

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

TERESA K. RISSMILLER

Appellant

v.

BARRY W. RISSMILLER

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 124 MDA 2012

Appeal from the Order Entered December 15, 2011  
In the Court of Common Pleas of Lancaster County  
Civil Division at No(s): CI-04-04314

BEFORE: SHOGAN, J., LAZARUS, J., and OTT, J.

MEMORANDUM BY OTT, J.

Filed: February 26, 2013

Teresa K. Rissmiller ("Wife") appeals from the order entered on December 15, 2011 in which the trial court directed the facts to be used in preparation of the Qualified Domestic Relations Order ("QDRO") regarding Barry W. Rissmiller's ("Husband") Civil Service Retirement System pension. On appeal Wife alleges the trial court erred by: 1) failing to require a partial spousal survivor annuity distribution to her; and 2) failing to schedule a hearing or admit expert testimony as to option for pre- and post-retirement surviving spouse benefits. After review of the original record, submissions of the parties, and the applicable law, we find the issues waived and accordingly, we affirm.

The trial court aptly summarized the factual and procedural history as follows:

The parties were married on August 5, 1972. Pursuant to §3301(c) and/or (d) of the Pennsylvania Divorce Code, Wife filed for divorce on May 17, 2004. The parties entered into a Postnuptial Agreement on September 13, 2007. Wife filed claims for equitable distribution, alimony, fees and costs but withdrew those claims in October of 2007. The order appointing a Divorce Master was also vacated at that time. A divorce decree was entered on November 21, 2007.

On June 15, 2011, Wife filed a Petition to Comply with the Postnuptial Agreement due to Husband's failure to execute the QDRO that had been prepared by Jonathan Cramer of Conrad Siegel Actuaries. In her prayer for relief, Wife requested that the Trial Court: (A) Schedule a Hearing; (B) After a hearing, enter an Order directing Husband to sign the Stipulated [QDRO] attached to wife's Petition; and (C) Directing Husband to pay half of the costs associated with the preparation of the QDRO. Wife's Petition was presented in Family Business Court where counsel for both parties had an opportunity to outline their respective positions; the principal issue for determination was whether language in the Postnuptial Agreement precluded Wife from making any claim to "survivor benefits" under Husband's Pension. At the conclusion of their respective presentations, the Trial Court entered a 20 Day Rule upon Husband to respond in writing, and gave both parties 30 days to submit Briefs on the matter.

On June 30, 2011, Husband filed an Answer to Wife's Petition, and, in his prayer for relief, Husband requested that the Trial Court: "dismiss the Petition filed herein and declare that the [QDRO] be prepared without survivor benefits and limited to one-half (1/2) of the marital component of [Husband's] Civil Service Retirement System Pension as the Postnuptial Agreement provides, and award [Husband] reasonable counsel fees and costs." Thereafter, both parties submitted Briefs in support of their respective positions.

In Husband's response to Wife's Petition, Husband maintains the QDRO was drafted by Mr. Cramer in December 2010 that granted Wife ½ of the marital component of Husband's CSRS Pension Plan. A new QDRO was drafted in January 2010 that included Wife receiving a portion of the survivor spouse benefits. Husband did not agree to this element as it would deny his current wife benefits as well as the Postnuptial Agreement signed by the parties did not provide for

survivor benefits. Wife maintains in her Petition that should Husband precede Wife in death, all of Wife's benefits would cease. It is Wife's contention that termination of benefits at death was not contemplated at the time the Postnuptial Agreement was signed. In addition Wife claimed she was willing to pay for her share of the survivor benefits.

After considering the various briefs submitted by both parties and careful review of the Postnuptial Agreement, the Trial Court concluded that there were no material facts in dispute which necessitated a Hearing, and that the language of the Postnuptial Agreement was clear and unambiguous with regard to the matter in dispute. Paragraphs 5 and 9 of the Postnuptial Agreement reads [sic] as follows:

5. PENSION/RETIREMENT PLANS. Except as set forth herein, each party hereby waives any and all right to claim any interest or share, including death benefits, in the other party's Pension Plan, Retirement Plan, 401 (k) Plan, Profit-Sharing Plan, and the like.

9. HUSBAND'S CIVIL SERVICE RETIREMENT PENSION. The parties hereto acknowledge that WIFE will receive one-half (1/2) of the marital component of HUSBAND'S Civil Service Retirement Pension. Counsel for WIFE shall retain Conrad Siegel and Associates for purposes of preparing the Order necessary to effectuate disposition of the CSRS pension as set forth herein. The parties agree to split the cost for preparation of this Order, payable directly to Conrad Siegel.

Accordingly, on July 20, 2011, the Trial Court entered an Order dismissing Wife's Petition, ordering that a QDRO be drafted in accordance with the Postnuptial Agreement granting Wife one half (1/2) of the marital component of Husband's Civil Service Retirement Pension, without a former spouse survivor annuity and denying Husband's request for attorney's fees and costs. From the Trial Court's perspective, the issue of interpretation regarding the meaning and import of the Postnuptial Agreement, as it pertained to the QDRO, was settled and a final order had been issued. Neither party appealed this decision.

Approximately three (3) months later on October 18, 2011, Husband filed his own Petition for entry of a QDRO. In this new Petition, Husband explained that Wife's counsel was now attempting to revise the QDRO in another manner. Specifically, he alleged that Wife's counsel had sent a revised QDRO with the *Cornbleth* offset calculation removed which amounted to an attempt to award her client a portion of Husband's Pension which was not part of the marital estate. On November 14, 2011 in response to a Rule to Show Cause, Wife filed a Reply to Husband's Petition, requesting a hearing so that the author of the revised QDRO could "testify regarding the complexities of [Husband's] Pension." After careful consideration of Husband's petition, Wife's Reply and review of *Cornbleth v Cornbleth*, 397 Pa. Super. 421, 580 A.2d 369 (1990), the Trial Court concluded, again, that were [sic] no material facts in dispute which necessitated a Hearing, and that the *Cornbleth* decision was controlling. Accordingly on December 15, 2011, the Trial Court denied Wife's request for a hearing and signed the QDRO as offered by Husband. On January 12, 2012, Wife filed a timely appeal to the December 15, 2011 Order (not the Trial Court's order dated July 20, 2011) to the Superior Court of Pennsylvania.

Trial Court Opinion, 3/5/2012 at 2-5 (footnote omitted).

In her first issue, Wife argues the court committed an abuse of discretion by failing to award her survivor spouse benefits in Husband's CSRS pension as contemplated in the Postnuptial Agreement. See Wife's Brief at 4.

The determination of marital property rights through prenuptial, postnuptial and settlement agreements has long been permitted, and even encouraged." *Sabad*, 825 A.2d at 686 (quoting *Laudig v. Laudig*, 425 Pa. Super. 228, 624 A.2d 651, 653 (1993)). Both prenuptial and post-nuptial agreements are contracts and are governed by contract law. *Laudig, supra*. Moreover, a court's order upholding the agreement in divorce proceedings is subject to an abuse of discretion or error of law standard of review. See *Busch v. Busch*, 732 A.2d 1274, 1276 (Pa. Super. 1999), *appeal denied*, 563 Pa. 681, 760 A.2d 850 (Pa. 2000) (citing *Laudig, supra*). An abuse of discretion is not lightly found, as it requires

clear and convincing evidence that the trial court misapplied the law or failed to follow proper legal procedures. *Paulone v. Paulone*, 437 Pa.Super. 130, 649 A.2d 691 (1994). We will not usurp the trial court's factfinding function. *Laudig, supra*.

***Holz v. Holz***, 850 A.2d 751, 757 (Pa. Super. 2004).

In June 2011 Wife requested the trial court direct Husband to sign the QDRO she had prepared which contained language giving her rights to survivor's benefits. Husband refused to execute the QDRO contending the Postnuptial Agreement did not give Wife a right to claim survivor benefits. The trial court considered whether the Postnuptial Agreement's division of the "marital component" of the pension included Wife's right to benefits if Husband predeceased her. The court's July 20, 2011 opinion specifically held, "In accordance with the terms of the Postnuptial Agreement, the Court directs that a [QDRO] be prepared by Conrad Siegal Actuaries, providing that [Wife] receive one-half (1/2) of the marital component of [Husband's] Civil Service Retirement Pension only, without a former spouse survivor annuity." Trial Court Order 7/20/2011 at 1. An order is final if it "disposes of all claims and of all parties." Pa.R.A.P. 341(b)(1). A final order is one that ends the litigation. ***See Pennsylvania Department of Transportation v. B.L.R.W.***, 829 A.2d 716 (Pa. Super. 2003). Wife does not argue the July 20, 2011 order was not a final order. Furthermore, Wife never filed an appeal.

On appeal, Wife now raises the issue of her right to the survivor benefits, however because the issue has been final since August 22, 2011<sup>1</sup> it is waived and without merit.

In her second issue, Wife alleges the court erred or abused its discretion by failing to schedule a hearing or admit expert testimony “as to the various options available with regard to the pre-retirement and post-retirement surviving spouse benefits which accrued during the parties’ marriage and which were a part of the marital benefit distributed to [Wife] as part of the equitable distribution agreement.” Wife’s Brief at 4.

“The controlling factor in determining whether a petition may be dismissed without a hearing is the status of the substantive assertions in the petition.” *Commonwealth v. Payne*, 794 A.2d 902, 906 (Pa. Super. 2002) (citation omitted). As the court correctly stated, “the issue of interpretation regarding the meaning and import of the Postnuptial Agreement, as it pertained to the QDRO, was settled and a final order had been issued. Neither party appealed this decision, and, therefore, any attempt, by either party, to revisit the Trial Court’s Order of July 20, 2011 should be deemed waived.” Trial Court Opinion, 3/5/2012 at 5-6. We agree with the trial court that the issue is waived, and this claim is without merit.

Order affirmed.

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<sup>1</sup> The day after the 30-day appeal period ran.