

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

GERALD W. VOGL,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
SUSAN C. VOGL,	:	
	:	
Appellant	:	No. 1467 WDA 2011

Appeal from the Order entered on August 22, 2011
in the Court of Common Pleas of Allegheny County,
Civil Division, No. FD-05-009140-004

GERALD W. VOGL,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
SUSAN C. VOGL,	:	
	:	
Appellee	:	No. 1573 WDA 2011

Appeal from the Order entered on August 22, 2011
in the Court of Common Pleas of Allegheny County,
Civil Division, No. FD-05-009140-004

BEFORE: MUSMANNO, BOWES and WECHT, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: March 18, 2013

Gerald W. Vogl ("Husband") appeals from the Order of equitable distribution of August 22, 2011. Susan C. Vogl ("Wife") has filed a cross-appeal. We affirm.

The pertinent facts and procedural history of this case were set forth by the trial court in its Opinion of December 2, 2011, which we adopt for the purpose of this appeal. **See** Trial Court Opinion, 12/2/11, at 1-6.

In this timely appeal, Husband raises seven issues, as set forth in his appellate brief. **See** Brief for Appellant/Cross-Appellee at 3. Wife, in her cross-appeal, raises eleven issues, and ten sub-issues. **See** Brief for Appellee/Cross-Appellant at 5-7.

Before addressing the issues, we set forth the applicable standards of review. Our standard of review of an award of equitable distribution is as follows:

A trial court has broad discretion when fashioning an award of equitable distribution. Our standard of review when assessing the propriety of an order effectuating the equitable distribution of marital property is "whether the trial court abused its discretion by a misapplication of the law or failure to follow proper legal procedure." We do not lightly find an abuse of discretion, which requires a showing of clear and convincing evidence. This Court will not find an "abuse of discretion" unless the law has been "overridden or misapplied or the judgment exercised" was "manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence in the certified record." In determining the propriety of an equitable distribution award, courts must consider the distribution scheme as a whole. "[W]e measure the circumstances of the case against the objective of effectuating economic justice between the parties and achieving a just determination of their property rights."

Biese v. Biese, 979 A.2d 892, 895 (Pa. Super. 2009) (citations omitted).

"The Divorce Code does not specify a particular method of valuing assets." Thus, "[t]he trial court must exercise discretion and rely on the estimates, inventories, records of purchase prices, and appraisals submitted by both parties."

When “determining the value of marital property, the court is free to accept all, part or none of the evidence as to the true and correct value of the property....”

Id. at 897.

There is no simple formula by which to divide marital property; the method of distribution derives from the facts of the individual case. In making an equitable distribution of property, the court must consider all relevant factors. **See** 23 Pa.C.S.A. § 3502. “The courts attempt to split property equitably, instead of equally, taking into consideration such factors as length of marriage, the contributions of both spouses, ages and health of each spouse.” When reviewing an equitable distribution award, this court must consider the distribution scheme as a whole.

Taper v. Taper, 939 A.2d 969, 974 (Pa. Super. 2007) (citations omitted).

In an equitable distribution case, the master’s report and recommendation are to be given the fullest consideration and we will not reverse the master’s credibility determinations on appeal. ***Busse v. Busse***, 921 A.2d 1248, 1256 (Pa. Super. 2007).

Our standard of review of an award of alimony is as follows:

Our standard of review regarding questions pertaining to the award of alimony is whether the trial court abused its discretion. We previously have explained that “[t]he purpose of alimony is not to reward one party and to punish the other, but rather to ensure that the reasonable needs of the person who is unable to support himself or herself through appropriate employment, are met.” Alimony “is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor’s ability to pay.” Moreover, “[a]limony following a divorce is a *secondary remedy* and is available only where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution award and development of an appropriate employable skill.”

In determining whether alimony is necessary, and in determining the nature, amount, duration and manner of payment of alimony, the court must consider numerous factors including the parties' earnings and earning capacities, income sources, mental and physical conditions, contributions to the earning power of the other, educations, standard of living during the marriage, the contribution of a spouse as homemaker and the duration of the marriage.

Teodorski v. Teodorski, 857 A.2d 194, 200 (Pa. Super. 2004) (citations omitted, emphasis in original).

Our standard of review of an award of counsel fees is as follows:

We will reverse a determination of counsel fees and costs only for an abuse of discretion. The purpose of an award of counsel fees is to promote fair administration of justice by enabling the dependent spouse to maintain or defend the divorce action without being placed at a financial disadvantage; the parties must be "on par" with one another.

* * *

Counsel fees are awarded based on the facts of each case after a review of all the relevant factors. These factors include the payor's ability to pay, the requesting party's financial resources, the value of the services rendered, and the property received in equitable distribution. "Counsel fees are awarded only upon a showing of need." Further, "in determining whether the court has abused its discretion, we do not usurp the court's duty as fact finder."

Id. at 201-02 (citations omitted).

The parties in this case have extensively argued each issue.¹ We emphasize that we have thoroughly considered each issue and sub-issue in light of the parties' arguments and the record before us. After review, we

¹ We note that Husband's main brief is 52 pages in length; Wife's is 44 pages in length. Husband also filed a second brief.

have discerned no reversible error in the trial court's decision. We note that many of the issues raised by the parties turn on the credibility determinations of the Master. Based on our review, we conclude that the equitable distribution scheme is supported by the evidence, and fairly allocates the parties' marital assets.

In support of our decision, we rely on and adopt the trial court's well-reasoned Opinion and the Master's Report, as appropriate.

Husband's Issues on appeal:²

1. Whether the trial court erred in declining to deduct \$5,000 in hand money by Husband for the purchase of a marital asset and \$66,917 in normal pre-separation living expenses used by Husband from the advance attributed to Husband from the marital Schwab account?

See Brief of Appellant at 10. The trial court did not abuse its discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 8-9, 11.

2. Whether the trial court committed an error of law in awarding a 55%/45% equitable distribution in favor of Wife, whereas application of the statutory equitable distribution factors to the facts of the instant case, as found of record, demands a 50%/50% distribution, and where the trial court abused its discretion in finding that Husband's earning capacity is \$300,000, where the record below lacks support for such a conclusion?

See Brief of Appellant at 25. The trial court did not commit an error of law or abuse its discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 6-7, 7-8; **see also** Master's Report, 12/20/10, at 5-6, 14-16.

² **See** Brief for Appellant at 3.

3. Whether the trial court committed an error of law in concluding that an award of alimony was warranted where the statutory factors do not support an award in the amount and subject to the terms of the [Master's] Recommendation, and the trial court abused its discretion in finding that Husband's earning capacity is \$300,000, absent support in the record below for such a conclusion?

See Brief for Appellant at 45. The trial court did not commit an error of law or abuse of discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 7, 12-13; **see also** Master's Report, 12/20/10, at 16-18.

4. Whether the trial court committed an error of law and abused its discretion in confirming the parties' 2010-2011 educational expenses as a marital debt, but not awarding payment of the past expenses (\$54,510) from the marital estate or subtracting it from Husband's marital asset total?

See Brief for Appellant at 21. The trial court did not commit an error of law or an abuse of discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 12; **see also** Master's Report, 12/20/10, at 7-9.

5. Whether the trial court abused its discretion in only awarding to Husband those of his family's sentimental items which Wife acknowledged after being confronted with an actual photograph, even though the ... Overdale Drive home is stacked with containers of hoarded items that Wife would neither allow inspection of, nor inspected herself, to locate all of Husband's family's sentimental items?

See Brief for Appellant at 20. The trial court did not abuse its discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 14-15.

6. Whether the trial court abused its discretion by granting counsel fees for numerous reasons, including but not limited to Wife's prior advances against equitable distribution, Wife's substantial savings and APL during separation, Wife's previous counsel fee awards, and the duplicative and wasteful work performed by Wife's four attorneys?

See Brief for Appellant at 48. The trial court did not abuse its discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 13-14; **see also** Master's Report, 12/20/11, at 18.

7. Whether the trial court abused its discretion in assigning the \$54,195 home equity loan balance to Husband as an advance distribution?

See Brief for Appellant at 17. The trial court did not abuse its discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 10-11.

We now examine Wife's claims in her cross-appeal.

Wife's Issues on appeal:³

1. The trial court erred in concluding that "\$6,003,495 was used either for marital expenses or college expenses and not an advance to either party."

a. The trial court erred in failing to conclude that Crown Castle International stock options and restricted stock awards, which were liquidated post-separation at a stipulated net marital asset value of \$3,078,260.00 should be that starting point to determine the amount of the "advance" taken by Husband.

b. The trial court erred in concluding that Husband received only \$793,510 as an "earlier advance from his Charles Schwab account." Pursuant to the evidence of record, ... Husband diverted, for his sole purposes, a sum of money totaling no less than \$1,845,005 from the marital estate.

i. The trial court erred in failing to find that Husband's Exhibits 19A and 19B were in admissible evidence of withdrawals/deposits, as they were neither disclosed prior to trial, nor included in Husband's Pre-Trial Statement and they were based upon inaccurate data, relying upon assumptions which are inconsistent with the Pennsylvania Divorce Code.

³ **See** Brief of Appellee/Cross-Appellant at 5-7.

See Brief for Appellee/Cross-Appellant at 13-14. The trial court did not err or abuse its discretion with regard to these issues. **See** Trial Court Opinion, 12/2/11, at 8-9 & n.5; Master's Report, 12/20/10, at 9.

ii. The trial court erred in granting Husband a credit in the amount of \$50,000 for his 2004 (pre-separation) purchase of a Mercedes 2003 SL 500 against the \$843,510 ... in advances determined by the Master.

See Brief for Appellee/Cross-Appellant at 17. The trial court did not err or abuse its discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 11.

iii. The Master found and the trial court affirmed that withdrawals from the Schwab Account after separation before the injunction Order of May 29, 2009, for college expenses would be a marital obligation, but this is contrary to law and the evidence.

See Brief for Appellee/Cross-Appellant at 17. The trial court did not abuse its discretion in affirming the Master with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 8-9; Master's Report, 12/20/10, at 9.

iv. The trial court failed to correct the Master's failure to charge Husband as an advance for margin account loan increases which occurred solely due to his cash withdrawals from the Schwab account ... and the PNC Investment account ... after the date of separation and through the date of the payoff of both margin loans. The sum of money withdrawn by Husband during this period is \$468,886.

See Brief for Appellee/Cross-Appellant at 18. The trial court affirmed the master as to advances from the marital estate, and did not abuse its discretion with regard to this issue. **See** Trial Court Opinion, at 9-10.

2. The trial court's Order affirming the Master is contrary to the law and the evidence to the extent that pre-judgment interest was not attributed to those sums of money which were diverted by Husband post-separation from the marital estate.

See Brief for Appellee/Cross-Appellant at 20. The trial court did not err or abuse its discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 9-10.

3. a. The trial court's order affirming the Master was contrary to the law and the evidence as it was erroneously concluded that \$24,625 unilaterally withdrawn by Husband from the Schwab Account for the purchase of a vehicle for the parties' daughter, Danielle, post-separation was accounted for in the \$743,510 "advance" assigned to Husband.

b. The same argument is set forth with regard to \$22,995 used for a vehicle for the parties' daughter, Allison.

See Brief for Appellee/Cross-Appellant at 22. The trial court did not abuse its discretion with regard to these issues. **See** Trial Court Opinion, 12/2/11, at 11; **see also** Master's Report, 12/20/10, at 11-12.

4. The trial court erroneously concluded that Wife received an advance of \$1,539 from the Schwab account, said conclusion being against the weight of the evidence.

See Brief for Appellee/Cross-Appellant at 23. The trial court did not abuse its discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 9-10.

5. The 55/45 percentage distribution recommended by the Master and affirmed by the trial court is contrary to the law and the evidence, given the disparate economic status of the parties. Wife's request for a 60/40 asset distribution is consistent with attainment of "economic justice" pursuant to

the equitable distribution factors stated in the Pennsylvania Divorce Code, as amended.

See Brief for Appellee/Cross-Appellant at 23. The trial court did not abuse its discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 7-8; **see also** Master's Report, 12/20/10, at 14.

6. The trial court's failure to find that Wife's reasonable expenses, necessary to meet her basic needs, are \$10,589 per month.... Wife specifically asserts that the downward adjustments made by the Master to Wife's budget are contrary to the law and the evidence.

See Brief for Appellee/Cross-Appellant at 25. Contrary to Wife's argument, the Master made an allowance for taxes. **See** Master's Report, 12/20/10, at 17-18. The trial court did not abuse its discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 12-13.

7. The trial court's conclusion that Wife receive partial reimbursement for her counsel fees in the amount of \$40,000 is contrary to the law and the evidence....

See Brief for Appellee/Cross-Appellant at 28. The trial court did not abuse its discretion with regard to this issue. **See** Trial Court Opinion, 12/2/11, at 13-14; **see also** Master's Report, 12/20/10, at 18.

8. The Master's recommendation, affirmed by the trial court, that pursuant to the May 29, 2009 Consent Order of the Court, the 2009-2010 college tuition expenses for the parties' daughters were to be paid from the PNC Investment Account, without further allocation between the parties at equitable distribution, is contrary to the law and the evidence.

See Brief for Appellee/Cross-Appellant at 31. The Master determined that the daughters' 2009-2010 college expenses would be paid from the parties'

joint PNC investment account pursuant to the May 29, 2009 consent Order of court. **See** Master's Report, 12/20/10, at 8. The trial court affirmed the Master with regard to the distribution scheme as a whole. **See** Trial Court Opinion, 12/2/11, at 10. We discern no abuse of discretion by the trial court or the Master in determining that the daughters' 2009-2010 college expenses were governed by the May 29, 2009 consent Order.

9. The Master's recommendation, affirmed by the trial court, that Wife be charged \$62,500 as a result of funds received by her from the parties' joint PNC checking account is contrary to the law and the evidence.

See Brief for Appellee/Cross-Appellant at 32. With regard to advances assigned by the Master to the parties, the trial court indicated that it had "reviewed the master's report and the record, ... and in the light of the overall distribution scheme, can find no error in the master's recommendations" Trial Court Opinion, 12/2/11, at 10. **See also** Master's Report, 12/20/10, at 10. We conclude that the trial court did not abuse its discretion in this regard.

10. a. The trial court's decision to enter the Elysian Street property on the asset distribution schedule at a net equity of \$178,062 without simultaneously providing a credit to Wife for Husband's post separation dissipation of this asset is contrary to the law and the evidence.

b. The trial court's failure to affirm that the Elysian Street property should be distributed to Husband as recommended by the Master is contrary to the law and the evidence.

See Brief for Appellee/Cross-Appellant at 34. The trial court did not abuse its discretion with regard to these issues. **See** Trial Court Opinion, 12/2/11, at 11-12.

11. As to distribution of household goods, the Master's recommendation and the trial court's affirmation of same is contrary to the law and the evidence by not awarding Wife the dining room set and buffet, the same being an integral part of the family home vacated by Husband.

See Brief for Appellee/Cross-Appellant at 35. The trial court did not abuse its discretion in regard to this issue. **See** Trial Court Opinion, 12/2/11, at 14-15. **See also** Master's Report, 12/20/10, at 12, 19.

Order affirmed.

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

GERALD W. VOGL,

No. FD 05-09140-004

Plaintiff,

v.

SUSAN C. VOGL,

Defendant.

REPORT AND RECOMMENDATION OF
THE SPECIAL MASTER

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ALLEGHENY COUNTY PA
COURT OF COMMON PLEAS

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**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION**

GERALD W. VOGL,

Plaintiff,

v.

SUSAN C. VOGL,

Defendant.

No. FD 05-09140-004

REPORT AND RECOMMENDATION OF THE SPECIAL MASTER

A. INTRODUCTION

The master was appointed by order of the Honorable Kathryn Hens Greco, dated August 16, 2010, to resolve all pending claims of the parties. The claims consisted of equitable distribution of marital property, wife's claim for alimony, and wife's claim for counsel fees and expenses. In addition, determination of a final APL order was deferred to equitable distribution, there being an interim order in effect, and the issue of the parties' responsibility for post-high school educational programs for their children was deferred to equitable distribution. Seven days of trial were held on November 15, 16,17, 18, 29, 30 and December 1, 2010.

The following witnesses testified:

Wendy Colbert, husband's sister;
William Westland, CPA;
Dennis Loughran, CPA
Husband;
Celia Evans;
Pamela Kende, husband's sister;
Robert Wettstein, MD;

Wife;
Hilary Spatz, Esq.; and,
Lisa Turbeville, CFP.

Husband offered the following exhibits which were admitted:

1. Husband's listing of sentimental personalty
2. March 11, 2010 order of court
3. 1995 photograph of husband's family gathering
4. Truncated version of Exhibit 6
5. William Westland's curriculum vitae
6. William Westland's evaluation of husband's non-qualified stock grants and restricted stock awards
7. William Westland's August 30, 2010 report of disbursements from marital account
8. William Westland's analysis of receipts and disbursements for 219 Elysian Street
- 9 A. William Westland's October 27, 2010 calculation of husband's net income for 2009 and 2010
- 9 B. William Westland's August 27, 2010 calculation of husband's net income for 2009 and 2010
10. Husband's curriculum vitae
11. August 3, 2010 motion for payment of educational expenses
12. May 29, 2009 consent order
13. May 11, 2010 motion for payment of educational expenses
14. Petition for special relief – equitable distribution and March 23, 2010 order of court
15. Schedule of school expenses for summer school and fall 2010
16. March 19, 1996 deed for 324 Overdale Drive from husband's mother's estate to husband and wife
17. Recapitulation of husband's income 2003 – 2010
18. Husband's September 30, 2010 pay stub
- 19 A. Husband's one-page summary of Exhibit 7
- 19 B. Summary of Exhibit 7 with some transactions moved to different columns
20. PNC checking account #4938 statements October 14, 2005 – April 13, 2010
21. PNC HELOC #3867 against Overdale house
22. PNC HELOC #3867 usage after September 28, 2006
23. Packet of information regarding North Carolina property
24. Settlement statement for North Carolina property
- 25 A. March 5, 2010 fax from Attorney Levine re Backbone property
- 25 B. October 28, 2005 settlement statement for Backbone property
26. First mortgage on Backbone property
27. Second mortgage on Backbone property
28. April 1, 2004 – April 30, 2010 Charles Schwab account statements
29. Husband's infusions into joint PNC checking account
30. Summary of money transferred from joint PNC HELOC to joint PNC checking

account

- 31. All checks from joint PNC checking account
- 31 A. Wife's check #2304 to Attorney Wymard
- 31 B. Wife's check #2519 to Attorney D'Emilio
- 32. Husband's motion to sell Backbone property and Elysian Street property
- 33. Richard Wagner's May 6, 2010 appraisal of personalty in marital residence
- 34. Celia Evans' vocational assessment of wife
- 35. Husband's budget
- 36. Husband's January 29, 2007 settlement and release agreement with CCI
- 37. Wife's PNC account statements for 2006, 2007 and 2008
- 38. Joint PNC account #4938 statements November 11, 2005 – July 13, 2009
- 39. 2010 Allegheny County tax assessment for 219 Elysian Street
- 40. 2010 City/School delinquent tax statement for 219 Elysian Street
- 41. October 1, 2009 West Penn Multilist for 219 Elysian Street
- 42. Table of Contents for husband's notebook of documents

Wife offered the following exhibits which were admitted:

- A. Husband's Charles Schwab account #6987 statement October 1, 2005 - October 31, 2005
- B. October 31, 2005 statement for joint PNC account #8775
- C. Dennis Loughran's November 1, 2010 report, curriculum vitae and invoices
- D. David Miller's rental income analysis for 219 Elysian Street
- E. Motion for reconsideration and March 31, 2010 order
- F. August 2, 2005 good faith estimate of Backbone's closing costs
- G. Husband's August 25, 2008 Social Security earnings statement
- H. 1. TriStar Corporation business history
- H. 2. Three TriStar biographies
- I. Husband's certificate of ownership of 400,000 shares of TriStar stock
- J. Husband's 2008 income tax return
- K. Husband's October 7, 2005 Sun Trust checking account statement
- L. Husband's November 7, 2005 Sun Trust checking account statement
- M. May 26, 2010 PNC email to Attorney Spatz
- N. CCI stock prices December 1, 2006 – May 31, 2007
- O. Wife's alleged release and waiver of spousal interest in Backbone property.
- P. Dr. Wettstein's May 25, 2010 report, curriculum vitae and invoice
- Q. Husband's April 1, 1988 certification
- R. Wife's updated counsel fee exhibit
- R. 1. Wife's November 29, 2010 counsel fee bill
- R. 2. History of wife's counsel fee payments
- S. Attorney Spatz' May 17, 2010 letter to Attorney Norton
- U. Excerpt from husband's September 2, 2009 deposition
- V. Five checks from wife to Mr. Russo
- W. Eight checks from wife to children's tutor

- X. Lisa Turbeville's budget for wife, curriculum vitae, invoice and various schedules
- Z. Miscellaneous documents relating to page 13 of Exhibit X

The parties offered two joint exhibits:

Joint Exhibit 1: November 15, 2010 letter from William Westland and Dennis Loughran to Attorneys Pollock and Levine

Joint Exhibit 2: Stipulations for trial November 15, 2010

B. HISTORY

The parties were married on June 23, 1985. By prior court order, the date of separation has been determined to be November 1, 2005. They are not yet divorced. They are the parents of two adult daughters, ages 20 and 22.

At the time of trial, the wife was 59 years of age . She is a college graduate and has a valid RN license although she has not worked since 1986. Husband's vocational expert, Celia Evans, opined that wife has a mean part-time earning capacity of \$9,435 per year (Exhibit 34). Ms. Evans noted that wife considers her health problem, which wife alleges are both physical and psychological, render her unable to work in any capacity (Exhibit 34, page 4). However, Ms. Evans stated that, as a vocational expert rather than a medical expert, she made no determination with regard to wife's medical condition.

Robert Wettstein, MD performed a psychiatric evaluation of wife with regard to her current psychiatric condition and work impairment (Exhibit P). He conducted several interviews with wife lasting more than eight hours and did psychological testing of her as well. He found her unable to function in a part-time or full-time job due to her chronic depression and anxiety and personality psychopathology. His report states:

Her attendance would be unacceptable with many late arrivals or difficulty formulating and following a work scheduling. Her work performance would be inadequate because she is too unfocused, disorganized, inattentive and self preoccupied to achieve work responsibilities. Her energy is low, her pace is slow, she is forgetful, and she manages her time poorly. She would make many excuses for her poor attendance and performance and not take responsibility for it as necessary. It would be difficult to supervise her at work because of her lack of acceptance of responsibility. She would likely infuriate her supervisors and be terminated for insubordination or non-performance. She would not be able to maintain the required cognitive and behavioral pace of regular job responsibilities. She would regularly call of(sic) due to personal or family health issues. Her interpersonal functioning is severely impaired; she has difficulty with socialization and that would impair her work functioning. (Exhibit P, page 13)

The master found Dr. Wettstein to be highly credible and his analysis was very thorough. That being so, the master finds that the wife has a zero earning capacity.

At the time of trial, husband was 51 years of age. He is a college graduate with an advanced certificate in accounting. From 1998 through 2006, he was employed by Crown Castle International (CCI). For the period 2003-2006, excluding restricted stock awards, his wages with CCI were as follows:

2003	\$256,429
2004	\$346,702
2005	\$374,152
2006	\$301,348

Effective January 29, 2007 he terminated his employment with CCI because he did not like his job responsibilities. He negotiated a one-year severance package and a one-year non-compete agreement (Exhibit 36). In exchange for not seeking a competitive position in his field for one year, he received 2007 compensation from CCI of \$301,592 (Exhibit 17). At the

end of the one year noncompete, he joined TriStar first as a consultant and then as a salaried vice president. His 2008 income from TriStar was \$101,764 (Exhibit 17). His 2009 TriStar salary was \$146,678 and his 2010 salary was \$150,000 (Exhibit 17). He is also receiving restricted stock awards and stock options which are not reflected in his TriStar salary.

Husband voluntarily quit his job and his salary is only half of what it was. There was no evidence that he was forced to leave his \$300,000 per year job or that he was in any way unable to continue with CCI. That being so, the master finds that, while husband's salary from his employment is only \$150,000 per year, he still has an earning capacity of \$300,000 per year.

An April 16, 2009 interim APL order requires husband to pay APL of \$3,173 per month, provide health insurance for wife, and pay 90% of her unreimbursed medical expenses after the first \$250 per year. At the time of the entry of that interim order, wife was found to have a full-time minimum wage earning capacity of \$1,046 per month and husband's net income was found to be \$8,994 per month.

C. ALIMONY PENDENTE LITE

The matter of the entry of a final APL was deferred to equitable distribution and the retroactive date is March 2, 2009.

Given the \$300,000 earning capacity which the master has found for husband, his net earning capacity is \$16,778 per month as follows:

\$300,000	gross earning capacity
\$- 75,482	federal tax*
\$- 9,210	state tax

\$- 6,622	Social Security tax
\$- 4,350	Medicare tax
<u>\$- 3,000</u>	local tax
\$201,336	annual net earning capacity
\$ 16,778	monthly net earning capacity

Federal Tax Calculation*

\$300,000	gross
\$ - 7,300	two exemptions ¹
<u>\$ - 8,400</u>	standard deduction (HH)
\$284,300	taxable income
\$ 75,482	federal tax (HH)

Wife having been given a zero earning capacity, husband's APL obligation retroactive to

March 2, 2009 is \$6,711 per month as follows:

\$16,778	husband's net monthly earning capacity
<u>\$- 0</u>	wife's net monthly earning capacity

$\$16,778 \times 0.4 = \$6,711$

Husband shall continue to provide health insurance for wife and pay 100% of her unreimbursed medical expenses.

D. RESPONSIBILITY OF PARTIES FOR PAYMENT OF POST-HIGH SCHOOL EDUCATIONS FOR THEIR ADULT DAUGHTERS

By order dated August 3, 2010 this matter was referred to the master to be dealt with at equitable distribution (Exhibit 11). Specifically, the order states: "This matter of tuition/board, books and fees for school year 2010 – 2011 for both girls shall be considered as a debt to the estate for both parties at equitable distribution." In 1995 the Pennsylvania Supreme Court held that Act 62 of 1993, which provided that divorced, separated, or never

¹ The master assigns Danielle to husband as a dependency exemption and Allison to wife as a dependency exemption.

married parents could be required to provide post-high school educations for adult children was unconstitutional since no such obligation existed for intact families. [*Curtis v. Kline*, 666 A.2d 265 (Pa 1995)].

It appears that the parental obligation in this case, which is at odds with *Curtis v. Kline*, arises at least in part from a May 29, 2009 consent order in which the parties agreed that the joint PNC investment account #8775 was to be used to pay tuition, room, board, books and fees for both daughters (Exhibit 12 ¶2). Given the date of the order it is clear that it covered the 2009- 2010 school year but it is unclear whether it covered a later period. A second consent order dated May 11, 2010 provided that the summer 2010 educational expenses and Allison's housing for fall 2010 would be addressed at an equitable distribution trial then scheduled for June 1 and June 2, 2010 (Exhibit 13). That consent order did not make the obligation "marital." It merely provided that the issue was to be addressed.

On August 3, 2010 husband presented a motion for the release of marital funds for the fall educational expenses. His proposed order was specifically denied and deferred to equitable distribution. However, because the order considers the school year 2010-2011 to be "a debt to the estate for both parties," the master concludes that the 2010-2011 expenses are a marital debt and one or the other or both parties can be required to pay that debt. It may well be that the debt could be paid with post-separation funds since the parties have now been separated for more than five years.

The master finds that, given the enormous disparity in the parties' earning capacities, husband should be solely responsible for payment of the 2010 – 2011 school year expenses which he can pay either from his post-separation funds or from marital assets awarded to him in equitable distribution. Because of *Curtis v. Kline* and because

there are no court orders relating to a period beyond the 2010 – 2011 school year, the master finds neither party obligated for educational expenses incurred after the 2010 – 2011 school year.

E. MARITAL PROPERTY

The parties stipulated that husband's non-qualified stock options and restricted stock awards had a total net value of \$3,078,260. They were deposited into three accounts:

1. Joint PNC investment account #8775
2. Husband's Charles Schwab investment account #6987
3. Husband's E Trade account #3825

Husband's E Trade account #3825 was retained by husband with a balance of \$83,649. The Charles Schwab investment account #6987 had a balance of \$212,528 when it was equally divided by court order dated May 29, 2009 with each party receiving \$106,264. The next question is whether any withdrawals from this account after separation but before May 29, 2009 were an advance to either party or used for a marital purpose. The parties have stipulated that their four pieces of real estate are marital and thus any mortgage pay-offs or real estate taxes, etc., are marital. In addition, college expenses before the account was divided in 2009 would be a marital obligation pursuant to their 2009 consent order regarding college expenses. It appears that \$6,003,495 was used for either marital expenses or college expenses and are not an advance to either party (Exhibit 19B). It is husband's position that he received an advance of \$843,510 from this account and wife received an advance of \$1,539 from this account. The master cannot tell from Exhibit 19B or any other exhibit what the \$1,539 advance to wife was for

but she accepts husband's testimony that it was an advance to wife in that amount.

It appears that there were transfers from the joint PNC investment account to the joint PNC checking account #4938 on an as-needed basis. Moreover, there being no support order in place, husband deposited his pay check into the joint checking account and later deposited monthly amounts instead of his pay check for wife's benefit. It is husband's position that these should all be deemed "advances" to wife. The master does not agree. They are voluntary support payments. However, some of the withdrawals from the joint PNC checking account were not support but were advances to wife as follows:

\$7,500	Joseph Wymard
\$2,000	Mathew D'Emilio
\$35,000	April 6, 2007 withdrawal
\$8,000	November 18, 2005 withdrawal
<u>\$10,000</u>	June 29, 2009 withdrawal
\$62,500	

The balance in the PNC joint investment account #8775 was \$698,841 as of October 31, 2010 (Stipulation 11).

Husband retained the joint PNC money market account #6772 which had a balance of \$705 at separation. His PNC checking account #6259 had a balance of \$850 at separation and his Sun Trust Bank checking account had a balance of \$225 at separation.

The real estate located at 324 Overdale Drive has a stipulated fair market value of \$127,000 less costs of sale of \$8,890. It is subject to a home equity loan with a current balance of \$54,195. This results in net equity of \$63,915. The real estate located at 219

Elysian Street has a stipulated fair market value of \$192,500 less costs of sale of \$14,438 resulting in net equity of \$178,062.

The North Carolina property has a stipulated fair market value of \$230,000, less costs of sale of \$16,100 and an outstanding mortgage of \$116,949 resulting in net equity of \$96,951. Since separation, husband indebted this property with a Sun Trust HELOC. Given that the master recommends that husband assume the marital debt portion of the children's college education expenses with his separate funds, the master does not consider this HELOC loan to be a marital debt.

The Backbone property titled in husband's name has a stipulated fair market value of \$417,500 less costs of sale of \$29,225 and a first mortgage of \$257,478. It is also subject to a \$70,000 PNC home equity loan which husband used to buy a 2005 Mercedes. That makes the net equity \$60,797. He also took \$18,300 from the Schwab account #6987 to buy the Mercedes. The master assumes that the \$18,300 is included in the previously noted \$843,510 advance to husband from the Schwab account. The master considers the \$70,000 to be an advance distribution to husband which he used to buy a post-separation vehicle. That being so, the master does not also assign a value to that vehicle, having dealt with it as an advance.

The marital portion of husband's Charles Schwab rollover IRA is \$431,244 and the marital portion of wife's PNC Bank IRA is \$41,318.

The 1999 Chrysler Town and Country van which husband operates has a stipulated marital value of \$5,400 and the 2000 Mercedes which wife operates has a stipulated marital value of \$19,196.

After separation, husband purchased vehicles for the parties' daughters using

funds from the Charles Schwab account. The master concludes that they are already included in the \$843,510 advance husband received from that account and does not consider them further.

Husband's 1996 Regal 18 foot boat and trailer has a stipulated marital value of \$4,108 and his 2003 Mercedes has a stipulated marital net equity of \$38,370. Husband's 1997 16 foot ski boat has a stipulated marital value of \$1,040.

The marital household goods in wife's possession have a stipulated value of \$5,272 (Exhibit 33). This includes the following items which husband asserts are of sentimental value to him (Exhibit 1) at the value set forth in the stipulated appraisal (Exhibit 33):

Exhibit 1 (p) entire dining room set and buffet	\$400
Exhibit 1 (n) French marble mantel clock	no value assigned
Exhibit 1 (m) chest of drawers (Allison)	\$ 10
Exhibit 1 (q) water color painting of flowers	no value assigned
Exhibit 1 (x) family photos	no value assigned
Exhibit 1 (hh) desk in entry	<u>\$100</u>
	\$510

All of the remaining items on husband's Exhibit 1 do not appear to be in wife's possession. That being so, the master will award to husband the following items listed on Exhibit 1:p, m, n, q, x, and hh having an aggregate appraised value of \$510 and award to wife the remaining items on Exhibit 33 which have an aggregate appraised value of \$4,762 (\$5,272 - \$510).

There is no other marital property. That being so, the marital estate totals

\$2,920,980 as follows:

E Trade account retained by husband	\$ 83,649
May 29, 2009 advance to husband from Charles Schwab account #6987	\$ 106,264
May 29,2009 advance to wife from Charles Schwab account #6987	\$ 106,264
Earlier advance to husband from Charles Schwab account #6987	\$ 843,510
Earlier advance to wife from Charles Schwab account #6987	\$ 1,539
Prior advance to wife from PNC joint checkingq	\$ 62,500
PNC joint investment account #8775	\$ 698,841
Joint PNC money market account retained by husband	\$ 705
Husband's PNC checking account #6259	\$ 1,850
Husband's Sun Trust checking account	\$ 225
324 Overdale Drive, net equity	\$ 63,915
219 Elysian Street, net equity	\$ 178,062
North Carolina condominium, net equity	\$ 96,951
Backbone property, net equity	\$ 60,797
Marital portion of husband's Charles Schwab rollover IRA	\$ 431,244
Wife's PNC Bank IRA	\$ 41,318
Husband's 1996 Regal boat & trailer	\$ 4,108
Husband's 2003 Mercedes	\$ 38,370
1999 Chrysler Town & County van	\$ 5,400
2000 Mercedes used by wife	\$ 19,156
Advance to husband from PNC HELOC	\$ 70,000
Husband's 1997 16 foot ski boat	\$ 1,040

Marital household goods awarded to husband	\$ 510
Remaining marital household goods awarded to wife	<u>\$ 4,762</u>
Total	\$2,920,980

F. EQUITABLE DISTRIBUTION OF MARITAL PROPERTY

Husband advocates a 50%-50% division of the marital estate. Wife advocates a 60%-40% in her favor citing, in part, husband's superior earning capacity. Factors §3502(a)(3), (5), and (6) of the Divorce Code would all require a distribution in wife's favor. Wife has a zero earning capacity and husband has an earning capacity of \$300,000 per year and an actual salary of \$150,000 per year. This gives husband a vastly greater opportunity for the future acquisition of capital assets and income. Wife has virtually no opportunity for the acquisition of capital assets or income other than what she might receive in her economic claims incident to the divorce.

That being so, the master recommends a 55% -45% division in wife's favor. This means that wife must receive assets valued at \$1,606,539 and husband must receive assets valued at \$1,314,441 as follows:

- \$2,920,980 total marital estate
- \$1,606,539 55% of the marital estate
- \$1,314,441 45% of the marital estate

To achieve this result, the master recommends the following specific distribution

To wife:

May 29, 2009 advance from Charles Schwab account	\$106,264
Earlier advance from Charles Schwab account	\$ 1,539

Prior advances from PNC joint checking account	\$ 62,500
PNC joint investment account #8775	\$698,841
324 Overdale Drive, net equity	\$ 63,915
Marital portion of husband's Schwab rollover IRA	\$431,244
Wife's PNC IRA	\$ 41,318
2000 Mercedes	\$ 19,156
Household goods awarded to wife	<u>\$ 4,762</u>
subtotal	\$1,429,539
plus cash from husband:	<u>\$ 177,000</u>
Total to wife:	\$1,606,539

To husband:

E Trade account retained by husband	\$ 83,649
May 29, 2009 advance from Charles Schwab account	\$106,264
Earlier advance from Charles Schwab account	\$843,510
Joint PNC money market account retained by husband	\$ 705
Husband's PNC checking #6259	\$ 1, 850
Husband's Sun Trust checking account	\$ 225
219 Elysian Street, net equity	\$178,062
North Carolina condominium, net equity	\$ 96,951
Backbone property, net equity	\$ 60,797
Husband's 1996 Regal boat and trailer	\$ 4,108
Husband's 2003 Mercedes	\$ 38,370

1999 Chrysler Town and Country van	\$ 5,400
Prior advance to husband from PNC HELOC	\$ 70,000
Husband's 1977 16 foot ski boat	\$ 1,040
Marital household goods awarded to husband	<u>\$ 510</u>
subtotal	\$1,491,441
less cash to wife	<u>\$- 177,000</u>
Total to husband	\$1,314,441

It is unknown how much cash husband has available from the liquid assets previously received by him. However, the master is awarding husband two pieces of real estate which he has testified should be sold. He will receive those proceeds and, to the extent necessary, he can make the required lump sum cash payment from those funds.

G. WIFE'S ALIMONY CLAIM

Wife's budget prepared by Lisa Turbeville asserts that her reasonable needs for herself alone are \$10,589 per month (Exhibit X). However, an assortment of deductions are required as follows.

<u>Deduction</u>		<u>Reason</u>
Elysian Property -	\$ 459	Being awarded to husband
Federal income tax -	\$2,059	Hypothetical – based upon assumed taxable income
Health insurance -	\$ 432	Husband testified that post-divorce COBRA coverage for wife is \$384 and not \$816
Deferred Home maintenance-	\$ 504	Wife offered no credible evidence of a need for home repairs totaling \$47,520

Interior household maintenance -\$300	\$400 per month is excessive in the absence of any credible evidence of such expenses
Drug and prescriptions -\$100	wife testified that she takes no prescription medications and she has a separate entry of \$100 per month for drug store/toiletries
Vacations -\$300	\$6,000 per year or \$500 per month appears excessive

This is a total reduction of \$4,154 per month bringing wife's alleged reasonable needs to \$6,435 per month (\$10,589 - \$ 4,154).

Wife can withdraw funds from the IRAs being awarded to her without penalty, having attained age 59 ½. The PNC joint investment account being awarded to her and the two IRAs have an aggregate value of \$1,171,403. She is receiving a cash award of \$177,000 bringing her total liquid assets to \$1,348,403. It is reasonable to conclude that, in the current market, she can receive a tax-free return rate of 3%. That is \$40,452 per year or \$3,371 per month. Further, wife may well still have funds from prior advance distributions to her (\$106,264 and \$62,500). That being so, the master conservatively estimates that she can generate \$3,500 per month tax-free from the liquid assets in her equitable distribution award. This reduces her need for alimony to \$2,935 per month (\$6,435 - \$3,500).

Using wife's pre-adjustment figures for deferred maintenance and interior household maintenance, her expenses to reside at the Overdale property, including utilities, homeowners insurance, real estate taxes, and the home equity loan total \$2,669 per month which is unusually high given that there is no primary mortgage on the property. It may be that in the future wife will decide to sell the Overdale property and buy

something which requires less maintenance. However, only she can make that decision.

Given her current adjusted expenses and the equitable distribution award she is receiving, wife will need alimony of \$3,100. This is a modest upward adjustment to reflect the fact that alimony will be subject to federal tax but there is no way for the court to know what her itemized deductions and thus her actual tax might be.

H. WIFE'S COUNSEL FEE CLAIM

Wife has incurred counsel fees totaling \$121,858 (Exhibit R). Her outstanding balance as of October 29, 2010 was \$62,393. Wife has received a preliminary counsel fee award of \$5,000 incident to the April 16, 2009 APL order. Husband argues that wife also "received" counsel fees of \$7,500 and \$2,000 in the form of two checks wife wrote from a joint account for prior counsel. However, that \$9,500 is part of the \$62,500 prior advance to wife from the joint checking account.

The "litigation playing field" has been very unequal throughout the litigation in terms of both access to funds and knowledge of assets. That being so, the master recommends a counsel fee award of \$40,000. That brings husband's counsel fee obligation to \$45,000 which is 37% of wife's counsel fee obligation and appears equitable under the circumstances.

I. RECOMMENDED AWARD

1. Retroactive to April 16, 2009, husband shall pay APL of \$6,711 per month, provide health insurance for wife and pay 100% of her unreimbursed medical expenses after the first \$250 per year. He shall pay \$100 per month on arrears.

2. Husband shall be entitled to claim Danielle and wife shall be entitled to claim

Allison as dependency exemptions on their respective tax returns.

3. Husband shall be solely responsible for payment of the parties' daughters' 2010-2011 college expenses and neither party is responsible for said expenses after the 2010-2011 school year.

4. Husband is awarded the following items of personalty from the marital residence having an aggregate value of \$510:

- entire dining room set and buffet
- French marble mantel clock
- chest of drawers (Allison)
- family photographs
- water color painting of flowers
- desk in entry

Wife is awarded the remaining personalty in the marital residence having a value of \$4,762.

5. Wife is awarded the following marital property:

May 29, 2009 advance from Charles Schwab account	\$106,264
Earlier advance from Charles Schwab account	\$ 1,539
Prior advances from PNC joint checking account	\$ 62,500
PNC joint investment account #8775	\$ 698,841
324 Overdale Drive, net equity	\$ 63,915
Marital portion of husband's Schwab rollover IRA	\$ 431,244
Wife's PNC IRA	\$ 41,318
2000 Mercedes	\$ 19,156

plus cash from husband in the amount of \$177,000 to be paid in full on or before his sale of either the Backbone or the Elysian property, whichever is the first to be sold.

6. Husband is awarded the following marital property:

E Trade account retained by husband	\$ 83,649
May 29, 2009 advance from Charles Schwab account	\$ 106,264
Earlier advance from Charles Schwab account	\$ 843,510
Joint PNC money market account retained by husband	\$ 705
Husband's PNC checking #6259	\$ 1, 850

Husband's Sun Trust checking account	\$ 225
219 Elysian Street, net equity	\$ 178,062
North Carolina condominium, net equity	\$ 96,951
Backbone property, net equity	\$ 60,797
Husband's 1996 Regal boat and trailer	\$ 4,108
Husband's 2003 Mercedes	\$ 38,370
1999 Chrysler Town and Country van	\$ 5,400
Prior advance to husband from PNC HELOC	\$ 70,000
Husband's 1977 16 foot ski boat	\$ 1,040

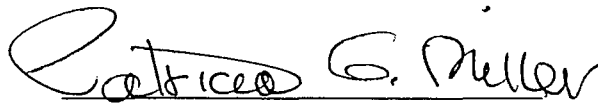
less cash to wife as set forth in ¶ 5 above.

7. Upon entry of a final order herein and wife's receipt of all of the assets being awarded to her in ¶5 above, including the \$177,000 cash payment from husband, husband's APL obligation shall terminate and he shall pay alimony of \$3,100 per month subject to modification at such time as wife is eligible for unreduced spousal Social Security benefits. Upon termination of the APL order, husband shall have no further obligation to provide health insurance for wife or pay any portion of her unreimbursed medical expenses.

8. Within sixty (60) days, husband shall pay to Levine & Spatz the sum of \$40,000 in full satisfaction of wife's counsel fee claim.

9. All other claims are dismissed with prejudice.

Respectfully submitted,


 Patricia G. Miller, Esq.,
 Special Master