "emphatically denied" this and "explained that the payor clause is now paid directly to the individual whereas in [the] 2008 gas lease, the payments for gas leases for both properties were directed to both parties jointly";[41]

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[41] The Court believes that the Master's conclusion Defendant takes issue with here is not inaccurate but merely unclear. Defendant *did* testify that in both 2008 and 2015, the parties did not have a joint bank account, so each deposited a portion of the payment they received for gas leases into their own bank accounts. This is demonstrated by the following exchange:

Q: [Y]ou guys deposited the checks the exact same way in 2015 that you did in 2008?

Defendant: Because in both cases we didn't have... we no longer had a joint personal account. They can only be deposited in one person's account...

...

- The Master concluded that, when Defendant broke her leg, Plaintiff attended a convention in Phoenix, Arizona (taking a 9-day motorcycle trip to attend) because he did not want to take leave from work so the family would have income, even though the record is devoid of testimony or evidence suggesting that was Plaintiff's purpose in going to the convention instead of attending to his injured spouse; and

- The Master "did not review the parties' testimony, texts or testimony from Tracy Barbour," a friend of Defendant who contrasted Plaintiff's care of Defendant during her 2010 hospitalization with his lack of compassion or care for her in 2018.

6. Master Erred in Determining Plaintiff was Credible

Defendant's final exception contends that the Master erred in finding Plaintiff credible. Defendant describes his testimony as "evasive, contradictory from the first day in his denial of knowledge of the date of separation and his complete disregard or explanation for the texts." Defendant highlights what she contends are blatant contradictions in Plaintiff's testimony, and argues that the testimony and evidence presented cannot support a finding of credibility. She avers that Plaintiff "produced no evidence to show that the parties continued to cohabit," and contends that the only justifiable conclusion from the testimony and evidence presented is that Defendant was credible and Husband was not.

The Master: Are you talking about the 2008 checks or the checks under the 2008 gas lease? The checks under the 2015 gas lease? Or both of them?

Defendant: ... I think by 2008 we no longer had the joint personal account. So, yeah, like I said, it was just like with the tax refunds, that's just how we did it. We deposited it into one person's account and then write a check to the other person because we didn't have a joint account.

C. Discussion

As noted above, the Court's review of the Master's decision is de novo, though her report is to be construed as advisory and "given fullest consideration, particularly on the issue of credibility of witnesses."[42]

Before addressing Defendant's first five exceptions to the Master's report, the Court will address the sixth, regarding credibility. "[I]t is the master who ha[s] the opportunity to observe the witnesses and the parties," and therefore her credibility determination must be given great weight. Here, the Court sees no reason to disturb the Master's credibility determination. Although Defendant highlights multiple alleged inconsistencies in Plaintiff's testimony, the Court does not believe these are irreconcilable statements but rather reflect the realities of testifying to events that occurred five or more years before the hearing and parsing attorneys' questions over multiple days of testimony. For instance, Defendant highlights that in February, Plaintiff testified he did not remember whether he had told Defendant "if she wanted a divorce she should file for a divorce"; in April he admitted he said "if you want a divorce, get the paperwork"; and in August he responded to a question about whether he and his wife ever discussed divorce by stating "no, not verbally." Setting aside the possibility that Plaintiff did not consider the statement "if you want a divorce, get the paperwork" to constitute a "discussion" of divorce (which would render the April and August statements consistent), the Court does not find that these

[42] *Herwig*, 420 A.2d at 748.

or other alleged inconsistencies in Plaintiff's testimony are of such a significant character as to justify the Court in upsetting the Master's credibility determination.

To determine the date of separation – that is, the date the parties began living "separate and apart" – the Court must determine the date of cessation of cohabitation, as well as whether and when "an independent intent on the part of one of the parties to dissolve the marital union... clearly manifested and [was] communicated to the other spouse."

Defendant urges the Court to find, contrary to the Master, that the date of separation was August 16, 2014, the date of the tractor incident. Defendant contends that on this date, she and Plaintiff permanently ceased sharing a bedroom, which constituted "cessation of cohabitation"; she further contends that the parties' statements and behavior following this date demonstrate that they both knew they were separated.

As the Superior Court has explained, "cohabitation" is "the mutual assumption of those rights and duties attendant to the relationship of husband and wife." The inherent difficulty in Defendant's position that the August 16, 2014 incident marked the "cessation of cohabitation" between the parties arises from the fact that many or most of the "rights and duties" typically "attendant to the relationship of husband and wife" had been absent from the parties' relationship many years *prior* to that date. The Court finds that the Master's conclusion that "although the parties began to sleep in different rooms, they did not change the other aspects of their marriage" is supported by the testimony and evidence. Many of the changes in the character of a marriage that typically denote an intent to separate – such as keeping finances

separate, the cessation of sexual relations, and taking separate trips or vacations – occurred years prior to the August 2014 incident, at a time when neither party has suggested there was any intent to separate.

Defendant, then, is left to argue that the decision to begin sleeping in different rooms was essentially the final straw that altered the relationship from "cohabiting" to "non-cohabiting." To reach this conclusion, the Court would need to ascribe great symbolic significance to this decision to stop sharing a bedroom; otherwise, there is no reason the Court should not conclude that cohabitation ceased well *before* August 2014, which neither party argues. In light of the many aspects of the marriage which did not change, the Court declines to ascribe such weight to the decision to sleep apart. It is of no moment that Defendant may claim she made this decision with the intent to end the marriage if that intent was not communicated to Plaintiff.

Thus, the dispositive question becomes when the "independent intent on the part of one of the parties to dissolve the marital union [was] clearly manifested and communicated to the other spouse." Given that Defendant contends this occurred before Plaintiff says it did, it is Defendant's burden to produce evidence of the date one of the parties communicated a clearly manifested intent to dissolve the union.

Defendant has not demonstrated that this occurred in August of 2014. Although the Court agrees with Defendant that the language of the post nuptial agreement means it *may not* be used as evidence that the parties *are* acting as a married couple, there is no support for Defendant's argument that this language means it *must* be construed as evidence that the parties *were not* acting as a married couple. Similarly, the statements made by both parties in 2014 and 2015 do not

constitute a communication of a clearly manifested intent to separate. Similarly, the Court does not believe that Plaintiff's purchase of a house for a clearly identifiable purpose unrelated to the marriage – to move his mother closer to him – alters this analysis, especially in light of the separation of finances predating 2014.

The Court finds, however, that Defendant has proven an earlier date of separation than that argued by Plaintiff and found by the Master. Defendant admitted, without objection, Exhibit 5, consisting of a number of text messages sent from Defendant to Plaintiff. A text message sent from Defendant to Plaintiff on May 25, 2017 recounted Defendant's feelings of lack of support or care from Plaintiff, and then stated, in relevant part:

> "This is not a marriage. And you apparently want to continue this indefinitely... and with me staying in the guest room on top of everything else... We both cannot keep living like this... We both know it has been over for far too long. It is time to move on and find some peace again in what is left of life...."

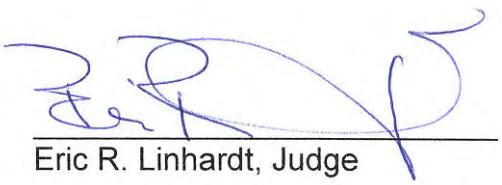
There is no possible way to read this text message as constituting anything other than a "clear communication" of a "clearly manifested", "independent intent on the part of [Defendant] to dissolve the marital union." Prior to this point, the parties were still cohabiting; even though they did not engage in many of the "rights and duties attendant to the relationship of husband and wife," there was still a "mutual assumption" of those rights and duties they did engage in. By clearly communicating her intent to dissolve the marital union, Plaintiff and Defendant no longer "mutual[ly] assum[ed]" those rights and duties, as Defendant had made clear to Plaintiff she was removing herself from the marriage.

ORDER

For the foregoing reasons, the Court GRANTS IN PART Defendant's Exceptions to the September 29, 2021 Master's Report. The Court finds that Defendant has established the date of separation is May 25, 2017.

IT IS SO ORDERED this 29th day of June 2022.

By the Court,



Eric R. Linhardt, Judge

ERL/jcr
cc: Christina Dinges, Esq.
Janice Yaw, Esq.
Gary Weber, Esq. (Lycoming Reporter)